University of Richmond Law Review

Volume 13 | Issue 1 Article 2

1978

Economic Competition and the Supreme Court: Decisions in the 1977 Term

Jeff Miles

John Russell

UNIVERSITY OF RICHMOND

LAW REVIEW

VOLUME 13 | FALL 1978 | NUMBER 1

ECONOMIC COMPETITION AND THE SUPREME COURT: DECISIONS IN THE 1977 TERM

*Jeff Miles**
*John Russell***

Through the years, the Supreme Court has emphasized numerous times that "[t]he heart of our national economic policy long has been faith in the value of competition."[1] Indeed, this principle was reiterated last Term.[2] Crucial to economic competition are the antitrust laws, especially the Sherman Act.[3]

Increasingly, however, proponents of competition are realizing that tools other than the antitrust laws can be used to promote a more competitive economy. The Antitrust Division of the Department of Justice, for example, regularly testifies before various congressional committees and regulatory agencies on matters affecting competition, whether or not the antitrust laws are directly impli-

---

* B.S., Virginia Polytechnic Institute and State University, 1968; M.A., 1971; J.D., Washington & Lee University, 1973. Assistant Attorney General, Antitrust Unit, Commonwealth of Virginia.

** B.A., Washington & Lee University, 1974; J.D., University of Richmond, 1978. Assistant Attorney General, Antitrust Unit, Commonwealth of Virginia.

The opinions expressed herein are those of the authors and do not necessarily represent the views of the Virginia Office of Attorney General.

1. Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951); *see also* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1956).

2. In City of Lafayette v. Louisiana Power & Light Co., 98 S.Ct. 1123, 1129 (1978), discussed in Part IV *infra*, Mr. Justice Brennan noted that in passing the Sherman Act, "Congress . . . sought to establish a regime of competition as the fundamental principle governing commerce in this country."

3. 15 U.S.C. §§ 1, 2 (1976).

cated.[4] Numerous industry regulatory schemes provide express[5] or implied[6] exemptions from antitrust challenge in certain circumstances. Administrative and judicial interpretation of these regulatory schemes delineates how broad or narrow the exemption is.

Finally, there are legal precepts which, while facially neutral, can be invoked to foster competition where the antitrust laws are not a viable weapon. Perhaps the clearest case is in the area of commercial speech. In the *Virginia State Board of Pharmacy* case,[7] Virginia's statutory proscription of drug price advertising was declared unconstitutional under the first amendment. Although the identical practice would violate the Sherman Act if implemented by agreement of private pharmacists, antitrust challenge of the statute would have failed because of the state action exemption.[8]

Thus, while antitrust cases are paramount in determining the effect which the Supreme Court exerts on competition, cases involving constitutional law and statutes other than the antitrust laws must also be examined. However, a word of caution is in order. Because non-antitrust statutes and constitutional provisions often promote objectives other than competition, and different frameworks of analysis are used in interpreting these provisions, it is dangerous to conclude from such cases that the Court is either receptive or hostile to a competitive philosophy. Often, the most that can be said is that a decision will have a procompetitive or anticompetitive effect.

I. AN OVERVIEW OF THE 1977 TERM

Twelve cases decided last Term will generate sufficient competitive effects to merit discussion. Seven were antitrust cases; one was primarily a commerce clause case, although the Robinson-Patman

4. *See generally* Kauper, *Competition Policy and the Institutions of Antitrust,* 23 S.D. L. REV. 1 (1978).

5. *See, e.g.,* 46 U.S.C. § 814 (1970) (approval of certain shipping industry agreements by the Federal Maritime Commission provides an antitrust exemption).

6. *See, e.g.,* United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 695 (1975) (securities industry).

7. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

8. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977), which held that the Bar's prohibition of advertising was protected from antitrust challenge by the state action exemption but was an unconstitutional suppression of speech.

Act appeared in a supremacy clause context; two implicated the first amendment; one arose under the Communications Act of 1934; and one settled an important issue affecting international competition.

Of the seven antitrust cases, three involved exemptions and evidenced the current Court's hostility toward exclusions from antitrust coverage. In *City of Lafayette v. Louisiana Power & Light Co.,*[9] the fourth state action exemption case decided by the Court in its last four Terms, the Court held, in a confusing five to four decision, that the actions of municipalities are not necessarily exempt from antitrust challenge. In *National Broiler Marketing Association v. United States,*[10] it held that where any member of an agricultural cooperative is not a "farmer," the coop loses its Capper-Volstead Act[11] exemption. Finally, the Court held in *St. Paul Fire & Marine Insurance Co. v. Barry*[12] that the meaning of "boycott," as used in the McCarran-Ferguson Act,[13] is sufficiently broad to encompass a boycott by insurance companies of their policyholders and that such conduct is not exempt from antitrust challenge.

Two antitrust cases dealt with procedure. In *Pfizer, Inc. v. Government of India,*[14] the Court interpreted "person" as used in section 4 of the Clayton Act[15] to include foreign countries, thus giving them standing to sue for treble damages. And in *Greyhound Corp. v. Mt. Hood Stages, Inc.,*[16] it said that section 5(i) of the Clayton Act,[17] which tolls the statute of limitations for one year after an enforcement action by the United States, is not tolled by government intervention in an Interstate Commerce Commission proceeding.

Two antitrust cases decided last Term involved interpretation of section 1 of the Sherman Act,[18] and each cut to the heart of fundamental antitrust analysis. In *National Society of Professional Engi-*

9. 98 S.Ct. 1123 (1978) (discussed in Part IV *infra).*
10. 98 S.Ct. 2122 (1978) (discussed in Part VI *infra).*
11. Cooperative Marketing Association Act, 7 U.S.C. § 291 (1976).
12. 98 S.Ct. 2923 (1978) (discussed in Part V *infra).*
13. 15 U.S.C. § 1013(b) (1970).
14. 434 U.S. 308 (1978) (discussed in Part VI *infra).*
15. 15 U.S.C. § 15 (1976).
16. 98 S.Ct. 2370 (1978) (discussed in Part VI *infra).*
17. 15 U.S.C. § 16(i) (1976).
18. 15 U.S.C. § 1 (1976).

neers v. United States,[19] the Court held that an agreement not to submit competitive bids restrains trade on its face and is therefore a per se violation of the Sherman Act. The Court explained that factors other than a restraint's competitive impact are immaterial in determining its legality.[20] The second case, *United States v. United States Gypsum Co.,*[21] established what degree of intent must be shown for conviction in a criminal antitrust case and, in addition, held that verifying prices with competitors to sustain the "meeting competition" defense of the Robinson-Patman Act[22] does not preclude a price-fixing conviction.

Five cases interpreting provisions other than the antitrust laws have significant competitive ramifications. Without doubt, *Exxon Corp. v. Maryland*[23] was the most important. It upheld, against substantive due process and commerce clause challenges, a Maryland statute prohibiting oil producers from operating their own retail outlets in the state. Of particular interest to professionals are *Ohralik v. Ohio State Bar Association*[24] and *In re Primus,*[25] which dealt with the validity, under the first amendment, of state imposed prohibitions of in-person solicitation by attorneys. In *Zenith Radio Corp. v. United States,*[26] the Court held that Japan's failure to tax certain products exported rather than sold in Japan did not require the United States to levy a duty against such goods under the Tariff Act of 1930[27] upon importation here. Finally, in *FCC v. National Citizens Committee for Broadcasting,*[28] the Court upheld a regulation of the Federal Communications Commission which prohibits future common ownership of newspaper and broadcasting combinations serving the same market and requires that some existing combinations divest one of the media.[29]

19. 98 S.Ct. 1355 (1978) (discussed in Part III *infra).*
20. *Id.* at 1363.
21. 98 S.Ct. 2864 (1978) (discussed in Part II *infra).*
22. 15 U.S.C. § 13(b) (1970); *see* note 30 *infra.*
23. 98 S.Ct. 2207 (1978) (discussed in Part VII *infra).*
24. 98 S.Ct. 1912 (1978) (discussed in Part VII *infra).*
25. 98 S.Ct. 1893 (1978) (discussed in Part VII *infra).*
26. 98 S.Ct. 2441 (1978) (discussed in Part VII *infra).*
27. 19 U.S.C. § 1303(a) (Supp. V, 1975).
28. 98 S.Ct. 2096 (1978) (discussed in Part VII *infra).*
29. Other cases last Term implicate competitive considerations to some extent. *See, e.g.,* First Nat'l Bank v. Bellotti, 98 S.Ct. 1407 (1978) (declaring a state's prohibition of certain advertising by corporations unconstitutional); FMC v. Pacific Maritime Ass'n, 98 S.Ct. 927

These cases highlight the myriad of contexts in which decisions affecting the strong national policy favoring competition can arise. Each deserves examination not only to grasp the legal principles espoused, but also to ascertain generally how well the paradigm of economic competition has fared.

II. What Intent Must Be Shown For A Criminal Antitrust Conviction?

United States v. United States Gypsum Co.,[30] a criminal case under section 1 of the Sherman Act, involved the legality of an interseller price verification program. Manufacturers of gypsum board called one another to verify that a certain price had been offered to a specific customer. While the government claimed that the program was a price fixing agreement, the defendants argued that the verification was necessary to sustain the "meeting competition" defense of the Robinson-Patman Act.[31]

The legality of price and other data information exchange programs has caused the Court difficulty since at least 1921, and the cases are not totally reconcilable.[32] One reason for this diversity of

(1978) (requiring certain shipping industry collective bargaining agreements to be approved by the FMC); Hicklin v. Orbeck, 98 S.Ct. 2482 (1978) (invalidating, under the privileges and immunities clause, a state statute requiring employment preference for the state's citizens on certain jobs); In re Trans Alaska Pipeline Rate Cases, 98 S.Ct. 2053 (1978) (upholding power of ICC to summarily fix pipeline tariffs in certain situations); NLRB v. Iron Workers Local No. 103, 434 U.S. 1365 (1978) (declaring certain picketing to enforce a pre-hire agreement an unfair labor practice); Parker v. Flook, 98 S.Ct. 2522 (1978) (invention not patentable where only novel feature was mathematical formula); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447 (1978) (striking, on commerce clause grounds, a state statute barring trucks longer than fifty-five feet, where evidence was only speculative that highway safety would be enhanced).

30. 98 S.Ct. 2864 (1978).

31. Under § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), it is "unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly. . . ."

Section 2(b), 15 U.S.C. § 13(b) (1970), allows the defendant to discriminate in price where "his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ."

The defendants argued that it was necessary for them to verify prices offered by competitors with competitors because buyers were not a reliable source of information. Buyers benefitted from fabricating low offers and then playing one seller against another.

32. *Compare* United States v. Container Corp. of America, 393 U.S. 333 (1969) (data dissemination among competitors illegal) *with* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975) (data dissemination among competitors legal).

results is that the effect of the program on price depends upon the type of information exchanged, the structure of the industry and characteristics of the product sold.[33]

Even where an effect on prices was shown, courts have wrestled with situations which arguably might negate a finding that the Sherman Act was violated. In *Cement Manufacturers Protective Association v. United States,*[34] for example, the Court upheld an information exchange program which aided manufacturers in protecting themselves from the fraudulent conduct of their customers, notwithstanding that the program tended to stabilize prices. The Court in *United States v. Container Corp. of America*[35] later referred to this as a "controlling circumstance."[36] In *Wall Products Co. v. National Gypsum Co.,*[37] a private action involving price verification, the district court found a "controlling circumstance," where "the *purpose* of the verification communications of the wallboard producers was to permit compliance with the Robinson-Patman Act,"[38] or to preclude fraud perpetrated against the defendant sellers by their customers,[39] notwithstanding that prices were stabilized.

Indeed, as the government recognized in its brief in *Gypsum,* "[e]xchanges of information between competitors occupy a position in the grey areas of antitrust law." Brief for the United States at 73, United States v. United States Gypsum Co., 98 S.Ct. 2864 (1978).

33. Conventional wisdom is that where the industry is composed of a large number of sellers, the product is differentiated and the information exchanged does not pertain to specific customers or current transactions, little danger of price stabilization arises; to the contrary, the program is beneficial because efficiency is increased. On the other hand, where the industry is concentrated, the product homogeneous, and current price information respecting specific customers is exchanged, price rigidity can be expected. *See generally* Note, *Antitrust Liability for An Exchange of Price Information — What Happened to Container Corporation?,* 63 VA. L. REV. 639 (1977). In United States v. Container Corp. of America, 393 U.S. 333 (1969), where price stabilization did result, a civil violation of the Sherman Act was found. Because, however, effect must be shown, the per se standard is inapplicable.

34. 268 U.S. 588 (1925).

35. 393 U.S. 333 (1969).

36. *Id.* at 335. In *Cement,* the Court emphasized that there was no agreement actually to employ the information obtained. A fair reading of the case is that an agreement to exchange information, without more, is not violative of the Sherman Act, notwithstanding that an adverse economic effect flows indirectly therefrom. Thus, *Cement* may have held not that an agreement otherwise violative of the Sherman Act was protected by a controlling circumstance, but rather that there was no agreement for Sherman Act purposes. Later cases, especially *Container,* make clear that the agreement to exchange information itself is a sufficient agreement to meet the conspiracy requirement of section 1.

37. 326 F. Supp. 295 (N.D. Cal. 1971).

38. *Id.* at 314 (emphasis added).

39. The crux of the court's holding was as follows:

Price verification cases such as *Container* and especially those with Robinson-Patman meeting competition defense aspects, when read together, emphasize the important roles which purpose and effect have played in determining an exchange program's validity under section 1. However, in no case in which the meeting competition defense was raised as an affirmative defense to a price fixing charge did the particular court pay more than lip service to accommodating the policies underlying section 1 of the Sherman Act and section 2(b).[40] Policies underlying the Robinson-Patman Act were given precedence over the Sherman Act, and the purpose of the program, *i.e.*, to sustain the section 2(b) defense, was considered more important than the program's effect on prices. This is ironic because the Supreme Court has implied that the Robinson-Patman Act is a less important antitrust statute than the Sherman Act.[41] Many authorities are extremely critical of the Robinson-Patman Act[42] and commentators agree that effect is as important, if not

---

> [I]n *Cement Manufacturers* the Supreme Court held lawful . . . an exchange between sellers of price information relating to specific customers, *even under circumstances amounting to an agreement,* where the purpose of the exchange was to safeguard against fraud and deception, and *even though prices might be affected* thereby.
>
> . . . .
>
> Here, the "controlling circumstance" of *Cement Manufacturers* is present in abundance and relates not only the defendants' efforts to meet the requirements of the Robinson-Patman Act, but also to their efforts to avoid the consequences of fraudulent misrepresentations of buyers. The record is replete with evidence that the purpose of the verification communications . . . was to permit compliance with the Robinson-Patman Act. The evidence also discloses that the verification communications served to protect defendants against the fraudulent practices of buyers. There is ample evidence in the record that the buyers attempted to obtain lower wallboard prices from producers by misrepresenting the lower prices which they claimed to have been offered by competitors.
>
> . . . .
>
> No court is required by the Sherman Act to foster "competition" procured by fraud and misrepresentation, and the Sherman Act does not prohibit a defendant from protecting itself therefrom. That is "the controlling circumstance" of *Cement Manufacturers. Container* recognizes and approves that controlling circumstance.

Id. at 314-15 (emphasis in original). The rationale of *Wall Products* appears to have been accepted in Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), *cert. denied,* 412 U.S. 923 (1973); and Webster v. Sinclair Refining Co., 338 F. Supp. 248 (S.D. Ala. 1971).

40. *See, e.g.,* Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973); Bellistarr v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied,* 408 U.S. 928 (1972); Wall Products Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971); Webster v. Sinclair Refining Co., 338 F. Supp. 248 (S.D. Ala. 1971).

41. *See* Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 74 (1953).

42. Professor Bork, in evaluating the Robinson-Patman Act, minces no words:

more important, than purpose in determining whether a practice violates the antitrust laws.[43]

While previous interseller verification cases were civil actions, *Gypsum* resulted from indictments. Evidence showed that the gypsum board industry was concentrated, with the eight largest firms having ninety-four percent of the market; that gypsum board is homogeneous, meaning that competition between firms was based on price; and that industry demand was inelastic, meaning that changes in price had little effect on total demand. While the defendants admitted that some price verification occurred, they claimed its purpose only was to sustain the meeting competition defense. Based on the instructions given them,[44] which are crucial to an understanding of the Supreme Court's subsequent decision, the jury convicted the defendants.

> The attempt to counter the supposed threat to competition posed by price discrimination constitutes what is surely antitrust's least glorious hour. The instrument fashioned for the task was the Robinson-Patman Act, the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory. . . . Although it does not prevent much price discrimination, at least it has stifled a great deal of competition.

R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 382 (1978).

43. *See, e.g.*, L. SULLIVAN, ANTITRUST 194 (1977) [hereinafter cited as SULLIVAN].

44. The salient portions of the instructions were as follows:

> First, you must determine whether there was an agreement, either implied or express, to engage in the practice of price checking or verification.
>
> . . . .
>
> Secondly, you must determine whether the purpose for the exchange of competitive information . . . was to insure a good faith meeting of competition as a defense to the Robinson-Patman Act.
>
> If you decide . . . this was merely done in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, standing alone, as establishing an agreement to fix, raise, maintain, and stabilize prices as charged.
>
> However, if you decide that the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these [ex]changes as evidence of the mutual agreement or understanding alleged in the indictment. . . .
>
> . . . .
>
> . . . If the effect of such exchanges was to raise, fix, maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act, regardless of the specific purpose that the parties to the agreement had in their minds. That is because the Sherman Act does not require proof of a specific purpose to restrain trade in order to establish the offense.
>
> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.

Brief for United States at 55-56, 98 S.Ct. 2864 (1978).

On appeal, the defendants argued that they were required to *investigate* and *verify* allegedly lower prices offered customers by competitors before the meeting competition defense could be sustained. This, they argued, meant verifying prices with competitors, where necessary,[45] and required that their purpose in exchanging price information be considered before legality under section 1 could be determined.

The Third Circuit,[46] relying on *Cement,* held that where there was a "controlling circumstance," an information exchange program could be upheld, notwithstanding a presumed or proven effect on price. On the other hand, while recognizing that cases such as *Wall Products* establish that a purpose to sustain the 2(b) defense is a controlling circumstance, it feared that such "quite broad" interpretations might "eviscerate the Sherman Act for the benefit of Robinson-Patman."[47] It therefore sought to reach an accommodation by not requiring as great a burden of investigation and verification as the defendants had argued was necessary. A defendant would sustain the 2(b) defense if it had taken every other reasonable step to corroborate the offer short of verification with a competitor, and it had no independent reason to doubt the purchaser's reliability.[48] Only where the required investigation of reliability or previous

45. The defendants relied primarily on FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945), and Viviano Macaroni Co. v. FTC, 411 F.2d 255 (3d Cir. 1969). In *Staley,* the seller justified its discriminatory prices on oral reports from salesmen and potential purchasers. Although it was stipulated that the seller believed such reports to be true, the section 2(b) defense was not sustained because the seller did not "investigate or verify" either the reports or the "character and reliability" of the informants. 324 U.S. at 758. *Viviano* involved three instances of price discrimination, and the meeting competition defense was rejected in each. In the first, the seller argued that he had sufficient experience in the industry to know what his competitors were offering and that he knew whose offers he was meeting. In the second, he relied on the oral representation of the purchaser. And in the third, he relied on information from a long-time salesman of his company. In each case, the court found a failure to investigate, verify or corroborate the information.

On the basis of these cases, the defendants in *Gypsum* argued that they must either (1) verify offers with competitors; (2) lower their price and risk violation; or (3) for go the price reduction and risk losing the sale. 550 F.2d 115, 122 (3d Cir. 1977), *aff'd,* 98 S.Ct. 2864 (1978).

46. United States v. United States Gypsum Co., 550 F.2d 115, (3d Cir. 1977), *aff'd* 98 S.Ct. 2864 (1978).

47. *Id.* at 125.

48. The court said, "If Robinson-Patman is interpreted to permit a seller lacking other corroboration to cut his price without taking the ultimate corroborative step of verifying the purchaser's report with his competitor, then the Sherman Act and *Container* retain more vigor." *Id.* at 125-26.

experience revealed that the buyer could not be trusted could the seller verify with competitors. Accordingly, the defendants were entitled to an instruction which allowed the jury to consider these variables, and the case was reversed.[49]

The Third Circuit's approach, similar to that taken in previous *civil* cases, was to determine whether a *purpose* to sustain the section 2(b) defense was a sufficient affirmative defense to a price-fixing charge. Although the Supreme Court continued this focus on purpose, it structured its analysis quite differently from the court below. Rather than equating purpose with affirmative defense, the Court first focused on whether an anticompetitive purpose was an element which must be proved by the government in a criminal case. In other words, what intent, if any, must the government show in a criminal antitrust case?[50] Only then did it consider whether a

---

49. With respect to proper instructions, the Court held that

> appellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue. Trial court charged instead that if the jury found that verification had an effect on prices, they had to find guilt under the Sherman Act.

Id. at 126-27.

50. In their briefs, the parties did not focus specifically on what degree of intent, if any, must be proved by the government. The government argued, as it had below, that "once an effect on prices has been demonstrated, no motive, however benign, is sufficient to excuse the practice." Brief for the United States at 76, United States v. United States Gypsum Co., 98 S.Ct. 2864 (1978). Although purpose or intent was discussed by defendants, it was not emphasized. *See* Respondent's Joint Brief at 44-46, 98 S.Ct. 2864 (1978).

Thus, one wonders why the Court decided to expound on the intent necessary to sustain a criminal conviction, especially when it could have decided the case by approving or disapproving the meeting competition theory as an affirmative defense. Perhaps, the reason flows from several lower court decisions, subsequent to the 1974 amendments to the Sherman Act raising the violation from a misdemeanor to a felony, where it was argued that specific intent must be shown for criminal conviction.

Previous cases had held that only "presumed intent" had to be shown. For example, in United States v. Patten, 226 U.S. 525, 543 (1913), the Court said:

> And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.

purpose to sustain the section 2(b) defense was sufficient to preclude conviction.

The Court, in an opinion written by the Chief Justice, first determined, six to two, that "an effect on prices, without more, will not support a criminal conviction under the Sherman Act."[51] Hence it was unwilling to accept the idea of strict criminal liability.[52]

That some degree of intent is a necessary element was derived from three considerations. First, and perhaps most importantly, although certain crimes require no intent, these are the exception rather than the rule. Relying primarily on *Morisette v. United States,*[53] the Court adopted the view that a crime should embody "[a] relation between some mental element and punishment for a harmful act. . . ."[54]

Second, that intent is not specifically mentioned in the Sherman Act was not dispositive. The question is one of legislative intent, and the legislature "will be presumed to have legislated against the background of our traditional legal concepts which render intent a

---

That this standard continued through the years is shown by the instructions in *Gypsum, see* note 42 *supra,* as well as instructions given in other criminal antitrust cases. *See generally* AMERICAN BAR ASSOCIATION, JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES: 1964-1976 at 163-68 (1978).

Subsequent to 1974, however, several cases dealt with what degree of intent had to be shown for conviction. That specific intent is necessary was rejected in United States v. Champion Int'l Corp., 557 F.2d 1270 (9th Cir. 1977); United States v. Jack Foley Realty, Inc., [1977-2] TRADE REG. REP. (CCH) ¶ 61,678 (D.Md. 1977); and United States v. Noll Mfg. Co., [1977-2] TRADE REG. REP. (CCH) ¶ 61,712 (N.D. Cal. 1977); but was accepted in United States v. Nu-Phonics, Inc., 433 F. Supp. 1006, 1013 (E.D. Mich. 1977), where the court said that "[i]t must be shown that the defendants joined together *for the purpose* of fixing prices." (Emphasis in original.)

Although none of these cases were cited by the Court and although *Gypsum* was a misdemeanor case, it appears reasonable to assume that the Court wished to settle the question.

51. United States v. United States Gypsum Co., 98 S.Ct. 2864, 2872 (1978).

52. The Court emphasized, however, that it was leaving "unchanged the general rule" that either unlawful purpose *or* anticompetitive effect is sufficient to establish civil liability. *Id.* at 2873 n.13.

53. 342 U.S. 246 (1952).

54. Gypsum, 98 S.Ct. at 2873 (quoting Morissette v. United States, 342 U.S. at 250-51). *Morissette* discussed when intent properly is an element of a criminal offense and when not. For example, often intent need not be proved in "public welfare offenses," 342 U.S. at 255, *i.e.,* public health, safety and welfare matters involving, for example, food, drink, drugs or even securities. Such offenses "are not in the nature of positive aggressions or invasions . . . but are in the nature of neglect. . . ." *Id.* In addition, crimes not requiring intent often are not infamous crimes but rather minor offenses with petty penalties, conviction of which "does no grave damage to an offender's reputation." *Id.* at 256.

critical factor."[55] Finally, the broadness of the Sherman Act and lack of clear and definitive rules of conduct, militated against a strict liability standard. This lack of clarity might induce businessmen to eschew borderline, but procompetitive, conduct.

Having determined that some level of intent must be proved, the Court, while recognizing " 'the variety, disparity and confusion' of judicial definitions of the 'requisite but elusive mental element' of criminal offenses,"[56] turned its attention to the degree of intent which must be proved.

The Court chose as its guide the American Law Institute's Model Penal Code, which defines four levels of intent, *viz.*, purpose, knowledge, recklessness and negligence.[57] Finding that concepts of recklessness and negligence were inapposite to business decisions, it focused on choosing between purpose, *i.e.*, "the 'conscious object' of producing [anticompetitive] effects," or knowledge, *i.e.*, "that the proscribed effects would most likely follow."[58] Because knowledge

---

55. 98 S.Ct. at 2873.

56. *Id.* at 2877 (quoting United States v. Morissette, 342 U.S. 246, 252 (1952)).

57. MODEL PENAL CODE § 2.02 (Prop. Official Draft 1962), in pertinent part, provides as follows:

> Section 2.02. General Requirements of Culpability.
>
> (1) *Minimum Requirements of Culpability.* Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.
>
> (2) *Kinds of Culpability Defined.*
>
> (a) *Purposely.*
>
> A person acts purposely with respect to a material element of an offense when;
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> . . . .
>
> (b) *Knowingly.*
>
> A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

While the Court in *Gypsum* referred to the comments to an earlier draft, MODEL PENAL CODE § 2.02 (Tent. Draft No. 4 1955), there is no indication that it relied on the earlier version of the penal code rather than the version finally adopted by the American Law Institute.

58. 98 S.Ct. at 2877.

appeared to be the prevalent standard in criminal cases and proof of such would evidence some consciousness of wrongdoing, the Court held that "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws."[59] The Court was careful to note that if purpose were shown, effects need not be.[60]

The Court thus held that the instruction below was erroneous because it established a conclusive presumption of intent from a finding that the verification program affected prices. Although effect is a factor which the jury properly could consider in determining whether the defendant knew that such was the probable consequence of its act, whether it did know is a question which could not be taken from the jury.[61] Accordingly, the Third Circuit's result was affirmed.[62]

---

59. *Id.* Note that this standard places a slightly lower burden on the prosecution than does the Model Penal Code which requires awareness "that it is practically certain" that the proscribed result will follow. MODEL PENAL CODE § 2.02(2)(b)(ii), *supra* note 55.

60. 98 S.Ct. at 2877 n.21. This emphasizes the oft-repeated maxim that a conspiracy in restraint of trade need not be successful to be illegal.

61. The lower court made a common error which is explained cogently by Professor Perkins:

> It is frequently stated, . . . that "everyone is presumed to intend the natural and probable consequences of his act." The word "presumed" is the key to such a phrase . . . . A true presumption is a rule of evidence which calls for a certain result . . . unless the party adversely affected by the presumption comes forward with evidence to overcome it. This is sometimes referred to as a "prima-facie presumption" to distinguish it from the so called "conclusive presumption" which is a legal device in the form of a postulate used for the determination of a particular case whether it corresponds with the actual facts or not. A third use is the so-called "presumption of fact" meaning "mere inferences of fact not affecting the accused with a duty to produce evidence." Presumed intent has been used in all three of these senses.
>
> An intent which is conclusively presumed is one which does not exist in fact but only by legal fiction. In other words it is a "constructive intent." . . . And despite some indications to the contrary it seems fairly well established that the "presumed to intend" formula is not a true presumption, but (when used otherwise than "conclusive presumption") means merely an inference of fact. . . . It may be useful in instructing juries to speak in terms of "presumed to intend," if care is taken to make clear exactly what is meant in the particular case. . . .

R. PERKINS, CRIMINAL LAW 747-48 (1969) (footnotes omitted). *See also* W. LAFAVE & A. SCOTT, CRIMINAL LAW 202-03 (1972).

62. Mr. Justice Rehnquist dissented. Mr. Justice Stevens, if he "were fashioning a new test of criminal liability . . . would require proof of a specific purpose to violate the law." 98 S.Ct. at 2892 (Stevens, J., concurring in part and dissenting in part). He appeared to argue, however, that given the language of section 1, only effect is necessary to prove intent. Interest-

The Supreme Court then considered whether a purpose to comply with the meeting competition defense of the Robinson-Patman Act would constitute a "controlling circumstance" and exempt conduct otherwise violative of section 1.[63] Because six justices were able to reconcile the Sherman and Robinson-Patman Acts by holding that interseller verification was not required under the latter, they found it unnecessary to ascertain "the existence and proper scope of the so-called controlling circumstance exception."[64]

The Court noted that no court, in a meeting competition case, had ever specifically required interseller verification to sustain the section 2(b) defense and emphasized that a good faith *belief* with respect to a competitor's offer, rather than absolute *certainty*, is all that is required.[65] It believed that in most circumstances, the standard could be met by proving that other customers had reported similar offers; that the buyer had threatened to purchase from others; and by obtaining documentary evidence which showed the competitor's offer.[66] In perhaps the most troublesome portion of the opinion, however, the Court implied that situations may arise where the defense simply is unavailable because no corroboration short of interseller verification was possible.[67] Justice Powell parted company with the Court on this point.[68]

The Court's rejection of the defense appeared to rest upon two

ingly, he noted that "[a]n argument can be made that an agreement among the major producers in the market to exchange current price information should be considered illegal on its face." *Id.* at 2893 n.6.

63. It was necessary for the Court to consider this issue because, if the defense were accepted, it would negate a successful prosecution irrespective of the defendant's intent.

64. 98 S.Ct. at 2880.

65. *Id.* at 2880-81.

66. *Id.* at 2882.

67. This situation would arise where the seller had "substantial reasons" not to believe the reports he had received and was unable to corroborate through "generally accepted ways." *Id.* at 2883. The Court, however, specifically refused to decide definitely that the defense would not be available in such a situation.

68. Mr. Justice Powell realized that such an ambiguous result, *i.e.*, holding that the defense *might* be unavailable, would induce the seller to forgo a price cut because of a fear of violating the Robinson-Patman Act, and that this would undercut the competitive polices underlying the Sherman Act. He argued that a seller who uses all reasonable means short of competitor discussions has carried his burden and sustains the meeting-competition defense. However, he did not think the Court had taken a "firm position" on the question of whether factual situations could arise where the defense was not available. 98 S.Ct. at 2890 n.2 (Powell, J., concurring in part).

premises. First, the efficacy of the Sherman Act would be decreased by holding otherwise. The Court recognized that "[e]specially in oligopolistic industries . . . 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."[69] This, and the Court's subsequent reference to *Automatic Canteen,*[70] in which it had noted the Sherman Act's lodestar position among the antitrust laws, suggest that the Sherman Act is at the apex of the "Magna Carta of free enterprise."[71]

Second, the Court, relying on basic tenets of price theory, argued that in an oligopolistic industry, price verification programs do little good because one competitor will misrepresent his price in discussions with another. Only if a price cut is kept secret does the offeror gain; otherwise the cut will be met. In addition, if all competitors know that their low offer will be discovered, the same theory posits that no seller will bother to deviate from the "going price." Again, if one lowers its price and others find out, they will match it, and thus, there is no inducement for any competitor to lower its price. Because, on the one hand, economics taught that a verification program would not serve its intended purposes, and on the other, could lead to entrenched price stabilization, the Court held that a purpose to sustain the meeting competition defense was not sufficient to negate a section 1 violation.[72]

From a practical standpoint, the Court's holding on the Robinson-Patman issue places sellers in that quagmire alluded to by the defendants, the Third Circuit,[73] and Mr. Justice Powell.[74] In some situations, sellers are faced with the choice of not meeting the lower offer of a competitor and losing a sale or risking a treble-damage action. Perhaps the courts will be sensitive to this dilemma and agree with Mr. Justice Powell that a seller is safe if he does all

69. 98 S.Ct. at 2884.

70. Automatic Canteen v. FTC, 346 U.S. 61 (1953).

71. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

72. 98 S.Ct. at 2883. *Gypsum* also presented issues concerning: (1) the correctness of instructions involving participation in and withdrawal from the conspiracy, and (2) whether the judge coerced a verdict. These are not discussed here.

73. *See* note 43 *supra.*

74. *See* note 64 *supra.*

that can reasonably be expected of him, short of verification with competitors.

The more interesting portion of the opinion is that dealing with intent. Although it is doubtful that the decision will have any substantial effect on either civil or criminal enforcement,[75] it does raise several questions.

First, what evidence of intent must the government offer in a per se case, where both purpose and effect traditionally have been conclusively presumed? Mr. Justice Stevens appeared to recognize this question in his opinion,[76] but neither he nor the majority explored it. *Gypsum,* however, should not cause any change. The Court recognized the continuing propriety of per se analyses in both the 1976 Term[77] and the 1977 Term,[78] albeit in a civil context. In addition, in *United States v. Nu-Phonics, Inc.,*[79] a recent criminal case which held that the government must prove specific intent or that the *purpose* of the agreement was to fix prices where "indirect price-fixing"[80] was charged, the Court recognized that evidence of purpose is not necessary in per se cases.[81] Perhaps the real battleground is whether the per se rule is applicable to the particular conduct in

75. In the civil context, intent remains immaterial except to the extent that a conspiracy to fix prices is unsuccessful or intent sheds some light on a practice's competitive effect. *See generally* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("knowledge of intent may help the court . . . to predict consequences"). With respect to criminal cases, it appears that standards used by the Antitrust Division in determining whether to indict encompass probable knowledge of consequences. *See generally* Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement,* 63 CORNELL L. REV. 405, 411-12, 414 (1978) [hereinafter cited as *Prosecutorial Discretion*]. With respect to price information exchanges, Mr. Justice Stevens noted that "if the practice of exchanging current price information is sufficiently prevalent to affect the market price, then there is an extremely high probability that the sales representatives of these companies had actual knowledge of that fact." 98 S.Ct. at 2893 (Stevens, J., concurring in part and dissenting in part).

76. 98 S.Ct. at 2892 (Stevens, J., concurring in part and dissenting in part).

77. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

78. *See* National Soc'y of Prof. Eng'rs v. United States, 98 S.Ct. 1355 (1978) (discussed in part III *infra*).

79. 433 F.Supp. 1006 (E.D. Mich. 1977). *See* note 48 *supra*.

80. Referred to as "indirect price fixing" were agreements not to quote prices over the telephone and not to advertise prices.

81. With respect to an agreement to charge $180 over cost for all state business, the court said, "The anticompetitive purpose of an express or tacit agreement to fix prices — *i.e.,* a direct price-fixing conspiracy — is apparent from the very nature of the agreement, and no other proof of purpose is required." 433 F.Supp. at 1012.

See also United States v. Continental Group, Inc., No. 76-514 (E.D. Pa. July 20, 1978), a post-*Gypsum* case holding that *Gypsum* did not affect the per se rule.

question. At worst from a prosecutor's viewpoint, however, the defendant's evidence of intent (but not of justification) will be admitted, and no "conclusive presumption" of intent[82] instruction will be given.

Second, the *Gypsum* case means that the defendant's sophistication may become important. The rule is not whether the defendant "should have known," or whether a "reasonable man" would have known, the standards which connote negligence, but whether the defendant had knowledge of his conduct's probable consequences. The vice president of sales for a *Fortune* 500 firm is more likely to have such knowledge than the president of Mom 'n Pop's Grocery.[83]

Third, it may be that the level of intent necessary with respect to the agreement element of the crime must be determined.[84] The Court specifically did not address this issue,[85] but the Model Penal Code appears to require that the defendant be aware that his conduct is in the "nature" of an agreement.[86] This might have some relevance in so-called "tacit" or "inferred agreement" cases.[87]

Finally, if lower courts read the *Gypsum* decision properly, sanctions for criminal antitrust convictions should increase. By making clear that antitrust violations are not strict liability crimes but rather crimes requiring the government to prove intent, the Court gave notice that the Sherman Act is now a marginally important statute based "upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*,"[88] as is true with many strict liability offenses. Because violations are serious matters rather than "minor offenses . . . [with] petty penalties,"[89] intent must be proved, but penalties should be severe upon conviction.

---

82. *See* note 59 *supra*.

83. *Cf.* Baker, *Prosecutorial Discretion*, *supra*, note 71 at 417: "Yet the naive innocence of the exceptionally unsophisticated may deserve some weight in prosecutorial discretion."

84. Mr. Justice Brennan explained this possible ramification clearly in United States v. Freed, 401 U.S. 601, 613-14 (1971), where he noted that "*mens rea* is not a unitary concept, but may vary as to each element of a crime; . . . . To determine the mental element required for conviction, each material element of the offense must be examined and the determination made what level of intent Congress intended the Government to prove. . . ."

85. 98 S.Ct. at 2876-77 n.20.

86. *See* MODEL PENAL CODE § 2.02(2)(b)(i), *supra* note 55.

87. *See, e.g.*, Esco Corp. v. United States, 340 F.2d 1000 (9th Cir. 1965).

88. United States v. Balint, 258 U.S. 250, 252 (1922).

89. Morissette v. United States, 342 U.S. 246, 257 (1952) (quoting Tenement House Dept.

III. Is A Purpose To Protect The Public A Sufficient Defense?[90]

In *Goldfarb v. Virginia State Bar,*[91] the Court held that professions enjoy no blanket exemption from the antitrust laws. The decision indicated, however, that only "*certain* anticompetitive conduct by lawyers is within the reach of the Sherman Act. . . ."[92]

From this and the Court's now-famous footnote 17, which indicated that self-imposed professional restrictions might be judged differently than other restraints,[93] many thought there were inherent characteristics of the professions which required an examination of many competing interests, only one of which was economic competition, before legality could be ascertained.[94] It could have been argued, for example, that since there are strong public service aspects to a professional's work, and because the effect of incompetent work could be devastating, the benefits of economic competition were of secondary importance. Indeed, several lower courts after *Goldfarb* interpreted the footnote in just this manner.[95]

In *National Society of Professional Engineers v. United States,*[96] however, the Supreme Court narrowed whatever comfort footnote 17 had provided and used the case as its vehicle for explaining that a

---

v. McDevitt, 215 N.Y. 160, 168, 109 N.E. 88, 90 (1915) (Cardozo, J., describing a common characteristic of a strict liability crime as opposed to an "infamous" crime requiring proof of intent for conviction)).

90. This portion of the article is adopted from Miles, *Competition and Professional Codes of Ethics — The Professional Engineers Decision,* 4 VA. BAR ASS'N J. 15 (No. 4, 1978).

91. 421 U.S. 773 (1975).

92. *Id.* at 793 (emphasis added).

93. *Id.* at 788-89 n. 17:

> 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 profession, 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.

94. *See generally* Note, *The Antitrust Liability of Professional Associations After Goldfarb: Reformulating the Learned Professions Exemption in the Lower Courts,* 1977 DUKE L. J. 1047.

95. *See, e.g.,* Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir.), *cert. denied,* 434 U.S. 825 (1977); Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258 (N.D. Fla. 1976).

96. 98 S.Ct. 1355 (1978).

restraint's effect on competition is the only salient variable in determining its legality.

The government's civil action, filed in 1972, challenged a section of the Society's code of ethics which prohibited engineers from "attempting to obtain employment or advancement or professional engagements by competitive bidding."[97] While the government claimed that the prohibition constituted price fixing by eliminating price competition, the Society argued that the provision was reasonable because price competition would lead to shoddy engineering work and subsequent disaster. The district court rejected this argument, noting that because the prohibition had "as its purpose and effect the excision of price considerations from the competitive arena of engineering services," it was a price fixing agreement, and thus reasonableness need not even be considered.[98]

On appeal, the Supreme Court remanded in light of its decision in *Goldfarb.*[99] The district court again rejected a rule of reason approach,[100] noting that the rule of reason had not been applied in *Goldfarb*; that while footnote 17 apparently distinguished between "a profession's business aspects and its valid self-regulatory 'restraints,'"[101] the bidding prohibition had great commercial impact; and that in *Goldfarb* the Supreme Court had rejected "reasonableness" arguments based on ruinous competition. The

97. *Id.* at 1360-61 n.3. Section 11(c) defined competitive bidding as the "formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars . . . or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer . . . has been selected for negotiations." *Id.* at 1361 n.3.

Several other professional associations were sued over similar practices at approximately the same time and entered into consent decrees. United States v. American Inst. of Architects, [1972] TRADE REG. REP. (CCH) ¶ 73,981 (D.D.C. 1972); United States v. American Inst. of Certified Pub. Accountants, [1972] TRADE REG. REP. (CCH) ¶ 74,007 (D.D.C. 1972); United States v. American Soc'y of Civil Eng'rs, [1972] TRADE REG. REP. (CCH) ¶ 73,950 (S.D.N.Y. 1972) (subsequent contempt citation, [1977-2] TRADE REG. REP. (CCH) ¶ 61,574 (S.D.N.Y. Aug. 4, 1977)).

98. United States v. National Soc'y of Prof. Eng'rs, 389 F. Supp. 1193, 1200 (D.D.C. 1974), *vacated and rem'd,* 422 U.S. 1031 (1975). The Society also argued that engineering was not "trade or commerce" and thus not subject to the Sherman Act. The court rejected this argument, calling it "a dangerous form of elitism." 389 F. Supp. at 1198. Also rejected was a state action exemption argument because there was no state mandate or supervision.

99. National Soc'y of Prof. Eng'rs v. United States, 422 U.S. 1031 (1975).

100. United States v. National Soc'y of Prof. Eng'rs, 404 F. Supp. 457 (D.D.C. 1975), *modified,* 555 F.2d 978 (D.C. Cir. 1977), *aff'd,* 98 S.Ct. 1355 (1978).

101. *Id.* at 461.

court of appeals affirmed,[102] holding that no full-blown rule of reason inquiry was necessary because although "[t]he Society may not have engaged in direct price fixing as such . . . its prohibition of free price competition is not far removed, in both legal and practical consequence."[103]

Before the Supreme Court, the Society admitted that the canon was anticompetitive but argued that competitive bidding would lead to corner-cutting and poor quality work[104] and thus that the proscription was reasonable. The government argued that since the prohibition prevented price competition, the per se rule had been properly applied.[105]

The Court framed the issue before it as "whether the canon may be justified under the Sherman Act . . . 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," or more simply, "whether the District Court should have considered the factual basis for the proffered justification before rejecting it."[106] Holding that the "asserted defense rests on a fundamental misunderstanding of the Rule of Reason,"[107] the Court unanimously rejected the Society's argument.[108]

Disagreeing that footnote 17 mandated a full-blown analysis of the restraint even if the prohibition were intended to mitigate harm to public safety which competitive bidding might create,[109] the

---

102. National Soc'y of Prof. Eng'rs v. United States, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 98 S.Ct. 1355 (1978).

103. *Id.* at 981.

104. The Society's arguments made in support of the canon's reasonableness were strikingly similar to those made by the bar, but rejected by the Court in its first amendment analysis in Bates v. State Bar of Ariz., 433 U.S. 350 (1977), *e.g.*, that purchasers would be misled, quality lowered and the dignity of the profession destroyed. Petitioner's Brief for Certiorari at 7-9, National Soc'y of Prof. Eng'rs v. United States, 98 S.Ct. 1355 (1978).

105. The government appeared to accept the argument that "antitrust law is flexible enough to allow professional self-regulatory conduct that is designed primarily to protect the public and is no more restrictive than necessary." Brief for the United States in Opposition to Certiorari at 16, National Soc'y of Prof. Eng'rs v. United States, 98 S.Ct. 1355 (1978).

106. National Soc'y of Prof. Eng'rs. v. United States, 98 S.Ct. 1355, 1359-60 (1978).

107. *Id.* at 1360.

108. *Id.* Mr. Justice Brennan took no part in the decision.

109. The Society argued as follows:

> The relation of an ethical canon's scope to the evil which the canon seeks to root out is an appropriate consideration for the courts in determining whether the canon is reasonable. However, that comparison can be made rationally only if the court exam-

Court went directly to the crux of its holding: "[c]ontrary 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.*"[110] A court's examination should not focus on any alleged social betterment which the restraint may promote; rather, the ultimate question for determination is whether the restraint is anticompetitive.

The Court noted that the Sherman Act drafters intended the statute to be interpreted in harmony with common law precedent, which emphasized the restraint's competitive impact,[111] and that it had emphasized the importance of economic analysis in Sherman Act cases from 1897[112] to the present.[113] It concluded that whether the effect of the restraint is "so plainly anticompetitive that no elaborate study of the industry is needed to establish [its] illegality,"[114] in which case the per se rule applies, or whether a broader examination is necessary, the determinant of a practice's legality is its effect on competition.[115]

The Court foreclosed the success of arguments that market imperfections preclude competition from working;[116] that competition

---

> ines the evil at which the canon is aimed, in the context of the professional practices involved.

Petitioner's Brief for Certiorari at 17, National Soc'y of Prof. Eng'rs, 98 S.Ct. 1355 (1978).

110. 98 S.Ct. at 1363 (emphasis added).

111. By its approval of Mitchel v. Reynolds, 1. P. Wms. 181, 24 Eng. Rep. 374 (1711), a case decided under common law principles, the court evidenced that a superficial appearance of short-run anticompetitive effect may not be decisive. *Mitchel* was an ancillary restraints case in which a merchant had sold his business and entered into a covenant not to compete with the buyer. The covenant was held reasonable in subsequent litigation. In discussing the relevance of *Mitchel* to the *Engineers* decision, the Court said, "[t]he 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." 98 S.Ct. at 1363-64.

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

113. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

114. 98 S.Ct. at 1365.

115. The Court said:

> 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. . . . [T]hat policy decision has been made by the Congress.

Id.

116. "The early cases also foreclose the argument that because of the special characteristics

in general is "bad";[117] that competition results in dangerous goods;[118] that competition promotes deception of the public,[119] or that lack of competition otherwise benefits the public.[120] By enacting the Sherman Act, Congress chose competition as the country's system of rationing scarce resources. Accordingly, any deviation from this system also is the prerogative of Congress.

Goldfarb's footnote 17 did not change the proper analytical framework by requiring or allowing courts to consider noneconomic justifications just because the restraint is self-imposed by professionals. Rather, the footnote should be interpreted as a recognition that because professional services differ in some respects from other business services, the competitive effect of such restraints may be different: "[e]thical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason."[121]

Because a restraint's effect on competition is the only proper determinant of legality, the Court's decision on the facts before it flowed *a fortiori*. The Society admitted that its rule restrained price competition. Indeed, its very purpose was to prevent the harm which the Society thought would flow from deceptively low bids by stabilizing prices at an artificially high level. Thus, "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[122] The Court concluded that "on its face," the Society's pro-

---

of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *Id.* at 1364.

117. "Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Id.* at 1367.

118. "Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute." *Id.*

119. The Court said:

> Certainly, the problem of professional deception is a proper subject of an ethical canon. But . . . the equation of competition with deception . . . 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.

Id.

120. *Id.* at 1367-68.

121. *Id.*; *cf.* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918), which arose in a strictly commercial context where the Court noted that "[t]he 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."

122. 98 S.Ct. at 1365. Clearly, the rule was within the broad definition of price fixing

hibition violated section 1.[123]

Mr. Justice Blackmun and Mr. Justice Rehnquist, while agreeing that the Society's rule violated section 1, dissented from their interpretation of the majority's holding, *i.e.*, "that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden."[124] Their thesis was that the Society's rule was grossly overbroad, and thus it was not necessary to determine whether variables other than competition could ever be considered. Additionally, they were not ready to invalidate all professional regulations which, although anticompetitive, might be necessary for the profession's proper ordering. They were willing to read more flexibility for professions into footnote 17 than was the majority.[125]

Engineers is the Court's latest chapter in the continuing saga of the attempt to introduce the professions to economic competition.[126] The decision already is having ramifications.[127] The case is espe-

posited in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940), *i.e.*, "a combination formed for the purpose and with the effect of . . . stabilizing the price." The rule appears to be another example of what is sometimes called "indirect price fixing." *See* United States v. Nu-Phonics, Inc., 433 F. Supp. 1006 (E.D. Mich. 1977); *see also* notes 48 and 76 *supra*, and accompanying text.

123. The Court appears consciously to have refused to use the term "per se" in its analysis. Notwithstanding that the opinion talks, in the main, about the rule of reason, and that there is ambiguous language such as "[i]t is this restraint that must be justified under the Rule of Reason," 98 S.Ct. at 1367, the Court's short-cut analysis of the prohibition and its citation to United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), lead inexorably to the conclusion that a per se standard was used. Also, *compare* text accompanying note 117 *supra* *with* text accompanying note 109 *supra*. In reality, because reasonableness has been read into the Sherman Act's prohibition of restraints, *see* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), the rule of reason is applicable in every antitrust case. The per se standard is simply a short-cut method of determining reasonableness. *See generally* SULLIVAN, *supra*, note 41 at 193.

124. 98 S.Ct. at 1369 (Blackmun & Rehnquist, JJ., concurring in part).

125. Also at issue in the case, but not discussed here, were certain provisions of the district court's decree which: (1) enjoined the Society from stating that competitive bidding is unethical, and (2) required it to state affirmatively that, indeed, competitive bidding is not unethical. The court of appeals upheld the first provision but felt the second was unnecessary and thus violated the first amendment. 555 F.2d at 984. The Supreme Court affirmed, although the Chief Justice felt that both of the provisions were unconstitutional. 98 S.Ct. at 1370 (Burger, C.J., concurring and dissenting).

126. Signs are good that the public is beginning to recognize the benefits of competition among professionals. An editorial in BUS. WEEK, July 24, 1978, at 182, noted that "most of the professions could benefit from an injection of old-fashioned competition."

127. In United States v. Tex. State Bd. of Pub. Accountancy, [1978-1] TRADE REG. REP. (CCH) ¶ 62,039 (W.D. Tex. May 5, 1978), a rule of the Board which prohibited accountants from submitting competitive bids was declared illegal per se.

cially important in light of the Court's recent decisions which narrow the scope of the state action exemption.[128] While *Engineers* involved a code of ethics provision promulgated and enforced by a private association, by contrast, the state often promulgates, by statute or agency rule, ethics provisions for regulated professions and occupations which have adverse impact on competition.

Although a full discussion of the state action exemption is beyond the scope of this section of the article,[129] it appears that to sustain the exemption the challenged action must have been mandated or at least contemplated by the legislature or some other sovereign branch of state government as part of a regulatory scheme intended to replace competition in the relevant product or service market. In addition, where the state agency promulgating the challenged conduct is a self-regulatory board, *i.e.*, composed of industry members, and where effects of their action could inure to their economic benefit, their action must be closely supervised by a nonfinancially interested, superior state body.[130] Where the state action exemption cannot be sustained, the agency, and especially its regulatees, may be in trouble.[131] Regulation of professionals by themselves is not, and should not be, a thing of the past, but professionals have been put on notice that they will receive no special treatment under the antitrust laws. Each professional association and state regulatory board should examine its code of ethics and other rules carefully to assure that no antitrust violation exists.

The ramifications of the decision, however, are much broader than the legality of a competitive bidding prohibition or the proper analytical framework for assessing professional restraints. The decision goes to the heart of the antitrust laws, the policies upon which they are based and their proper interpretation. The Court made

128. City of Lafayette v. La. Power & Light Co., 98 S.Ct. 1123 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

129. *See* notes 139-45 *infra* and accompanying text.

130. *See generally* I.P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 71-91 (1978) [hereinafter cited to as AREEDA & TURNER].

131. A recent example is United States v. Tex. State Bd. of Pub. Accountancy, *supra* note 122. An argument that the rule was protected by the state action exemption was rejected because the rule was not mandated by the state and the accountancy statutes did not contemplate such a restraint. Although each rule of the Board had to be approved by a referendum of the Board's regulatees, this unusual factor was not relied on in denying the exemption.

crystal clear that the relevant inquiry in all antitrust cases is the restraint's economic impact. A future battleground will be the delineation of what is "anticompetitive" and what is not. First "competition" must be defined. Professor Bork sets forth five possible definitions[132] and, relying on "Chicago-school" economic philosophy, rejects the concept of rivalry and opts for equating competition with allocative and productive efficiency. Maximization of rivalry, the definition most often accepted by the courts,[133] and maximization of efficiency are often at odds.[134]

In addition, the Court's reliance upon common law precedent and the ancillary restraints doctrine evidences that while a balancing of competitive impact and other social goals is improper, a balancing of short-run and long-run competitive effects is not. Defendants will rely on the Court's approval of *Mitchel v. Reynolds*[135] and argue that while the immediate effect of a restraint appears to be elimination of competition, the long-run effect is procompetitive. In addition, there must be an examination of all possible competitive effects rather than only the most obvious.[136] We can expect some strange arguments explaining why a certain practice which appears anticompetitive is not.

A close examination of *Engineers* demonstrates that not all restraints with anticompetitive effects are illegal. The Court recognized this when it noted that if section 1 were read literally, every contract would be illegal.[137] Rather, as Professor Sullivan notes, a rule of reason analysis condemns agreements "which in purpose or

132. R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 58-61 (1978). His alternative definitions are: (1) the process of rivalry; (2) absence of control by one person over another's economic activities; (3) the economist's model, where buyers and sellers are "price-takers," rather than entities whose actions affect price; (4) a system of atomistic buyers and sellers preserved by protecting small business; and (5) a state where consumer welfare cannot be increased because efficiency is maximized.

133. *See* SULLIVAN, *supra*, note 41 at 153.

134. In fact, the Society implicitly argued that its ban promoted efficiency. Allocative efficiency, *i.e.*, assuring that "resources are employed in tasks where consumers value their output most," BORK, *supra*, note 127 at 91, is promoted by prohibiting engineering work which results in dangerous buildings.

135. *See* note 106 *supra*.

136. *Cf.* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (while destroying intrabrand competition, vertical territorial restraints may enhance interbrand competition and thus be legal).

137. 98 S.Ct. at 1363.

likely effect will *significantly* restrict competition."[138] A per se analysis does the same; the difference is simply that under the per se rule the necessary degree of restraint is presumed. Perhaps, therefore, the concurring justices were overly concerned with the decision's effect on professional ethics provisions. At the least, the ethical restriction need not *promote* competition to be valid as they suggest.[139]

Perhaps the most disturbing facet of the opinion is the Court's seemingly conscious failure to use the phrase "per se." Surely this deletion would not be important were it not clear that this Court is less willing to allow per se analyses than the Warren Court.[140] During the 1977 Term, the Court made clear that use of the per se standard is the exception rather than the rule, holding that it only should be applied where the conduct is "manifestly anticompetitive,"[141] or has a "demonstrable [adverse] economic effect."[142]

This trend toward more reliance on demonstrated economic impact in determining legality is proper. On the other hand, if the Court's failure to simply label the restriction per se illegal is an indication of a further retreat from using a per se analysis, the pendulum may have swung too far in the other direction.

IV. Is Municipal Action Subject To The Antitrust Laws?

The Court extended its streak of state action exemption cases to four straight terms by deciding *City of Lafayette v. Louisiana Power & Light Co.*[143] This time, however, the application was unique: the actions of two cities were challenged under the Sherman Act, and the cities argued that their conduct was exempt.

In *Parker v. Brown*,[144] the Supreme Court determined that Congress never intended the antitrust laws to apply to restraints of trade

138. Sullivan, *supra*, note 129 at 187.

139. See note 119 *supra* and accompanying text.

140. *Compare* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) *with* United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

141. Continental T.V., Inc., 433 U.S. at 50.

142. *Id.* at 59. Some hostility toward the per se rule also can be gleaned from the Court's decision last Term in United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977).

143. City of Lafayette v. La. Power & Light Co., 98 S.Ct. 1123 (1978).

144. Parker v. Brown, 317 U.S. 341 (1943).

imposed by states "as sovereign" through "an act of government."[145] This judicially created state-action doctrine[146] remained unqualified by the Court for thirty years. The long hiatus ended in 1975, with *Goldfarb v. Virginia State Bar,*[147] which narrowed the state action exemption by holding that only anticompetitive actions *mandated* by the State are immune from attack. *Goldfarb* was followed by *Cantor v. Detroit Edison Co.,*[148] and *Bates v. State Bar of Arizona.*[149] The result of all this sudden interest by the Court is a great deal of uncertainty.[150]

Lafayette began its legal journey two years before the *Goldfarb* decision.[151] The cities, plaintiffs in the original action, alleged violations of sections 1 and 2 of the Sherman Act by Louisiana Power & Light.[152] The utility counterclaimed, alleging that the cities had violated the antitrust laws by engaging in sham litigation and requiring customers outside city boundaries to purchase electricity from the cities as a condition to the purchase of gas and water.[153]

Acting on the basis of prior holdings within the Fifth Circuit[154] and without benefit of *Goldfarb,* the district court reluctantly dismissed the counterclaims, holding that the cities' activities consti-

---

145. *Id.* at 352.

146. The *Parker* Court held that, based upon principles of federalism, the antitrust laws were inapplicable to certain anticompetitive actions of the states. Thus, no exemption, as such, was created. However, commentators and courts alike refer to the "state action exemption," the "*Parker* exemption," "*Parker* immunity," and the like.

See generally Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977,* 77 COLUM. L. REV. 979, 1005 (1977) [hereinafter cited as Handler]; AREEDA & TURNER, *supra* note 125, at 212-13.

147. 421 U.S. 773 (1975).

148. 428 U.S. 579 (1977). *Cantor* was a suit against an investor-owned utility that challenged the utility's practice of giving free lightbulbs to its customers. Notwithstanding that the practice was approved by the state public utility commission as part of the utility's tariff, the Court, in a fragmented decision, refused to sustain a state action exemption claim.

149. 433 U.S. 350 (1977).

150. The district court in *Lafayette* admitted that this was an area of law "as to which there is substantial ground for difference of opinion." [1975-1] TRADE REG. REP. (CCH) ¶ 60,240 (E.D. La. 1975).

151. The case was filed on July 24, 1973.

152. 98 S.Ct. at 1126 n.5.

153. *Id.* n.6.

154. *See* Saenz v. Univ. Interscholastic League, 487 F.2d 1026 (5th Cir. 1973), which involved an alleged boycott of plaintiff's slide rule by plaintiff's competitor and a state agency. The Fifth Circuit held that defendants' status as state officials and state agencies conferred complete immunity. *Id.* at 1028.

tuted state action.[155] Based upon the intervening *Goldfarb* decision, a unanimous Fifth Circuit reversed and instructed the lower court to "determine whether the activities alleged fall within the intended scope of the powers granted to the Cities by the legislature."[156]

In four separate opinions with no clear majority, the Supreme Court affirmed, five to four.[157] The cities argued, first, that aside from the *Parker* "state action" exemption, Congress did not intend the antitrust laws to apply to the anticompetitive actions of municipalities. Second, they argued that the state action doctrine, itself, precluded application of the antitrust laws to them.

A majority of the Court rejected the first argument, noting that because cities were "persons" capable of suing within the meaning of antitrust statutes,[158] logic dictated that they could be sued unless some overriding policy mandated otherwise.[159] Only two policies had ever borne sufficient weight to overcome the presumption against implied exclusion: promoting the free flow of information from citizens to the government even if for anticompetitive purposes, a policy embodied in the first amendment;[160] and principles of federalism whereby states are considered sovereign within our dual system of government, the policy underlying the state action exemption.[161] As neither applied, the cities attempted to establish new policy justifications, arguing first, "that it would be anomalous to subject municipalities to the criminal and civil liabilities imposed upon violators of the antitrust laws."[162] The Court effectively sidestepped this

155. City of Lafayette v. La. Power & Light Co., [1975-1] TRADE REG. REP. (CCH) ¶ 60,240, p. 65,950 (E.D. La., 1975).

156. City of Lafayette v. La. Power & Light Co., 532 F.2d 431, 436 (5th Cir. 1976).

157. Justice Brennan wrote for the plurality of Marshall, Powell and Stevens. The Chief Justice wrote a separate concurrence. Justice Stewart dissented for White and Rehnquist. Justice Blackmun dissented separately.

158. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906); *see* Ga. v. Evans, 316 U.S. 159 (1942) (the language in section 7 of the Sherman Act (now section 4 of the Clayton Act) which allows suits by "[a]ny person injured in his business or property" includes states).

159. 98 S.Ct. at 1128.

160. This is the basis for the *Noerr-Pennington,* or government solicitation, exemption. *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965); E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

161. Federalism was the underlying basis for the *Parker* decision. *See* Olsen v. Smith, 195 U.S. 332 (1904); Handler, *supra,* note 141 at 1005-06; Handler, *The Current Attack on the Parker v. Brown State Action Doctrine,* 76 COLUM. L. REV. 1, 4-18 (1972).

162. 98 S.Ct. at 1130. This argument was actually given little attention in the briefs. *See*

argument, noting that while cities are subject to many federal laws,[163] it was not necessary to determine, in this case, the appropriate remedy against cities violating the antitrust laws.[164] The cities then argued that "the antitrust laws are intended to protect the public only from abuses of private power and not from actions of municipalities that exist to serve the public weal."[165] The Court rebutted this argument by stating that public restraints can harm competition to the same extent as private anticompetitive behavior. Moreover, the restraints in the instant case coerced those outside the municipality who had no political recourse.[166]

The second major question presented by *Lafayette* was whether the *Parker* doctrine precluded application of the antitrust laws. Here Chief Justice Burger departed from the plurality, and the Court split decisively in answering the question.

Rejected convincingly was the notion held by many[167] that "governmental entities, whether state agencies or subdivisions of a state, are, simply by reason of their status as such, exempt from the antitrust laws."[168] The plurality read *Parker, Bates* and *Goldfarb* as holding that only where *states* act as sovereign will the antitrust laws stand aside.[169] "*Parker's* limitation of the exemption to 'official

---

Brief for Petitioners at 21, 23, 98 S.Ct. 1123 (1978); Brief for Respondents at 21, 98 S.Ct. 1123 (1978).

163. *See, e.g.,* Union Pac. R.R. v. United States, 313 U.S. 450 (1941) (Elkins Act, 49 U.S.C. § 41 (1970), applicable to municipalities).

164. According to the Court, *Union Pacific,* 313 U.S. 450 (1941), and other similar cases "do not require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities; nor need we decide any question of remedy in this case." 98 S.Ct. at 1131. Mr. Justice Brennan said that the question of appropriate remedies could be addressed only upon a finding of liability by the district court. *See* note 184 *infra* and accompanying text.

165. 98 S.Ct. at 1131.

166. *See* note 148 *supra.* The Court emphasized that the utility and its shareholders and customers, as well as non-resident customers of the cities, were potential victims of the alleged violations, and all are left without realistic and potential political redress.

167. Here, for example, Mr. Justice Stewart argued that the status of the defendant rather than the nature of the activity should have been dispositive. 98 S.Ct. at 1144 (Stewart, J., dissenting).

168. 98 S.Ct. at 1134.

169. It said that:

> [T]he determinant of the exemption [in *Parker*] was whether the challenged action was "an act of government" by the State as "sovereign." *Parker* repeatedly emphasized that the anticompetitive effects of California's prorate program derived from "the state[']s command;" the state adopted, organized, and enforced the program "in the

action directed by the state,' . . . is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves."[170] Therefore, cities are not sovereign.

Under what circumstances, then, can actions by municipalities qualify for *Parker* immunity? The Court's short answer was whenever they are executing a clear "state policy to displace competition with regulation or monopoly public service."[171] In deciding what constituted a sufficient expression of such a policy, the plurality affirmed the standard which the Fifth Circuit had adopted: The state legislature must have contemplated the anticompetitive action complained of.[172] If no such contemplation can be found, the antitrust laws must be obeyed.

In his concurrence, Chief Justice Burger posited a stricter test than the plurality. Noting that *Parker* was decided upon principles of federalism, he urged that the decision be put into historical perspective. Since federalism is an evolving precept, so must the state action doctrine be evolutionary. *Parker* was based upon the "requirements of a dual system of government" in 1943, and was not "cast in bronze." The current acceptance of increased federal involvement in the affairs of the states dictates a narrowing of the exemption.[173]

The Chief Justice then entered the very "quagmire" that the Fifth Circuit had tried to avoid: the proprietary/governmental dis-

---

execution of a governmental policy."

Id. at 1135 (footnotes omitted).

Goldfarb "made it clear that, for purposes of the *Parker* doctrine not every act of a state agency is that of the State as sovereign." *Id.* The *Bates* Court found the exemption because the restraint was "compelled" by the "ultimate body wielding the State's power over the practice of law," emphasizing the fact that "the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy and that the state's policy was actively supervised by the State Supreme Court as the policymaker." *Id.* (quoting Bates v. State Bar, 433 U.S. 350, 360 (1977) & Goldfarb v. Va. State Bar, 421 U.S. 773, 791 (1975)). For a more thorough analysis of all three cases see Miles, *Socking It to Plaintiffs: Supreme Court Antitrust Decisions in the 1976-77 Term,* 12 U. RICH. L. REV. 1 (1977) [hereinafter cited as Miles].

170. 98 S.Ct. at 1136.

171. *Id.* at 1137.

172. *Id.* at 1138.

173. 98 S.Ct. at 1141 (Burger, C.J., concurring).

tinction.[174] Where the activity in question is determined to be proprietary, the court should then analyze the problem as if a private party were claiming *Parker* immunity. First, the *Goldfarb* "threshold inquiry" must be met: Is the activity required by the State acting as sovereign?[175] An affirmative answer is necessary but not dispositive. In addition, he would require that the test for other implied exemptions be sustained, *i.e.*, an exemption is necessary for the regulatory scheme to work, and the restraint imposed is the least onerous necessary.[176]

There still appear to be four Justices who would grant immunity based solely on the identity of the parties. They argue that immunity attaches to the government and its officials but not to private parties, even if their anticompetitive activities are mandated by the government. Justice Stewart wrote another vigorous dissent based primarily upon arguments of public policy and the perceived effects of the majority's holding.[177] The list of horribles imagined by the dissents of both Justice Stewart and Justice Blackmun was extensive: the decline in the ability of states to delegate power and responsibility to their municipalities;[178] cities having to ask the legislature to compel almost every act of the municipality;[179] the discouragement of local "experimentation with innovative social and economic programs;"[180] and the imposition of "staggering costs on the

---

174. The Fifth Circuit had said that,

> [a]s a final point, we cannot accept defendant's invitation to import the discredited proprietary-governmental distinction into this area of the law. This contention is unsupported by authority and is irrelevant under *Parker* and *Goldfarb*, which look only to the scope of the legislative action and not the "proprietary" or "governmental" nature of the subordinate governmental body's conduct.

City of Lafayette v. La. Power & Light Co., 532 F.2d 431, 434 n.8 (5th Cir. 1976), *aff'd* 98 S.Ct. 1123 (1978).

The Chief Justice noted that he used the distinction "only to focus attention on the fact that all of the parties are in a competitive relationship." 98 S.Ct. at 1141 n.3 (Burger, C.J., concurring).

The plurality, too, avoided having to make this formal distinction. The "business" nature of the city-run utility was, however, mentioned several times. *E.g.*, 98 S.Ct. at 1131.

175. 98 S.Ct. at 1143 (Burger, C.J., concurring).

176. *Id.* Justice Marshall wrote a brief concurring opinion on this point. He agreed with the Chief Justice but felt that the plurality's approach incorporated the "least onerous alternative" within it. 98 S.Ct. at 1139 (Marshall, J., concurring).

177. 98 S.Ct. at 1144 (Stewart, J., dissenting).

178. *Id.* at 1148.

179. *Id.* at 1149-50.

180. *Id.* at 1150.

thousands of municipal governments."[181] Both dissenting opinions criticize the plurality for arguing that treble damages may not be appropriate in suits against cities without explaining how the mandatory treble damage statute can be avoided.[182]

Of all the antitrust decisions of this Term, *Lafayette* promises to affect more people than any other. The governing bodies of every locality will now be forced to sit down with their attorney and carefully examine the instances in which the local government enters the marketplace. Entrance may take one of three forms: monopolist, regulator, or purchaser.

Where a municipality wishes to dispense a service on a monopoly basis, foreclosing the market completely, there must be enabling legislation from the state legislature. How specific and extensive this authorization need be is dependent upon the nature of the actions to be taken by the locality. Where the municipality wishes to displace a private firm with a public monopoly through either local ordinance or anticompetitive conduct, something more than a general enabling statute will be necessary. The exact degree of specificity required becomes a function of several factors: the extent of the anticompetitive effects, the extent to which these effects are felt outside the boundaries of the municipality, the egregiousness of the anticompetitive conduct, and the common practice within the state.

Fewer problems arise where the locality wishes simply to regulate a sector of the economy without entering the market. Zoning regulations are an example of conduct which, although possibly anticompetitive, normally would not be violations of the antitrust laws since all action is unilateral and not in furtherance of a monopoly.[183]

---

181. *Id.* at 1151.

182. *Id.* n.30; 98 S.Ct. at 1152 (Blackmun, J., dissenting). Justice Blackmun criticized the "nonchalance with which the Court puts aside the question of remedy." 98 S.Ct. at 1152 (Blackmun, J., dissenting). He noted the mandatory nature of § 4 of the Clayton Act but then cited to his *Cantor* concurrence which suggested an equally unsupportable defense to damages based upon fairness. *Id.*

183. An example of this is city regulation of adult bookstores, massage parlors and other activities through restrictive zoning. Surely this restrains trade in the market for pornography, but the action is unilateral. There is no agreement and therefore no § 1 violation. Further, since the city does not compete in the dispensing of these goods and services, there is no § 2 monopolization. *But see* Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977) (allegations that a zoning ordinance was adopted in furtherance of a private conspiracy stated valid antitrust claim).

The last and most vulnerable situation is exclusive dealing by the municipality.[184] This would include direct purchasing by the local government as well as purchasing on behalf of its citizens, *i.e.*, the awarding of an exclusive franchise.[185] It is clear now that absent state authorization such contracts carry no immunity.[186] Lack of blanket immunity, however, does not mean that cities will be forced to either abandon the practice or run to the legislature for authorization of every contract. But where a municipality awards an exclusive franchise the city must examine the contract in terms of its competitive effects and degree of market foreclosure.[187]

So long as the contract is legal under the antitrust laws, of course, no authorization is needed. Further, there appears to be no reason why municipalities cannot grant *legal* franchises. As noted by Professors Areeda and Turner, most of a municipality's participation in the marketplace does not, by necessity, involve encroachment upon the antitrust laws.[188]

However, just as businesses violate the antitrust laws through either innocent ignorance or purposeful design, cities will also. This raises the most troublesome aspect of the Court's opinion, the question of liability for damages. While the plurality in *Lafayette* implied that it may not be proper to assess treble damages against a municipality, the language of section 4 of the Clayton Act is mandatory[189] as was so cogently pointed out in Justice Blackmun's dissent.[189.1] No legal theory and little legal precedent[190] exists which

184. *See generally* SULLIVAN, *supra* note 41 at 471-90.

185. This would include such operations as a cable television franchise, taxicab stands at airports, and concessions at sports arenas.

186. *See* Duke & Co. v. Foerster, 521 F.2d 1277 (3rd Cir. 1975). This case arose from concession operations at city-owned facilities. The case, relied on heavily by the Fifth Circuit in *Lafayette,* declined to find an exemption "absent state authority which demonstrates that it is the intent of the state to restrain competition in a given area." *Id.* at 1280.

187. *See, e.g.,* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961); Standard Oil Co. v. United States, 337 U.S. 293 (1949) (Standard Stations).

188. AREEDA & TURNER, *supra,* note 125 at 103-05.

189. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1973), provides that "[a]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefor . . . and *shall recover* threefold the damages by him sustained . . . ." (emphasis added).

A majority of the Court and such notable commentators as Professors Areeda and Turner question the propriety of treble damages against state and local governments. AREEDA & TURNER, *supra* note 125, at 101-08. A similar argument against treble damages was made in *Cantor,* 428 U.S. at 579, 614-15 n.6.

189.1. 98 S.Ct. at 1152 (Blackmun, J., dissenting).

supports the proposition that a defendant who violates the antitrust laws is not liable for money damages or subject only to single damages. This appears to be an area for Congressional action.

The implications of *Lafayette* are certain to be far-reaching. They are also, just as certainly, not going to be the disaster envisioned by the dissent. But, like it or not, county and city governments had best heed the warning of a senior Justice Department official to examine local government's forays into the marketplace in terms of "competitive impact" and "potential antitrust exposure if that impact is anticompetitive."[191]

V. THE EXCEPTION TO THE EXEMPTION: HOW TO READ A CONGRESSIONAL DOUBLE NEGATIVE.

While *Lafayette*[192] dealt with the judicially created state action exemption, *St. Paul Fire & Marine Insurance Co. v. Barry*[193] was one of two cases[194] last Term which dealt with a statutory exemption. The McCarran-Ferguson Insurance Regulation Act[195] (McCarran Act) largely exempts the "business of insurance" from the antitrust as well as other federal laws to the extent it is regulated by the states.[196]

---

190. *See* Rogers v. Douglas Tobacco Bd. of Trade, 244 F.2d 471 (5th Cir. 1957); Haskell v. Perkins, 28 F.2d 222 (D.N.J. 1928), *rev'd on other grounds,* 31 F.2d 53 (3d Cir.), *cert. denied,* 279 U.S. 872 (1929). Both cases involved deceased defendants. The courts reasoned that the personal representatives and estates should not be liable for treble damages. Both cases are treated as anomolies by those circuit courts specifically rejecting pleas for single damages. *See* Locklin v. Day-Glo Color Corp., 429 F.2d 873 (7th Cir. 1970); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 281 F.2d 481 (3d Cir. 1960); Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F.2d 284 (7th Cir. 1954).

191. Address by Joe Sims, former Deputy Assistant Attorney General, Antitrust Division, Antitrust Comes to Main Street, quoted in Hills, *Fallout From Lafayette: Many Potential Suits Face Cities, States,* LEGAL TIMES OF WASHINGTON, June 26, 1978, at 19, col. 1.

192. City of Lafayette v. La. Power & Light Co., 98 S.Ct. 1123 (1978). *See* Part IV *supra.*

193. 98 S.Ct. 2923 (1978).

194. The other was National Broiler Marketing Ass'n v. United States, 98 S.Ct. 2122 (1978), discussed in Part VI *infra.*

195. 15 U.S.C. §§ 1011-1015 (1976).

196. Section 1 of the Act states its purpose:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (1976).

The McCarran Act was a congressional reaction to the Court's 1944 decision in *United States v. South-Eastern Underwriters Association*[197] that insurance was interstate commerce and thus subject to the Sherman Act.[198] Within a year, Congress had passed the McCarran Act, a statute which can be characterized as "reverse preëmption" because it allows state laws to preempt federal regulation to the extent that the state laws relate to the business of insurance.

In section 2(b) of the McCarran Act, Congress allowed federal antitrust laws to remain applicable only "to the extent that [the business of insurance] is not regulated by State law."[199] The interpretation of this section and the meaning of the phrase "business of insurance" have been the subject of most appellate opinions regarding the exemption and the only questions which have been examined by the Court.[200]

Section 3(b) excepts "boycotts, coercion [and] intimidation" from the section 2(b) exemption thus making them subject to Sherman Act challenge.[201] The exception was added so that practices such as those in *South-Eastern Underwriters, i.e.,* blacklisting inde-

197. 322 U.S. 533 (1944). South-Eastern Underwriters Association (S.E.U.A.) was composed of 200 privately-owned fire insurance companies, which controlled 90 percent of the relevant, six-state market.

> The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms.

Id. at 535. The Court held that the business of insurance traversed state lines and was, therefore, interstate commerce. Further, Congress had shown no intent "to exempt the business of insurance from the operation of the Sherman Act." St. Paul Fire & Marine Ins. Co. v. Barry, 98 S.Ct. 2923, 2928 (1978) (footnote omitted) (discussing *S.E.U.A.*).

198. This reversed the long-standing precedent of Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).

199. 15 U.S.C. § 1012(b)(1976).

200. *See, e.g.,* SEC v. National Sec., Inc., 393 U.S. 453 (1969); FTC v. National Cas. Co., 357 U.S. 560 (1958); Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178 (6th Cir. 1971), *cert. denied,* 409 U.S. 917 (1972). For a more thorough discussion of § 2(b) of the McCarran Act and its judicial interpretation, *see generally* Note, *Qualified Immunity for Insurers Under the McCarran-Ferguson Act,* 46 GEO. WASH. L. REV. 396 (1978) [hereinafter cited as *Qualified Immunity*]; Comment, *The McCarran Act's Antitrust Exemption For "The Business of Insurance": A Shrinking Umbrella,* 43 TENN. L. REV. 329 (1976).

201. 15 U.S.C. § 1013(b) (1976): "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

pendent agents, could be stopped even though they constituted the business of insurance. *Barry* was the first opportunity for the Supreme Court to address the issue of what constitutes "boycott, coercion [and] intimidation" under section 3(b).

Few cases involving section 3(b) arose until the late 1950's.[202] Early cases appear to have interpreted boycotts broadly. Although all involved boycotts of other insurance companies or insurance agents by an insurance company, none of the opinions limited the interpretation of boycott to those having targets within the industry.[203]

In *Transnational Insurance Co. v. Rosenlund*,[204] however, a district court noted in dicta that "[t]he legislative history shows that the boycott, coercion and intimidation exception, was placed in the legislation to protect insurance agents from the issuance by insurance companies of a 'black-list.' "[205] Although the "legislative history" cited was the remarks of one non-sponsoring Congressman who later took issue with this interpretation,[206] this one paragraph became the entire basis for later narrow interpretations of section 3(b).

The early 1970's saw a marked increase in suits relying on section

---

202. *See* California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co., 179 F. Supp. 65 (N.D. Cal. 1959); United States v. New Orleans Ins. Exch., 148 F. Supp. 915 (E.D. La.), *aff'd per curiam* 355 U.S. 22 (1957); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D.C. Mass.), *aff'd per curiam* 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957); United States v. Insurance Bd., 144 F. Supp. 684 (N.D. Ohio 1956).

The *New Orleans Exchange* case contains the most complete discussion of section 3(b). The court analyzed the challenged practice in terms of purpose, effects on competition, and methods of enforcement. The major evil found by the court was the intent and result of foreclosure of free access to the market of insurance. 148 F. Supp. at 920; *see also* Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

203. "These [boycott] provisions of the Sherman Act remain in full force and effect." *New Orleans Exchange*, 148 F. Supp. at 922, n.23. "Congress made it clear that agreements to boycott or acts of boycott *affecting* the insurance business remain at all times within the effective ban of the Sherman Act." *Insurance Bd.*, 144 F. Supp. at 690 (emphasis added).

204. 261 F. Supp. 12 (D. Ore. 1966).

205. *Id.* at 26.

206. *See* 91 CONG. REC. 1087 (1945) (remarks of Rep. Cellar); *see also* Note, *Qualified Immunity*, *supra* note 195, at 413 n.111 (quoting [1975] 696 ANTITRUST & TRADE REG. REP. (BNA) at A-5): " 'By no stretch of the imagination can any remarks [in the legislative history] be construed as intended to limit the applicability of the Sherman Act to antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents.' "

3(b) to escape the exemption. Several district courts[207] and two circuit courts[208] relied on *Transnational* and adopted the theory that boycotts within the meaning of section 3(b) did not include those of policyholders and others outside the insurance industry. A definite split had developed over the last two years with three circuits adopting a broader reading of section 3(b),[209] holding that it was not limited to boycotts within the industry. With such a diametric split, the area was ripe for review by the Supreme Court.[210]

In *Barry,* St. Paul Fire & Marine Insurance Co., the largest medical malpractice insurer in Rhode Island, announced that all new and renewed policies would be on less favorable terms than had been offered in the past. Barry and other plaintiff physicians found that the other three Rhode Island malpractice insurers had agreed with St. Paul not to write new policies of any kind for any of St. Paul's previous customers, thereby forcing these customers to assent to St. Paul's new terms.[211]

Justice Powell wrote the opinion for the majority of seven.[212] After disposing of a mootness question not raised by either party[213] and reviewing the lower courts' holdings in the case,[214] the Court first discussed the general, non-legal definition of boycott. "The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target."[215] Next, the definition of boycott for Sherman Act purposes was addressed. Rejected was

207. *See, e.g.,* McIlhenny v. American Title Ins. Co., 418 F. Supp. 364 (E.D. Pa. 1976). For a more complete list, *see Qualified Immunity, supra* note 195, at 411 n.93.

208. *See* Meicler v. Aetna Cas. & Sur. Co., 506 F.2d 732 (5th Cir. 1975); Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975).

209. *See* Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262 (D.C. Cir. 1977), *petition for cert. filed,* 46 U.S.L.W. 3294 (U.S. Oct. 19, 1977) (No. 77-580); Barry v. St. Paul Fire & Marine Ins. Co., 555 F.2d 3 (1st Cir. 1977); Ballard v. Blue Shield, 543 F.2d 1075 (4th Cir. 1976), *cert. denied,* 430 U.S. 922 (1977).

210. Certiorari was denied in *Addrisi* and *Ballard,* but granted in *Barry;* the Court has not decided what to do with *Proctor.* For some reason, *Proctor* was not remanded in light of *Barry.*

211. 98 S.Ct. at 2926-27.

212. Justices Stewart and Rehnquist dissented.

213. 98 S.Ct. at 2927-28.

214. *Id.* at 2929.

215. *Id.* at 2930 (footnote omitted). For a thorough discussion of boycotts under the Sherman Act, cited with approval by the Court, *Id.* n.11, *see* Bird, *Sherman Act Limitations on Non-commercial Concerted Refusals to Deal,* 1970 DUKE L. J. 247.

the argument of the insurance companies that the target of the boycott must have been in competition with the boycotters.[216] The specific facts in *Barry* were then compared with the boycott definition to determine whether they constituted an illegal boycott under the Sherman Act. In reaching the affirmative, the Court noted that the refusal to deal in this case was total, *i.e.*, a refusal to deal under *any* terms, as opposed to a refusal to deal only under specified terms.[217] Also recognized by the Court was St. Paul's use of the agreement with the other three companies as an enforcement mechanism against its policyholders.[218]

The Court then turned to whether a boycott under section 3(b) was in any way different from a boycott under the Sherman Act. The Court looked first to the legislative history. After examining conflicting passages, it determined that the definition of boycott is "broad and unqualified."[219] If Congress had desired a narrow definition of boycott, it should have been explicit. Ambiguous legislative history cannot counter what is clear in the statute itself.[220]

Based, then, on the general meaning of "boycott," its definition under section 1 of the Sherman Act, and that Congress apparently did not intend for it to have a special meaning in the McCarran Act, the Court held that "boycott" under section 3(b) is not limited to boycotts of competitors or boycotts by insurance companies of other insurance companies or agents.

But Justice Powell stopped short of holding that "boycott" is synonymous for McCarran and Sherman Act purposes, for in the final portion of the opinion, the Court noted that one question remained to be answered, *viz.*, "whether the type of private conduct alleged to have taken place . . . constitutes a 'boycott' within the meaning of section 3(b)."[221] That this question needed to be answered implies that conduct constituting a section 1 Sherman boycott may not, necessarily, fall within section 3(b).

While the Court did not explain in what ways, if any, the defini-

216. 98 S.Ct. at 2931. *But see* SULLIVAN, *supra*, note 41 at 256-59.
217. 98 S.Ct. at 2932.
218. *Id.*
219. *Id.* at 2934.
220. *Id.*
221. *Id.* at 2935.

tion of boycott under the two provisions differs, it did leave clues which appear important in determining whether a boycott falls within the section 3(b) exception to the McCarran Act exemption. Indeed, as in determining whether section 1 has been violated, purpose and effect appear paramount. Importance was placed on the answers to four questions: First, was there an anti-competitive purpose behind the alleged boycott agreement?[222] Second, were the effects of the boycott anti-competitive?[223] Third, did the boycott promote any underlying policy of the McCarran Act, *i.e.*, were the boycott actions the kind the McCarran Act was designed to allow?[224] Finally, was the boycott mandated, authorized or otherwise regulated by state law?[225] It is implicit that where the alleged boycott is anti-competitive in purpose and effect, does not promote the objectives of the McCarran Act and is not authorized by the state, the conduct is subject to Sherman Act challenge.

Importantly, the Court qualified the fourth part of the analysis by refusing to say whether state authorization (not present in the facts of *Barry)* should be considered in determining whether the alleged conduct falls within section 3(b) or whether it would form the basis of a *Parker* "state action" defense.[226]

Thus the Court never fully answered the very question on which it granted certiorari, *i.e.*, whether a boycott under section 3(b) of the McCarran Act is the same as a boycott under section 1 of the Sherman Act. We are told implicitly that they are not necessarily the

222. "As a means of ensuring policyholder submission to new, restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, to refuse to sell any insurance to its policyholders." *Id.* at 2936.

223. "The argument binding petitioners erected a barrier between St. Paul's customers and any alternative source of the desired coverage, effectively foreclosing all possibility of competition anywhere in the relevant market. . . . St. Paul's policyholders became the captives of their insurer." *Id.*

224. "The conduct alleged here is certainly not, in Senator O'Mahoney's terms, within the category of 'agreements which can normally be made in the insurance business,' . . . or 'agreements and combinations in the public interests [*sic*] which can safely be permitted.' " *Id.* (citations omitted).

225. "We emphasize that the conduct with which petitioners are charged appears to have occurred outside of any regulatory or cooperative arrangement established by the laws of Rhode Island. There was no state authorization of the conduct in question." *Id.*

226. The state-action doctrine would not seem to be applicable since *Parker* was a finding by the Court that Congress had expressed *no* intention of applying the Sherman Act to governmental acts of the state as sovereign. Clearly, in the McCarran Act, Congress expressed such an intent. *See* note 141 *supra*.

same, although they are at least very similar. In future cases these differences may not be readily apparent; they should surface, however, when the allegations are subjected to the final substantive analysis used by the *Barry* majority. The possible consequences of state authorization remain a mystery, but it appears that the Court would find some way of upholding boycott-type activity undertaken pursuant to a state directive or plan.

The opinion, no doubt, strikes down the narrow view held by the Fifth[227] and Ninth[228] Circuits. By narrowing the McCarran Act exemption itself, clearly the recent trend of increased litigation in this area will continue, if not accelerate. The decision also portends an increase in competition among insurance companies, resulting, perhaps, in newer forms of coverage and lower rates.

VI. Additional Antitrust Cases: Another Exemption And Procedure.

Last term saw three other antitrust decisions, each involving the interpretation of statutory provisions. None involved the complexity found in other antitrust decisions, and thus they are treated here together.

A. *Round Three: Antitrust Laws-3 Exemptions-0.*

For the third time last Term,[229] a defendant came to the Court seeking an exemption from the antitrust laws and for the third time the Court denied the exemption and re-emphasized the importance of the antitrust laws and economic competition.[230] *National Broiler Marketing Association (NBMA) v. United States,*[231] involved inter-

227. Meicler v. Aetna Cas. & Sur. Co., 506 F.2d 732 (5th Cir. 1975). *See* text accompanying note 203 *supra.*

228. Addrisi v. Equitable Life Assurance Soc'y of the United States, 503 F.2d 725 (9th Cir. 1974). *See* text accompanying note 203 *supra.*

229. See Parts IV and V *supra.*

230. To repeat an oft used quote:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete — to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

231. 98 S.Ct. 2122 (1978).

pretation of a statutory exemption, the Capper-Volstead Act,[232] which provides a limited exemption for agricultural producers and farmers as well as for their agricultural cooperatives.

NBMA marks only the fifth time since the passage of the Capper-Volstead Act in 1922 that the Supreme Court has examined the exemption.[233] Lower federal courts have also been relatively inactive. As the Fifth Circuit noted: "[N]o significant body of Capper-Volstead law has developed in the lower federal courts. And the legal commentary has not been abundant."[234] This lack of activity may have led the Court to comment at the beginning of *NBMA* that "[t]he issue *apparently* is of importance to the broiler industry and in the administration of the antitrust laws."[235]

The NBMA is a nonprofit cooperative association composed of less than seventy-five members involved in the production and marketing of broiler chickens.[236] At the time the Justice Department brought suit, most of its members were fully integrated, *i.e.*, engaged in all three phases of the broiler production process: breeding and hatching, growing, and processing. Three of its members, however, were only involved in the processing stage.

The civil action against NBMA alleged that it and its members entered into price-fixing agreements in violation of section 1 of the Sherman Act. NBMA claimed that any such agreement was exempt

---

232. Cooperative Marketing Associations Act, 7 U.S.C. §§ 291-292 (1964). Section 1 provides in part:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . .

233. Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967) (membership of non-growers in cooperative results in loss of immunity); Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19 (1962)(three cooperatives may join together to form one exempt entity); Maryland & Ma. Milk Producers Ass'n. v. United States, 362 U.S. 458 (1960)(predatory practices by a cooperative not exempt); United States v. Borden Co., 308 U.S. 188 (1939)(a cooperative may be guilty of antitrust violations when combining with outside, non-exempt parties).

234. United States v. NBMA, 550 F.2d 1380, 1384 (5th Cir. 1977) (footnotes omitted). For a partial listing of lower court cases and commentary, *see id.* nn.10 & 11.

235. 98 S.Ct. at 2125 (emphasis added).

236. *Id.* at 2126.

from challenge under the Capper-Volstead Act, and the district court agreed.[237] Based on an earlier decision, *Case-Swayne Co. v. Sunkist Growers,*[238] and the fact that three NBMA members were only processors, the Fifth Circuit reversed.[239]

The entire case hinged on the definition of "producer" and "farmer" as those terms are used in the Capper-Volstead Act. NBMA argued, however, not what the definition *was* but what it *should* be was the issue. Citing the drastic changes in the basic structure and characteristics of the agricultural industry since 1922, it urged an expansion of the exemption to cover all persons engaged in agriculture who take the risk of uncertain prices rather than simply those persons engaged in the initial stages of growing and producing or who only "till the soil."[240]

Justice Blackmun wrote the brief opinion for the majority. According to the Court's reading of the legislative history, the Act was designed to protect the small, independent farmer who, when taking his perishable crop to market, found himself at a distinct competitive disadvantage to brokers and middlemen. By allowing these farmers to form cooperatives to pack, ship and sell the produce, the middlemen could be avoided and the competitive balance equalized. Clearly the Act was not designed to protect those same middlemen when they joined the farmer in formation of a cooperative. Once the cooperative allowed members who were only packers/processors, the immunity was lost.

As in *Barry,*[241] however, the most interesting question was raised, but specifically left open:[242] Is immunity lost when middlemen, *i.e.*, packers/processors, also own, to some degree, the means of production, *i.e.*, the land, cattle or chickens, and thus are vertically integrated? Because NBMA had members who engaged only in pro-

237. United States v. National Boiler Mkting. Ass'n, [1975-2] TRADE REG. REP. (CCH) ¶ 60,509 (N.D. Ga. 1975).

238. As noted earlier, note 228 *supra*, *Case-Swayne* held that to be exempt a cooperative must be composed only of producers. The issue in *NBMA* seems so similar and the Court's holding so narrow that one wonders why certiorari was even granted.

239. 550 F.2d 1380 (5th Cir. 1977).

240. Brief for Petitioner at 16, 21, National Broiler Mkting. Ass'n v. United States, 98 S.Ct. 2122 (1978).

241. *See* note 221 *supra* and accompanying text.

242. 98 S.Ct. at 2130 n.21.

cessing, which caused its loss of immunity, it was not necessary for the Court to determine whether integration backwards into production would save the exemption.

Justice Brennan, in his concurring opinion, answered this question, positing that the fully integrated producers also cause loss of immunity for cooperatives of which they are members. He interpreted the Act and its legislative history as providing an exemption only to farmers who need to cooperate in processing and marketing their crops. Congress intended no exemption for fully integrated agri-businesses which cooperate principally to set prices and allocate markets.[243]

Justice White's dissent argued that expansion of the exemption's scope was necessary because of drastic changes in agriculture since passage of the Capper-Volstead Act. The small, independent farmer has become a rarity.[244] Justice Brennan countered this argument by noting that where an exemption is antiquated, as here, any reconstruction or revitalization must be done by Congress.[245]

Whether any of the other Justices subscribe to Justice Brennan's view of the scope of the exemption is unclear. Although a majority in *NBMA* was not ready to support him, adoption of Justice Brennan's result in the near future is not unlikely should the Court be presented with the issue in an unavoidable posture. This Court, although prone to avoid issues when possible, has been very consistent in their narrow reading of exemptions.

B. *Tolling the Statute of Limitations: Greyhound.*

Greyhound Corp. v. Mt. Hood Stages, Inc.,[246] arose out of a bitter conflict between two competitors dating back to 1947. The plaintiff, Mt. Hood, operated a small, regional bus service in the northwest corner of the country. From 1947 to 1956, Greyhound, through systematic acquisition,[247] completely surrounded Mt. Hood's area of operation, placing Mt. Hood in the unenviable position of dependence upon its giant competitor for all through traffic, both passenger

243. 98 S.Ct. at 2135 (Brennan, J., concurring).
244. *See* 98 S.Ct. at 2136 (White, J., dissenting).
245. 98 S.Ct. at 2136 (Brennan, J., concurring).
246. 98 S.Ct. 2370 (1978).
247. Greyhound purchased eight regional bus companies in this time period. *Id.* at 2372.

and freight. In hearings before the ICC, Greyhound promised to continue all through routes. It later cancelled the routes and, in 1964, Mt. Hood filed a complaint before the ICC.[248] The Antitrust Division of the Justice Department intervened in the proceedings to ask that the ICC give Mt. Hood the opportunity to prove its allegations. In 1968, Mt. Hood filed an antitrust suit, alleging violations of sections 1 and 2 of the Sherman Act and claiming damages from 1947.[249] The jury returned a special verdict for Mt. Hood which would have resulted in a recovery of $13,000,000 after trebling but for the finding that Mt. Hood knew or should have known of Greyhound's violations in 1960. With the statute of limitations being four years,[250] Mt. Hood's damages could only go back to 1964. Mt. Hood's claim though, and the only issue before the Supreme Court, was that the intervention of the Antitrust Division resulted in the limitations period reverting back to 1964 under section 5(i) of the Clayton Act[251] which tolls the limitation period during antitrust proceedings initiated by the Government.

Both lower courts upheld Mt. Hood's claim,[252] basing their decisions not on the literal wording of section 5(i), but on a congressional purpose to allow private suits whenever possible after *any* antitrust involvement by the government. This purpose would be advanced by "treating intervention by Antitrust Division lawyers as the functional equivalent of a direct action by them."[253]

The Supreme Court unanimously rejected this clear expansion of the statutory language. The Court began its analysis by noting that

248. Greyhound later refused to reinstate the through routes in contravention of a formal ICC order and a district court injunction. Finally, upon a finding of criminal contempt against Greyhound, civil contempt against several of its officers, and fines totalling $600,000, Greyhound reinstituted the through-bus arrangement that it had originally promised to maintain with Mt. Hood. *Id.* at 2374.

249. The complaint alleged numerous restraints of trade, predatory practices, monopolization and attempts to monopolize through the acquisition of surrounding bus lines and which deprived Mt. Hood of connecting traffic. *See* Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687, 689 (9th Cir. 1977).

250. The Sherman Act's statute of limitations is contained in section 4(B) of the Clayton Act, 15 U.S.C. § 15(b) (1976).

251. 15 U.S.C. § 16(i) (1976) provides in part that "[w]henever any civil or criminal proceeding is instituted by the United States to . . . punish violations of any of the antitrust laws . . . the running of the statute of limitations . . . shall be suspended during the pendency thereof and for one year thereafter."

252. 555 F.2d 687, 699 (9th Cir. 1977).

253. 555 F.2d at 700.

"[t]he starting point in every case involving construction of a statute is the language itself."[254] For tolling, the statute requires that the government *institute* a civil or criminal proceeding; here, however, the government simply *intervened* in a proceeding already instituted by Mt. Hood. Further, the petition to intervene made no allegations of any antitrust violations and took no position on the merits of Mt. Hood's position that Greyhound was attempting to monopolize the market. The Justice Department simply asked the Commission to give Mt. Hood the opportunity to prove its claims.[255]

The Court did not go so far as to say that intervention by the government in a regulatory proceeding would *never* toll the statute. Rather, once again,[256] it simply left the question open.[257] The Court also found no help for Mt. Hood in the legislative history of section 5(i). Congress wanted private parties to be able to use facts established by the government in antitrust proceedings.[258] Here, the Justice Department put forth no facts, examined no witnesses and did not attempt to prove anything.

The Court had no choice but to decide against Mt. Hood. The Ninth Circuit had clearly expanded the scope of section 5(i); and, it appeared that Mt. Hood would obtain only its post-1964 treble damages in spite of Greyhound's blatantly predatory actions. In addition to its section 5(i) claim, however, Mt. Hood had argued that the statute of limitation should be tolled on equitable grounds;[259] because certiorari had not been granted on that question, the Court dutifully declined to decide the issue, leaving it for the

254. 98 S.Ct. at 2375 (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975)(Powell, J., concurring)); *see also* St. Paul Fire & Marine Ins. Co. v. Barry, 98 S.Ct. 2923 (1978); Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978) (Burger, C.J., dissenting).

255. 98 S.Ct. at 2376. This lack of position on the part of the Justice Department served to distinguish this case from Minnesota Mining & Mfg. Co. v. New Jersey Wood Furnishing Co., 381 U.S. 311 (1965). There the Court held that the statute of limitations was tolled by an FTC proceeding which successfully challenged a merger which also was the subject of the private action.

256. *See* notes 221 & 236 *supra* and accompanying text.

257. 98 S.Ct. at 2378 n.20.

258. *Id.* at 2377.

259. Brief for Respondent 22-32, 98 S.Ct. 2370 (1978). Simply stated, Mt. Hood's argument was that tolling is an equitable doctrine that may be applied to prevent injustice, and that application was proper here because, under the doctrine of primary jurisdiction, Mt. Hood had to go before the ICC before it could bring an action in federal court.

Ninth Circuit on remand.[260] Chief Justice Burger, however, made clear that should Mt. Hood's equitable argument be upheld on remand, the circuit court need not fear another reversal. His concurrence was brief but impassioned in stressing the magnitude of Greyhound's repeated violations.[261] While carefully not deciding whether equitable principles tolled the statute of limitations, he assured the court of appeals that it was free to consider the question and he even pointed the court to all the authority it would need to do so.[262]

Greyhound will take little joy in having won this battle, for, in the process, the Chief Justice seems to have cost it the war.

C. *Standing for Foreign Governments: Pfizer*

Chas. Pfizer & Co., American Cyanamid and, to a lesser extent, four other pharmaceutical manufacturing companies have been the subject of a multitude of antitrust suits charging price-fixing, market allocation and monopolization of broad spectrum antibiotics.[263] When foreign governments jumped on the bandwagon, the Supreme Court was asked to determine for the first time whether foreign nations are "persons" under the Sherman and Clayton Acts[264] and thus entitled to sue for treble damages. In a five to three decision,[265] the Supreme Court affirmed the decisions of two lower courts[266] and granted standing.

As in *Greyhound,* the question in *Pfizer, Inc. v. Government of India* involved statutory interpretation.[267] The Court admitted that

---

260. 98 S.Ct. at 2379 n.21.

261. 98 S.Ct. at 2379 (Burger, C.J., concurring).

262. *Id.* The Chief Justice stated as follows:

> The authority of a federal court, sitting as a chancellor, to toll a statute of limitations on equitable grounds is a well established part of our jurisprudence. . . . With respect to the limitations period of the Clayton Act, equitable tolling is particularly appropriate since the addition of a federal limitations period in the Act was essentially a "procedural" change in the statute.

263. Pfizer has been sued by the FTC, the Justice Department, its competitors, its customers, and over fifty state and local governments. Several have sued more than once.

264. 15 U.S.C. §§ 7, 12 (1976): "The word 'person,' or 'persons,' [wherever used in this act] shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

265. Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978) Burger, C.J., Powell and Rehnquist, J.J., dissented. Justice Blackmun took no part in the decision.

266. 550 F.2d 396 (8th Cir. 1976). The district court decision is unreported.

267. *See* note 246 *supra* and accompanying text.

"[t]here is no statutory provision or legislative history that provides a clear answer; it seems apparent that the question was never considered at the time the Sherman and Clayton Acts were enacted."[268] There were, according to the Court, two reasons why the plaintiffs might not be "persons": First, they were foreign; and second, they were sovereign nations. On the first issue, the Court noted that the definition of "person" contained in the antitrust laws[269] specifically includes foreign corporations and thus allows the assumption that an entity should not be denied standing simply because it is foreign. Further, allowing foreign plaintiffs standing serves the two purposes of private antitrust actions, deterrence and compensation.[270]

The Court relied on an earlier decision to answer the second question, *viz.*, whether sovereignty precluded standing. In *Georgia v. Evans,*[271] the Court held that a sovereign state is a "person" and thus has standing. The majority in *Pfizer* reasoned that foreign nations could be victims of antitrust violations as much as domestic states.[272] Noting that foreign governments are generally entitled to bring suits in federal courts,[273] the Court held that an exception to this rule for antitrust could not be justified without affirmative legislative intent.[274]

The dissent, while recognizing the lack of pertinent legislative history, used this as its springboard to reach an opposite conclusion. While the majority held that standing should be conferred absent clear legislative intent, the dissent argued that there should be no standing without an affirmative legislative intent.[275]

Presently, there is a movement in Congress to limit the *Pfizer* holding by legislation providing for standing only in limited circumstances.[276] Because, however, this provision is a rider to a bill which

268. 434 U.S. at 316 (footnote omitted).

269. 15 U.S.C. §§ 7, 12 (1976). *See* note 259 *supra*.

270. 434 U.S. at 131-14.

271. 316 U.S. 159 (1942).

272. 434 U.S. at 318.

273. *See* 28 U.S.C. § 1332 (a)(4) (Supp. 1978).

274. 434 U.S. at 319.

275. "The conversion of this silence in 1890 into an affirmative intent in 1978 is indeed startling." 434 U.S. at 325 (Burger, C.J., dissenting).

276. At the time of this writing, the Antitrust Enforcement Act of 1978 (S. 1874) had cleared the Senate Judiciary Committee. The bill contains a section partially overruling

would overrule the Court's 1977 decision in *Illinois Brick Co. v. Illinois*,[277] which precluded indirect purchases from antitrust recoveries, one question is whether the *Pfizer* amendment will be fully debated. Whatever Congress does, the Court's decision is another indication of the importance it places on vigorous enforcement and the broad scope of the antitrust laws.

VII. Non-Antitrust Cases Affecting Competition

The Court's antitrust decisions exhibit a hospitable attitude toward the policy of economic competition. We now turn to cases which, although not raising strictly antitrust issues, involved the antitrust laws peripherally or otherwise will affect the level of competition.

A. *The Home Court Advantage Is Worth More Than Ten Points: Exxon Corp. v. Maryland*

Economic competition suffered its worst setback of the Term in *Exxon Corp. v. Maryland*,[278] where the Court upheld a Maryland statute which (1) forbids producers and refiners of petroleum products from operating retail gasoline stations in Maryland,[279] and (2) requires that a "voluntary allowance"[280] extended to one dealer by a supplier be extended to all dealers in the state.[281] The first provision, a so-called "gasoline divestiture" statute, was alleged to violate the due process and commerce clauses. The second was alleged to conflict with section 2(b) of the Robinson-Patman Act,[282] and therefore with the supremacy clause.[283]

Pfizer, by allowing foreign nations to sue for actual damages upon a finding by a court that the plaintiff nation has enacted its own laws prohibiting restrictive trade practices and allows suit in its courts by the United States. *See* 870 Antitrust & Trade Reg. Rep. (BNA) A-1 (June 29, 1978).

277. 431 U.S. 720 (1977).

278. 98 S.Ct. 2207 (1978).

279. Md. Ann. Code art. 56, § 157E(c) (Supp. 1977).

280. A voluntary allowance is a reduction in price or a discount given by the oil company to its dealers for a short period to allow the dealer to compete with other retailers.

281. Md. Ann. Code art. 56, § 157E(d) (Supp. 1977).

282. 15 U.S.C. § 13(b) (1970). *See* note 30 *supra*.

283. U.S. Const. art. VI. The plaintiffs were Exxon, Continental, Shell, Gulf, Ashland and Phillips Petroleum all of which are fully integrated, *i.e.*, perform production, refining, transportation and marketing functions; and Commonwealth Oil, a refiner which does not produce oil but purchases it from other companies. Continental, Commonwealth and Ashland had

The legislature's precise rationale for enacting the divestiture portion of the statute is not clear. Both the Supreme Court and the Maryland Court of Appeals emphasized a study done by the Maryland Comptroller which showed that stations owned by independent dealers received less gasoline during the 1973 gas shortage than did stations operated by the oil companies. The court of appeals also noted that since evidence showed that the companies were converting independent dealer stations to company owned outlets, the legislature "could reasonably conclude," that this trend was anticompetitive.[284]

The rationale for requiring oil companies to give every dealer in the state a discount if any dealer were given one is even less clear. The court of appeals simply noted that the practice was a means of controlling price competition in localized areas.[285] The Supreme Court appeared to rationalize the provision on the ground that Maryland chose the policy of treating all customers equally over that of allowing sellers freedom to make their own competitive decisions.[286]

The Maryland Court of Appeals upheld the statute against all challenges.[287] With respect to the due process challenge, it noted that the test was not the wisdom of the measure, but whether there were "any considerations relating to the public welfare by which it can be supported," or whether it was unreasonable, arbitrary or

---

only company-owned retail outlets in Maryland and marketed large volumes of gasoline at prices consistently lower than other retailers. The remaining plaintiffs sold primarily to their franchised, independent retail dealers who resold to the public, although each had at least one company-owned retail outlet.

The case was commenced in the Circuit Court for Anne Arundel County, Maryland. In addition to commerce clause, substantive due process, and preemption by Robinson-Patman challenges, the plaintiffs argued that the statute resulted in an unconstitutional taking of property and denied them equal protection of the laws. They also argued that it constituted an unlawful delegation of legislative power by authorizing Maryland's Comptroller to promulgate certain regulations, was preempted by the Federal Emergency Petroleum Allocation Act, and was void for vagueness. These theories were not pursued to the Supreme Court.

284. Maryland v. Exxon Corp., 279 Md. 410, 370 A.2d 1102, 1112 (1977).

285. 279 Md. at 446, 370 A.2d at 1122.

286. 98 S.Ct. at 2217-18.

287. Maryland v. Exxon Corp., 279 Md. 410, 370 A.2d 1102 (1977). The lower state court had invalidated the voluntary allowance portion of the statute because it would preclude suppliers from discriminating in price where section 2(b) of the Robinson-Patman Act would allow it, *see* 1976-1 TRADE CASES (CCH) ¶ 60,704 (Cir. Ct. Anne Arundel County, Md. 1975), and the divestiture portion on substantive due process grounds.

oppressive.[288] Holding, in effect, that the plaintiffs failed to show that the statute would not promote competition, the court overruled this challenge.[289]

The plaintiffs fared no better with their commerce clause theory. The court of appeals held: (1) that the flow of gasoline into Maryland would not be burdened since the statute regulated a wholly intrastate activity, *viz.*, retailing; (2) that the purpose of the statute was to promote competition rather than protect local retailers as the oil companies argued; and (3) that commerce was not discriminated against because neither intrastate producers or refiners (of which there were none) nor interstate producers or refiners could operate retail outlets.

With respect to the requirement that any discount given to one customer be given to all, the companies argued that section 2(b) of the Robinson-Patman Act, the "meeting competition" defense, gave them a right to discriminate where the discount was given a customer to allow him to compete with a competitor who had received a discount from his supplier. The court held, however, that since section 2(b) did not even apply to this situation, there was no conflict.[290]

---

288. 279 Md. at 424, 370 A.2d at 1110-11, (quoting Westchester West No. 2 v. Montgomery County, 276 Md. 448, 455, 348 A.2d 856, 860 (1975)).

289. The plaintiff oil companies argued that if the statute was upheld, competition would be reduced because refining companies operating outlets solely with company personnel as well as other aggressive, independent marketers depending on high volume sales at low prices would cease competing in Maryland and new competitors would eschew the Maryland market. The state, on the other hand, argued that without the divestiture statute, competition would decrease because recent increases in crude oil prices would allow the integrated companies to use profits achieved there to drive competitors in retailing from the market and divert gasoline supplies from independent, unbranded retailers. Finally, the state argued that the companies' desire to convert more stations to company-owned status would reduce the number of competitors.

290. In FTC v. Sun Oil Co., 371 U.S. 505 (1963), the Court held that the meeting competition defense was not available where a seller reduced his price to one customer to allow that customer to compete against a competitor who had not received a price cut from his supplier. Whether the defense would have been available had the competing retailer been given help by his supplier was specifically left open. Lower courts have reached diverse results. *Compare* Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972)(§ 2(b) defense available), *with* Enterprise Indus. v. Texas Co., 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) (defense not available).

The Supreme Court affirmed.[291] All Justices hearing the case[292] agreed that substantive due process standards were not violated and that the voluntary allowance provision did not conflict sufficiently with the Robinson-Patman Act or any other antitrust policy to warrant preemption. All except one agreed with the Maryland Court of Appeals that the divestiture provision did not offend the commerce clause.

Finding that the statute bore "a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market,"[293] the Court rejected the due process claim.[294] With respect to the commerce clause, the Court adopted much of the Maryland court's reasoning. It rejected the argument that the divestiture provision effectively would discriminate against out-of-state companies, holding, rather, that only companies performing certain functions, *i.e.*, producing and refining, whether in Maryland or not, were excluded.[295] Additionally, the Court held that there was no burden on commerce because while some refiners might cease their retail operations and thus ship less gas into Maryland, other refiners would fill this void.[296] The Court felt that the plaintiffs' real concern was not that interstate commerce would be affected, but that they would be excluded from the retail market. To that, it retorted that the commerce clause protects interstate markets rather than interstate firms.[297]

Mr. Justice Blackmun dissented, arguing that because the practical effect of the statute was to exclude out-of-state gasoline marketers, the statute was invalid[298] unless the state carried the burden of showing that the provision supported some legitimate state interest which could not be achieved by a less drastic measure. And while

291. Exxon Corp. v. Governor of Md., 98 S.Ct. 2207 (1978).

292. Mr. Justice Powell took no part in the case.

293. 98 S.Ct. at 2213.

294. The Court noted that the efficacy of the statute in promoting competition was far from clear: "The evidence presented by the refiners may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a "superlegislature to weigh the wisdom of legislation."'" *Id.* (Citations omitted).

295. *Id.* at 2213-14.

296. *Id.* at 2214.

297. *Id.* at 2215.

298. 98 S.Ct. at 2219 (Blackmun, J., concurring in part and dissenting in part).

the state's purported goal was to promote competition, it had not even attempted to demonstrate why it was necessary to ban completely the out-of-state producer-refiners.[299]

Implicit throughout Mr. Justice Blackmun's opinion was the belief that the divestiture provision was special interest legislation enacted specifically to protect small, local businessmen. Twice, he referred to the statute's "parochialism,"[300] and noted that, perhaps, the out-of-state plaintiffs had insufficient political clout, when compared with the in-state dealers, to stop the measure.[301]

The voluntary allowance provision was also upheld. All Justices agreed that there was insufficient conflict between it and the Robinson-Patman Act to warrant preemption, even if the section 2(b) defense were available where the supplier lowered his price to allow a customer to compete with a retailer who had received a price reduction from his supplier.[302] Noting that the companies' major argument was that the Maryland statute prohibited discrimination where the Robinson-Patman Act might permit it,[303] the Court simply said that any possible conflict was too speculative to warrant preemption. To the argument that the statute undermined the competitive balance that Congress intended between the Sherman and Robinson-Patman Acts,[304] the Court said that this was just another

---

299. *Id.* at 2221.

300. 98 S.Ct. at 2222, 2227. *Cf.* City of Lafayette v. La. Power & Light Co., 98 S.Ct. 1123, 1134 (1978)(footnote omitted): "If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established."

301. *See* Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment,* 28 VAND. L. REV. 1277, 1307 (1975), where the author says:

> Although neutral on their face, the statutes will unquestionably have the effect of shielding local gasoline dealers from the competition of major oil producers engaged in interstate commerce. Whatever the enacting states' asserted interest in insuring motorist-consumers an uninterrupted supply of reasonably priced petroleum products, the independent dealers' lobbyist groups have supplied the primary impetus for the enactment of the divestiture statutes.

302. Whether the defense was available in such a situation was not decided. *See* 98 S.Ct. at 2216.

303. For example, if the suppliers cut the price in Baltimore to allow its dealer to meet a competitive situation there, the price also would have to be cut to dealers in Maryland near the border who compete with dealers across the state line. To avoid a section 2(a) secondry line violation, the seller must also offer the out-of-state customer the voluntary allowance.

304. It is often argued that because the Robinson-Patman Act precludes price differences, its effect is to stabilize prices, thus undercutting the Sherman Act's policy of maximizing

argument that the statute was anti-competitive,[305] and, by itself, an insufficient reason for invalidation.[306]

From the standpoint of economic competition, the disturbing aspect of *Exxon* is not the Court's analysis or even its result, which may have been mandated under the constitutional provisions in question. Rather, the case is disturbing because it means that states can enact and sustain all sorts of anti-competitive regulation. Indeed, *Exxon* will give impetus to other state legislatures to enact similar types of statutes dealing with the retail marketing of gasoline as well as other industries. For example, the Court noted that four states had adopted similar statutes and that thirty-two others had considered such legislation.[307] Similar types of statutes which, for example, restrict a seller from franchising more than one dealer in an area, are prevalent in the automotive[308] and beer industries,[309] and much of the Court's analysis in *Exxon* will apply to attacks on them.[310] Thus, state legislatures may find themselves besieged with local businessmen from a multitude of industries, asking for special protection from large national concerns. This can only inure to the detriment of consumers.

The arguments are always the same: The large firm acts in a predatory manner. If it operates in more than one geographic market, it subsidizes losses in one market with high profits in another; if it is a conglomerate, it subsidizes losses on one product from

---

price competition. *See generally* UNITED STATES DEPARTMENT OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977).

305. The Court recognized that "[i]n this sense, there is a conflict between the statute and the central policy of the Sherman Act — our 'charter of economic liberty.' " 98 S.Ct. at 2218.

306. The Court concluded that "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Id.*

307. 98 S.Ct. at 2215 n.18. The General Assembly of Virginia enacted its version of a petroleum divestiture provision during its last session. *See* VA. CODE ANN. § 59.1-21.16:1 (Cum. Supp. 1978). *The Wall Street Journal*, June 15, 1978, noted that the Chamber of Commerce estimates that at least seventeen other industries may attempt similar legislation.

308. *E.g.*, VA. CODE ANN. § 46.1-547 (Cum. Supp. 1977).

309. *E.g.*, VA. CODE ANN. § 4-118.6 (Cum. Supp. 1978).

310. In American Motor Sales Corp. v. Division of Motor Vehicles, 445 F. Supp. 902 (E.D. Va. 1978), Virginia's statute prohibiting automobile manufacturers from establishing more than one dealership in a defined trade area except under certain circumstances was declared unconstitutional under the commerce clause. The case, decided before *Exxon*, is on appeal and probably will be reversed.

excess profits on others; if it is vertically integrated, it subsidizes downstream losses with upstream profits. Unfortunately, the various legislatures often give too much credence to these arguments, especially when put forward by strong, well-organized trade associations, and forget that often efficiency is equated with predatory abuse.

In some instances, but probably very few, these arguments have some validity:

> This state of affairs in the petroleum industry poses a dilemma to the thoughtful legislator considering proposed divestiture legislation. On the one hand, the efficiencies made possible through the oil majors' large scale, integrated methods of operation enable them to pass on potentially significant cost savings to the consumer. On the other hand, the majors, under certain circumstances at least, appear to be capable of destroying needed competition at the marketing level.[311]

But it makes little sense to throw the baby out with the bathwater as Maryland did.[312] As Justice Blackmun noted in his dissent, less restrictive alternatives were available—alternatives which would solve the problems envisioned by the legislature, while, at the same time, allow consumers to benefit from the advantages flowing from efficiencies. Especially difficult to understand was Maryland's preclusion of companies which had never used independent dealers and, themselves, were dependent on the majors for oil to refine.

Two elementary principles of antitrust analysis are that the antitrust laws are meant to protect competition rather than competitors,[313] and that exclusion of competitors is disfavored.[314] These principles are equally valid policies in other contexts and should be heeded by legislators when they contemplate regulatory schemes which limit market entry and establish quasi-public utilities in in-

311. Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment,* 28 VAND. L. REV. 1277, 1319 (1975).

312. In what appears to be another boon to independent dealers, a district court recently upheld another Maryland statute which places a two year moratorium on allowing retail stations to change from full-service facilities to gas only outlets. The purported state interest for the statute was motorist safety. Sun Oil Co. v. Goldstein, No. N-77-1960 (D. Md. June 23, 1978).

313. *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

314. *See* Associated Press v. United States, 326 U.S. 1 (1945).

dustries which exhibit few of the economic characteristics of natural monopolies.

B. *Solicitation of Business and the First Amendment: Ohralik and Primus*

Ever since the Court made clear in *Bigelow v. Virginia*[315] that commercial speech, *i.e.*, speech calculated to result in a commercial transaction, is entitled to some protection under the first amendment, the Court has wrestled with state prohibitions of certain types of solicitation. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[316] a statute prohibiting drug price advertising by pharmacists was invalidated. And in the 1976 Term, the Court declared that attorneys have a first amendment right to publish truthful advertising concerning the terms and availability of routine legal services in *Bates v. State Bar of Arizona.*[317]

The nexus between truthful advertising, especially price advertising, and economic competition is clear; the economist's model of economic competition assumes a state of perfect knowledge.[318] Indeed, that price advertising often decreases price contributed to the Court's result in *Pharmacy* and *Bates.*[319]

Advertising such as that permitted by *Bates*, of course, is only one form of business solicitation. Specifically left open by that decision was whether "in-person solicitation of clients — at the hospital

315. 421 U.S. 809 (1975).

316. 425 U.S. 748 (1976).

317. 433 U.S. 350 (1977); *see also* Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977), which invalidated a local ordinance prohibiting the placing of real estate "for sale" signs in yards.

318. *See, e.g.*, C. FERGUSON, MICROECONOMIC THEORY 224 (1969).

319. In *Bates*, for example, 433 U.S. at 377, the Court noted that "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising."

In *Pharmacy*, 425 U.S. at 765, the Court explained how price competition improves allocative efficiency:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

320. 433 U.S. at 366.

room or the accident site, or in any other situation that breeds undue influence,"[320] is constitutionally protected.[321] To the surprise of no one, this question was soon before the Court. Unfortunately, however, the factual circumstances in which it arose were so egregious in one case and so innocuous in the other that the Court was not required to espouse clear standards which will provide the various state bars with guidance.

The constitutionality of state prohibitions on solicitations by attorneys arose in the companion cases of *Ohralik v. Ohio State Bar Association*[322] and *In re Primus.*[323] While both cases involved aspects of solicitation arguably prohibited by Disciplinary Rule 2-103 of the states' Code of Professional Responsibility and were decided together, all similarity ends there.

In *Ohralik,* the attorney learned of an automobile accident, visited the victim in the hospital, and there solicited her business. In addition, he solicited the business of the victim's rider while surreptitiously taping their conversations. When both clients finally fired him, he sued for breach of contract. The Supreme Court of Ohio rejected his argument that such conduct was protected by the first amendment as a form of commercial speech and suspended him indefinitely from the practice of law.[324]

Mr. Justice Powell, speaking for a unanimous Court,[325] first made clear that commercial speech enjoys a somewhat lower degree of first amendment protection than do some other forms of speech. Accordingly, it may be subjected to regulation which would not be tolerated in other contexts. Moreover, because speech is only a subordinate part of in-person solicitation, it demands a lower level of judicial scrutiny than otherwise would be the case.[326]

Advertising of the type presented in *Bates* was differentiated on the grounds that it left the recipient free to act or not and did not require an immediate response without leaving time to contemplate

---

321. Also left open was whether advertising the *quality* of legal services could be prohibited. *Id.* at 383.

322. 98 S.Ct. 1912 (1978).

323. 98 S.Ct. 1893 (1978).

324. Ohio State Bar Ass'n v. Ohralik, 48 Ohio St. 2d 217, 357 N.E.2d 1097 (1976).

325. Mr. Justice Brennan took no part in the case.

326. 98 S.Ct. at 1918-19.

alternatives. On the other hand, in-person solicitation was often one-sided and provided no opportunity for other points of view. Emphasis was placed on the consumers' need for information upon which to make rational choices rather than the attorney's interest in "procurement of remunerative employment . . . a subject only marginally affected with First Amendment concerns."[327]

After noting that regulation of speech often is permissible where necessary to achieve a legitimate state interest, the Court explained that the state interests which the prohibition of in-person solicitation promoted were consumer protection and the maintenance of "true professionalism,"[328] *i.e.*, the protection of clients. To the extent, then, that the prohibition protects the public from evils of solicitation such as overreaching, invasion of privacy, and conflict of interest between the lawyer's judgment and his own economic betterment, it promotes a legitimate state interest and is valid.

Importantly, however, the Court did not approve all prohibitions of in-person solicitation. Rather, it required that the facts of each situation be examined. In rejecting the attorney's argument that actual harm to the client must be shown, the Court held that the prohibition may be applied where employment for pecuniary gain occurs "under circumstances likely to result in adverse consequences," such as situations "inherently conducive to overreaching."[329] Particularly suspect is in-person solicitation of the "unsophisticated, injured, or distressed lay person."[330]

The Court's refusal to require a showing of actual harm appeared to be based on three factors. First, the prohibition is prophylactic in nature, intending to prevent harm before it occurs.[331] Second, given the prophylactic nature of the rule, a showing of actual harm would place too great a burden on the state.[332] Third, practical problems of policing and proof would arise.[333] Unlike the type of written advertising involved in *Bates*, in-person solicitation is oral, and thus it is difficult later to ascertain what was said and the circumstances

327. 98 S.Ct. at 1920.
328. *Id.* at 1921 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 368 (1977)).
329. *Id.* at 1923.
330. *Id.*
331. *Id.*
332. *Id.* at 1924.
333. *Id.*

surrounding the solicitation.[334] Accordingly, the Court was willing to give the bar more leeway in prohibiting in-person solicitation than in precluding other forms of advertising.

Primus[335] presented a startling factual contrast.[336] There, the attorney, who was a cooperating lawyer with the American Civil Liberties Union but received no money from it, wrote a letter to a woman who had been sterilized, suggesting that she allow the ACLU to file a civil rights suit on her behalf. The Supreme Court of South Carolina held that the attorney had violated Disciplinary Rule 2-103(D) and ordered a public reprimand.[337]

Unlike Ohralik, Primus argued not that her solicitation was protected commercial speech but that "her activity involved constitutionally protected [political] expression and association."[338] Primary reliance was placed on *NAACP v. Button*,[339] in which the Court had held that the NAACP's efforts to solicit plaintiffs for civil rights actions challenging racial discrimination were means of expression and association to advance political beliefs, and thus constitutionally protected.

The Court had little difficulty in quickly distinguishing *Primus* from *Ohralik*. First, in-person solicitation was not even involved because the solicitation was by letter.[340] This distinction was not a form over substance difference because use of a letter negated many of the objections to in-person solicitation found in *Ohralik*. For example, there is no coercion or overreaching and only a small inva-

---

334. *Id.*

335. 98 S.Ct. 1893.

336. As Mr. Justice Marshall noted in his concurrence in *Ohralik*, "[w]hile both of these cases involve application of rules prohibiting attorneys from soliciting business, they could hardly have arisen in more disparate factual settings." 98 S.Ct. at 1925 (Marshall, J., concurring in part).

337. In re Smith, 268 S.C. 259, 233 S.E.2d 301 (1977).

338. 98 S.Ct. at 1899. Mr. Justice Powell, writing for the Court, phrased the question presented as follows:

> [W]hether a State may punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated.

Id. at 1896.

339. 371 U.S. 415 (1963).

340. 98 S.Ct. at 1899.

sion of privacy, because the recipient simply may throw the letter away.[341] In addition, tangible evidence of the solicitation is created which is subject to subsequent examination.[342] Second, no economic benefits accrued to the attorney; her motive was not financial gain but rather furtherance of her political beliefs.[343] Finally, speech calculated to advance political ideology was involved rather than commercial speech, and thus stricter scrutiny of the restraint was necessary.[344]

Similar to its result in *Ohralik* that not all commercial speech in the form of in-person solicitation can be prohibited, the Court held in *Primus* that not all solicitation promoting political ideology or objectives is protected. Rather, it adopted the standard rejected in *Ohralik* that the state must show actual harm.[345] Then, as it did in *Ohralik,* the Court examined the record below but determined that none of the harms of solicitation had occurred.[346]

Thus, *Primus* and *Ohralik* involved different facts and different legal theories. *Ohralik* was a commercial speech case involving in-person solicitation, while *Primus* involved a more protected form of speech which arose outside the context of in-person solicitation.

Both cases, however, shed light on the permissible scope of in-person solicitation prohibitions. Read together, they appear to espouse two general rules. First, no written solicitation per se, whether motivated by pecuniary gain or not, may be suppressed unless it falls within one of the exceptions set forth in *Bates.*[347] Second,

---

341. *Id.* at 1906-07.

342. *Id.* at 1907.

343. *Id.* at 1903.

344. *Id.* at 1906. Mr. Justice Powell noted that "[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *Id.*

Mr. Justice Rehnquist objected to the dichotomy between "commercial" and "associational" speech, saying cynically that "we may be sure that the next lawyer in Ohralik's shoes who is disciplined for similar conduct will come here cloaked in the prescribed mantle of 'political association' to assure that insurance companies do not take unfair advantage of policyholders." 98 S.Ct. 1910 (Rehnquist, J., dissenting).

345. "Although a showing of potential danger may suffice in the [context of commercial speech], appellant may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's broad prohibition is said to be directed." 98 S.Ct. at 1906.

346. *Id.* at 1906-07.

347. Bates v. State Bar of Ariz., 433 U.S. 350 (1977). *Bates* held that a state may suppress

whether written, oral, in-person, or otherwise, what Mr. Justice Marshall referred to as "benign commercial solicitation,"[348] is protected.

The crucial variable is the situation in which the solicitation occurred. This, of course, injects considerations of the client's sophistication, the location of the solicitation, the client's mental and physical state and the opportunity or inducement to "shop around," into determining the prohibition's constitutionality. Not dispositive are that in-person solicitation is the form of the solicitation, that the motive for the solicitation is pecuniary gain, and that no harm actually resulted from the solicitation.

The decisions should exert a procompetitive influence if they are properly interpreted by the bar. The Court appeared to recognize "benign commercial solicitation" as a proper competitive practice which benefits the public. The solicitation condemned achieves none of the benefits which competition seeks to promote. For example, one need only look at the result of the solicitation in *Ohralik* to realize that some in-person solicitation leads to gross inefficiency.[349]

C. *The Court Strikes a Procompetitive Blow for International Competition: Zenith*

In a May 26, 1978 speech, Assistant Attorney General John H.

---

false, misleading or deceptive advertising and advertising dealing with illegal activities. In addition, the state may promulgate reasonable time, place and manner restrictions and require either supplemental information or warnings where necessary. 433 U.S. at 383-84.

This position is bolstered by the recent decision in Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978), where the court held that a law firm's mailing of its fee schedules to various real estate agencies was protected. It said the solicitation was more similar to the advertising in *Bates* than to in-person solicitation. *Id.* at 934.

348. Benign commercial solicitation was defined as:

> solicitation by advice and information that is truthful and that is presented in a noncoercive, nondeceitful and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous.

Ohralik v. Ohio State Bar Ass'n, 98 S.Ct. at 1927 n.3 (Marshall, J., concurring in part). This standard appears to negate, implicitly at least, the concerns expressed over in-person solicitation.

349. One of the accident victims paid the soliciting attorney $4,166.66 of a $12,500 insurance settlement even though he did not represent her during settlement negotiations. She paid the attorney who finally represented her an additional $900. The other victim ended up paying the attorney over $2,000, even though she had fired him. Time and other resources were wasted. 98 S.Ct. at 1916-17 nn.5&6.

Shenefield of the Antitrust Division expressed concern over an increasing trend toward protectionism in international trade and outlined several programs undertaken by the Division to promote competition in international markets.[350] Efforts toward increased competition received a boost in *Zenith Radio Corp. v. United States,*[351] in which the Court held that the Secretary of the Treasury need not collect countervailing duties on certain goods shipped to the United States by Japan.

Section 303(a) of the Tariff Act of 1930[352] requires the Secretary to levy a "countervailing duty" on goods exported into the United States where the exporting country pays a "bounty or grant" upon exported merchandise. The amount of the duty is the "net amount" of the sum paid by the foreign country to its manufacturer. Zenith alleged that Japanese tax laws conferred such a bounty by exempting from an indirect commodity tax certain electronics products exported, while requiring the tax to be paid on the same products when sold in Japan. In the case of exported goods, the tax was either never paid or if paid, was remitted[353] by Japan to the manufacturer.[354] The Secretary argued, consistent with the position taken by the Treasury Department since 1898, that since the remission was "non-excessive," *i.e.,* not in excess of the tax paid, no countervailing duty was required.[355]

The Supreme Court upheld the Secretary's position, relying on the statute's language, legislative history and the overall purpose of the duty provision. It traced the history of the statute and its predecessors from 1890, when the legislative history indicated that "bounties" meant the amount by which remission exceeded taxes paid; through the 1894 version of the statute, which expressly in-

---

350. Address by John H. Shenefield, ALI-ABA Course of Study on International Antitrust (May 26, 1978), *reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,371.

351. 98 S.Ct. 2441 (1978).

352. 19 U.S.C. § 1303(a) (Supp. V, 1975), in pertinent part, provides as follows:

> (1) Whenever any country . . . shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article . . . produced in such country . . . then upon the importation of such . . . merchandise into the United States . . . there shall be levied and paid . . . a duty equal to the net amount of such bounty or grant.

353. The term "remission" as used herein includes both situations, *i.e.,* where the tax was never paid and where it was paid and subsequently remitted.

354. 98 S.Ct. at 2441.

355. *Id.* at 2442.

cluded that definition; to the 1897 version, still in force, which uses the term net bounty, which could only mean the excess of amount remitted over amount paid.[356]

Additionally, the legislative history showed that the statute's purpose was to negate the unfair competitive advantage which some nations gave their manufacturers by subsidizing exported goods.[357] Where, however, the remission was non-excessive, the Treasury Department posited that the foreign manufacturer gained no competitive advantage because although no indirect tax was levied by the exporting country, the goods were subject to excise, sales and use taxes imposed by this country.[358]

The Court found *Downs v. United States*,[359] relied on by Zenith, to be unpersuasive. *Downs* involved Russian trade laws which provided for a nonexcessive remission but also granted the manufacturer the right to sell in Russia an amount equal to the amount of the product exported without paying an excise tax. Thus the provision, as a whole, amounted to an excessive remission,[360] and a countervailing duty was proper. Finally, the Court noted that the Secretary's position had been incorporated in the General Agreement on Tariffs and Trade, and thus there was substantial reliance placed on the continuation of the Secretary's position by both private interests and foreign governments.[361]

Of course, the issue in *Zenith* is only one of many crucially important problems involving international economic competition. "Dumping," the selling by foreign countries of goods here at below cost or below the price charged in the exporting country, is perhaps the most well known. One source, however, has noted that "[t]he *Zenith* case itself was generally viewed as an invitation to trade chaos if the Court had upheld the U.S. manufacturer's position."[362]

356. *Id.* at 2445-48.

357. *Id.* at 2448. The problem of export subsidies by foreign manufacturers continues to cause serious international trade difficulties. *See, e.g., Farm Issues Trip the Trade Talks, Great Lakes Ruling Irks Steel,* and *A Code for Subsidies,* BUS. WEEK, August 7, 1978, at 24, 25, 94.

358. 98 S.Ct. at 2451.

359. 187 U.S. 496 (1903).

360. 98 S.Ct. at 2451. The Secretary had reached the same conclusion, unlike the situation in *Zenith.*

361. *Id.* at 2449.

362. *Zenith Hasn't Settled All Vital Trade Issues,* LEGAL TIMES OF WASHINGTON, June 26, 1978, at 4, col. 1.

D. *Deconcentrating the Communications Media: National Citizen Committee for Broadcasting*

Under the Communications Act of 1934,[363] the Federal Communications Commission is directed to allocate the limited supply of radio and television frequencies by licensing stations to operate.[364] In addition, the FCC must promulgate regulations to implement the statutory scheme[365] "as public convenience, interest, or necessity requires";[366] these regulations espouse its views with respect to policies which promote the public interest.

In its licensing and other regulatory functions, the FCC has placed heaviest reliance on the two policy goals of, first, achieving the best possible service for the public, and second, insuring through diversification of ownership rules that a variety of programs and viewpoints are broadcast and that economic concentration in the broadcast industry is not excessive.[367] While some media other than television and radio, such as newspapers, are not under direct supervision by the FCC, its licensing decisions often take ownership of such media into consideration.[368]

In 1970, the FCC commenced a rulemaking proceeding to ascertain to what extent the common ownership of broadcast services[369] and newspapers should be prohibited. Based upon evidence submitted during the proceeding, it determined that while common ownership had not been shown to be detrimental to the public interest, either because commonly owned facilities espoused similar view-

363. 47 U.S.C. §§ 151-609 (1970).

364. 47 U.S.C. § 301 (1970).

365. 47 U.S.C. § 303 (1970).

366. 47 U.S.C. § 303(r) (1970).

367. Several of the FCC's regulations in this regard merit mention. In 1941, networks were prohibited from owning more than one station in the same community, and entities were precluded from owning more than one network. This regulation was upheld in National Broadcasting Co., Inc. v. United States, 319 U.S. 190 (1943). Shortly thereafter, a rule prohibiting an entity from operating more than one "broadcast service," *i.e.*, a radio or television station, in the same community, was promulgated.

In 1953, a rule allowing one entity to own no more than a total of seven FM radio stations, seven AM stations and five VHF television stations was enacted. Its validity was upheld in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). And finally, a 1970 regulation prohibits prospectively the common ownership of a radio station and VHF television station in the same market.

368. *See, e.g.*, McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956).

369. Broadcast services as used herein means AM and FM radio and VHF television.

points or because they were anticompetitive, it felt that restricting common ownership might promote more diversity in programming without causing any concomitant harms.[370] Accordingly, it promulgated a two part rule. The first part, based upon the first amendment policy to achieve "the widest possible dissemination of information from diverse and antagonistic sources,"[371] prospectively prohibited the common ownership of a daily newspaper and a broadcast service serving the same area.[372] The second portion, based upon both first amendment and antitrust policies, required certain already existing commonly owned broadcast service and daily newspaper combinations to divest either the newspaper or broadcast portion within five years.[373] The FCC determined that divestiture of all combinations would not further its policy of assuring the best service possible because of the experience obtained and high quality of service rendered in the past by many combinations.

Review of the rule was sought by several petitioners including the National Citizens Committee for Broadcasting, which argued that the divestiture provisions did not go far enough; and the National Association of Broadcasters and American Newspaper Publishers Association, which felt that the rule was too restrictive and argued that it violated the first amendment, exceeded the FCC's authority and that the difference in treatment afforded combinations by the divestiture provision was arbitrary and capricious.[374] The Court of Appeals upheld the prospective ownership provision but required divestiture of all existing combinations.[375]

The Supreme Court unanimously upheld the original rule.[376] Because the authority of the FCC to promulgate common ownership rules with respect to industries regulated by it had been upheld in

370. In re Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C. 2d 1046, 1074-86 (1975).

371. *Id.* at 1048.

372. 47 C.F.R. § 73.35(a) (1977).

373. 47 C.F.R. § 73.35(c) (1977). Not all combinations were required to divest. Divestiture was required only where the combination had "an effective monopoly in the marketplace of ideas as well as economically." 50 F.C.C. 2d at 1081. The FCC deemed an effective monopoly to mean a combination between a community's only newspaper and its only television station or between the only newspaper and only radio station if there were no television station. *Id.* at 1083-84. The regulation would force divestiture of some sixteen broadcast service stations.

374. FCC v. National Citizens Comm. for Broadcasting, 98 S.Ct. 2096, 2109 (1978).

375. National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938, 944 (D.C. Cir. 1977).

376. FCC v. National Citizens Comm. for Broadcasting, 98 S.Ct. 2096, 2104 (1978).

the past,[377] the broadcasters this time argued that the FCC had exceeded its authority by attempting to regulate the newspaper industry as well.[378] The Court noted, however, that the FCC's mandate to regulate in the public interest clearly allows it to consider both first amendment and antitrust policies, both of which might be promoted by following a pattern of mass-media ownership diversification in granting broadcast service licenses.[379] Thus, in determining whether to grant a license, it properly could consider whether the applicant also owned another media.[380]

An argument that the rule violated the newspapers' and broadcasters' first amendment rights fared no better. The Court noted that because of the scarcity of broadcast frequencies and the resulting necessity for allocation, the " 'First Amendment right to broadcast [is not] comparable to the right of every individual to speak, write, or publish.' "[381] While the allocation must promote the public interest, diversification aids in achieving that goal.[382] Indeed, diversification promotes rather than suppresses free speech.[383]

The final challenge was that the dichotomy in the divestiture provision, *i.e.*, that only those combinations constituting "effective monopolies" were subject to divestiture, was arbitrary and capricious under the Administrative Procedure Act.[384] The Court noted that while the rule was not subject to the "substantial evidence" review test, it must be "rational" and "based on consideration of the relevant factors."[385]

While the FCC realized that the continuing existence of combina-

---

377. *See* cases cited note 342 *supra*.

378. 98 S.Ct. at 2111.

379. *Id.* at 2112. With respect to the propriety of the FCC basing its decisions on antitrust policies, the Court quoted from its earlier decision in United States v. Radio Corp. of America, 358 U.S. 334, 351-52 (1959):

> [I]n a given case the commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication.

380. *Id.* 98 S.Ct. at 2112.

381. 98 S.Ct. at 2114 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969)).

382. 98 S.Ct. at 2114.

383. *Id.* at 2115.

384. 5 U.S.C. § 706(2)(A) (1970).

385. 98 S.Ct. at 2116.

tions would not serve its policy of assuring the greatest variety of programming and viewpoints, it felt that divestiture would disserve its policy of assuring the best possible service.[386] In the case of the effective monopolies, however, the need for diversification was "especially great."[387] And although the standards for what constituted an effective monopoly were not based on precise evidence, the line had to be drawn somewhere. Accordingly, neither the judgment to bar future combinations while "grandfathering" some existing commonly owned newspaper and broadcast services, nor the decision to require divestiture in less than all cases of common ownership was irrational,[388] and the original rule as promulgated by the FCC was upheld.

The FCC's two governing policies[389] and the challenged rule appear to highlight the argument which often arises in antitrust economics that trade-offs are sometimes necessary between industry fragmentation and efficiency.[390] Diversification of ownership attempts to maximize or at least increase the number of competitors in both the commercial market and marketplace of ideas. On the other hand, the goal of providing the best possible service to the public appears to be more concerned with efficiency. In *Broadcasters*, the Court noted that the goals are "sometimes conflicting."[391]

By barring commonly-owned newspapers and broadcast services prospectively, the FCC emphasized the goal of increasing the num-

---

386. 50 F.C.C.2d at 1074-86. The Supreme Court noted that

> [t]he [FCC's] Order identifies several specific respects in which the public interest would or might be harmed if a sweeping divestiture requirement were imposed: the stability and continuity of meritorious service provided by the newspaper owners as a group would be lost; owners who had provided meritorious service would unfairly be denied the opportunity to continue in operation; "economic dislocations" might prevent new owners from obtaining sufficient working capital to maintain the quality of local programming; and local ownership of broadcast stations would probably decrease. [Citation omitted.] We cannot say that the Commission acted irrationally in concluding that these public interest harms outweighed the potential gains that would follow from increasing diversification of ownership.

98 S.Ct. at 2117 (footnotes omitted).

387. *Id.* at 2122.

388. *Id.* at 2119.

389. *See* text accompanying note 342 *supra*.

390. *See generally* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 4-11 (1978).

391. 98 S.Ct. at 2105.

ber of competitors. It realized, however, that this should be pushed only so far and that in the case of many existing combinations, substantial efficiencies of integration benefiting the public were realized. Thus, total divestiture was not required. Notwithstanding efficiencies, there then came a point where the potential for exercise of monopoly power was too great to allow. In these few cases, divestiture was required. Although the theory is interesting, it is impossible to second-guess the correctness of the points at which the FCC drew its lines without closely examining all evidence presented. The Court, relying on the FCC's expertise and the limited scope of review, refused to do this.

VIII. Conclusion

In retrospect, last Term was highly interesting but far from shocking. Rather, the Court took the opportunity to reemphasize and reinforce some of the trends established in previous Terms.

In most areas, the Burger Court has evidenced a policy of restraint and moderation by limiting its holdings to the narrow facts presented. Issues not vital to the specific question presented were usually avoided. While *Lafayette* and *Barry* are examples of this policy, *Gypsum* and *Engineers* evidence that the Court will venture outside the strict parameter of the specific question when such will clarify a fundamental antitrust tenet. In *Engineers,* for example, the Court went far beyond the necessary decision to correct what it considered a widely held perversion in rule of reason interpretation. The Court's exercise afield in *Gypsum* is not as easy to explain, but perhaps it reflects a desire to emphasize the new seriousness attached to criminal violations and the concomitant burden on the government to prove a violation.

Also continued last Term was the Court's strict reading of statutory language, while echoing the ever-popular refrain of "if you don't like the law, ask Congress, not us, to change it." This policy was followed even where a harsh result was necessitated, as in *Greyhound,* although the Court explained how to circumvent its decision. Exemptions continue to be strictly scrutinized and seldom implied. In substantive matters, the Court continues to emphasize economic analysis and competitive effect.

Although containing no bombshells, the 1977 Term's decisions will have significant effects. In the criminal area, with the addition of an element of intent, there should be less reluctance on the part of federal judges to mete out stiff penalties and longer sentences to those convicted. On the civil side, per se cases will no longer be defended on policy and other non-economic grounds.

Litigation, unfortunately, is necessary to answer many of the questions left open in last Term's decisions. Is a fully integrated agri-business a "farmer"? Are state sanctioned boycotts by insurance companies immune from attack? What exactly is needed to show "contemplation" by the state legislature sufficient to sustain the government action exemption? Just as *Ohralik* and *Primus* were necessary to test the limits of *Bates,* the scope of several decisions this Term needs delineation.

In general, then, the theme of the Supreme Court's 1977 Term in its antitrust cases seems to be one of polishing the already established law by solving particular problems. Above all, the Court continues to espouse a philosophy which recognizes the extreme importance of economic competition and promotion thereof by the antitrust laws. Moreover, one cannot read the non-antitrust cases without feeling that this procompetitive philosophy has spilled over into other areas of the law.