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Stephen Calkins

Wayne State University, calkins@wayne.edu

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THE OCTOBER 1989 SUPREME COURT TERM AND ANTITRUST: POWER, ACCESS, AND LEGITIMACY

STEPHEN CALKINS*

Never have so many Supreme Court antitrust cases effected so little change, at least on the surface. The CCH Trade Regulation Reporter included ten of this past term's final decisions.¹ Yet antitrust law may not be substantially different today from what it was a year ago.

In part the apparent lack of change is because four of the cases turned on non-antitrust issues.² One hotly-disputed antitrust case failed to

* Professor, Wayne State University Law School.

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¹ *Kansas & Missouri v. Utilicorp United, Inc.*, 110 S. Ct. 2807 (1990); *Texaco Inc. v. Hasbrouck*, 110 S. Ct. 2535 (1990); *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 110 S. Ct. 2281 (1990); *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990); *California v. American Stores Co.*, 110 S. Ct. 1853 (1990); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S. Ct. 1570 (1990); *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990); *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 110 S. Ct. 701 (1990); *Michigan Citizens for an Indep. Press v. Thornburgh*, 110 S. Ct. 398 (1989) (per curiam; affirming judgment by an equally divided Court).

² *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S. Ct. 1570, 1576 (1990) (O'Connor, J.), held that "postjudgment interest runs from the date of the entry of judgment." *Peel v. Attorney Registration & Disciplinary Comm'n*, 110 S. Ct. 2281 (1990) (Stevens, J., 4-member plurality opinion), was another entry in the all-too-long line of attorney advertising cases. (The previous cases are summarized in Note, Shapero v. Kentucky Bar Ass'n: *Regulating Lawyers' Targeted Direct-Mail Advertising—A Constitutional Standard for an Ethical Dilemma*, 63 TUL. L. REV. 724 (1989).) This entry held that a state may not prohibit attorneys from listing certifications as a specialist by bona fide organizations on their letterhead. However, an essential concurrence emphasized that such claims, even if true, are potentially misleading and thus may be regulated, e.g., by requiring disclaimers. *Id.* at 2293 (Marshall, J., concurring in the judgment).

Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2459 (1990) (O'Connor, J.), was the Rule 11 case that taught that voluntary dismissals are not an easy exit for those making baseless filings, that appellate courts should review Rule 11 decisions with a "unitary abuse of discretion standard," and that one cannot receive Rule 11 attorney's fees for the cost of defending a Rule 11 award on appeal. Rule 11's purpose, according to the Court, is "to deter baseless filings in District Court." *Id.* at 2454. (*Cooter & Gell* was the Court's second Rule 11 case. The first, *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456

change the law precisely *because* it was so controversial, with an equal number of Justices taking each side.³ The opinion in *Hasbrouck*,⁴ the Robinson-Patman Act functional discount case, emphasized how little it disturbed settled law. *American Stores*⁵ resolved a split in the circuits by concluding that states and private parties may seek divestiture, but even where this worked a change its practical consequences are limited. The three remaining opinions are important principally for what they did *not* do: *Superior Court Trial Lawyers*⁶ rejected an exception to the per se rule against price fixing; *Utilicorp*⁷ declined to create an exception to *Illinois Brick*;⁸ *Atlantic Richfield*⁹ disagreed with a Ninth Circuit decision to relax the rigor with which the antitrust injury requirement is applied.

Decisions not to change the law are rarely legal landmarks. Yet this term's antitrust opinions have implications of possibly lasting significance, significance not revealed by a simple recitation of what was decided. The case with the most important implications is *Trial Lawyers*. It implicitly expressed concern about the increased use of market power screens to dispose of antitrust cases. By expressing this concern, *Trial Lawyers* may contribute to the emergence of a third category of analysis, between per se rules and the full-blown rule of reason. At the same time, its

(1989) (Scalia, J.), held that Rule 11 authorizes sanctions against attorneys who sign improper court papers, but not against their law firms.)

W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 110 S. Ct. 701 (1990), was a typical Justice Scalia opinion addressing the act of state doctrine. The Court was untroubled by the Government's warning, as amicus, against adopting a "rigid formula." *Id.* at 706 (quoting Brief for United States at 37). "Act of state issues only arise when a court *must* decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *Id.* at 705 (emphasis in original). The Court ruled that the validity of a foreign sovereign's act was not put in issue by a complaint alleging that "commissions" paid in connection with securing a Nigerian contract violated RICO and other U.S. laws. The heart of the opinion is the conclusion:

Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.

Id. at 707.

³ Michigan Citizens for an Indep. Press v. Thornburgh, 110 S. Ct. 398 (1989) (per curiam, affirming judgment by an equally divided Court, Justice White not participating). For a discussion of this case's thorny issues of interpretation of the statute permitting newspaper joint operating arrangements, see Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 ANTITRUST L.J. 327 (1988).

⁴ Texaco Inc. v. Hasbrouck, 110 S. Ct. 2535 (1990).

⁵ California v. American Stores Co., 110 S. Ct. 1853 (1990).

⁶ FTC v. Superior Court Trial Lawyers Ass'n, 110 S. Ct. 768 (1990).

⁷ Kansas & Missouri v. Utilicorp United, Inc., 110 S. Ct. 2807 (1990).

⁸ Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

⁹ Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884 (1990).

reaffirmance of the per se rule is in tension with the more elaborate attempts to integrate those two traditional forms of antitrust analysis, and should help restore the confidence of lower courts in the use of per se rules or their equivalent.

Of the three cases concerned principally with procedural issues, the most intriguing is *Atlantic Richfield*. Although the case's holding concerned antitrust injury, its language undermined whatever support remains for the per se illegality of maximum vertical price fixing. The noteworthy implications of *American Stores* and *Utilicorp* relate to state and private antitrust enforcement. Although states brought both cases, winning one and almost winning the other, private enforcement was the greater beneficiary. The *American Stores* right to seek divestiture may eventually be invoked more frequently by private parties than by states. Furthermore, *American Stores* resoundingly reaffirmed the role of private plaintiffs. The opinions almost consciously avoided praising state antitrust enforcement. Finally, although *Hasbrouck* created enough uncertainty about functional discounts that its consequences will not be known for years, it may have more lasting importance for its treatment of damages than for anything else.

The significance of the 1989-90 term, in short, will depend on how the cases' implications are developed by lower courts and a Court without Justice Brennan. This article opens by giving special attention to *Trial Lawyers*, then discusses the three more procedural cases, and ends with a review of *Hasbrouck*. My brief comments about the antitrust consequences of Justice Brennan's retirement are included as Appendix A.

I. SUPERIOR COURT TRIAL LAWYERS*

In *FTC v. Superior Court Trial Lawyers Association*¹⁰ the FTC filed a controversial challenge to a well-publicized "strike" by the relatively low paid attorneys who regularly accept court appointments to represent indigent criminal defendants.¹¹ The FTC condemned the strike as a boycott that was illegal per se and illegal under an abbreviated rule of

* This discussion of *Trial Lawyers* is a revised version of remarks delivered at Conference Board and CATO Institute programs. The CATO Institute presentation is expected to be published as part of the conference proceedings. Thanks for helpful comments go to J. Baker, W. Blumenthal, W. Kovacic, E.T. Sullivan, and F.R. Warren-Boulton; responsibility stays with the author.

¹⁰ 110 S. Ct. 768 (1990) (Stevens, J.), *order enforced on remand*, 897 F.2d 1168 (D.C. Cir. 1990) (without opinion).

¹¹ 110 S. Ct. at 774 ("Reasonable lawyers may differ about the wisdom of this enforcement proceeding. . . . Respondents' boycott may well have served a cause that was worthwhile and unpopular. . . . [I]t is not our task to pass upon the social utility or political wisdom of price-fixing agreements.").

reason.¹² The District of Columbia Circuit, in an opinion by Judge Douglas Ginsburg, vacated the Commission's order.¹³

The Circuit Court adopted a novel approach. First, it agreed with the Commission in most respects: the boycott restrained trade without procompetitive justification and could be condemned as per se illegal unless protected by the first amendment. But then the court relied on *United States v. O'Brien*,¹⁴ the famous draft card-burning case, to rule that the lawyers' boycott contained an "element of expression" deserving first amendment protection. This ruling meant that any government restriction could be "no greater than is essential" to further the government's interest in protecting competition, which, the court wrote, protected the boycott absent proof that the lawyers had market power.¹⁵ This conclusion was based on the court's view of per se rules: "The antitrust laws permit, but do not require, the condemnation of price fixing without proof of market power; even the per se rule, as the Commission acknowledges in brief, is only a rule of 'administrative convenience and efficiency,' not a statutory command."¹⁶

The Supreme Court disagreed with unusual vehemence, pointing to "two errors" in this analysis. First, far from being mere permissive presumptions, per se rules "have the same force and effect as any other statutory commands."¹⁷ Second, they reflect not only concern with convenience but also "a long-standing judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'"¹⁸ Drawing particularly colorful analogies, the Court likened per se rules to legislative prohibitions of speeding and of stunt flying in crowded areas. These commands can be enforced even against drivers and pilots

¹² 101 F.T.C. 510, 572-81 (1986) (Azcuena, Comm'r). The Commission ruled that the boycott was "a naked restraint of trade for which no competitive justification exists" and this was sufficient to condemn it under the rule of reason, although the Commission also found anticompetitive effects. *Id.* at 577.

¹³ 856 F.2d 226 (D.C. Cir. 1988). For contemporaneous discussion of the opinion see Calkins, *supra* note 3, at 372-75.

¹⁴ 391 U.S. 367 (1968).

¹⁵ 856 F.2d at 249. The court also objected to the Commission's finding of market power, 107 F.T.C. at 575 n.79. That finding was based on the success of the boycott, whereas success could have been based either on economic power or on publicity and political persuasion. 856 F.2d at 250-52.

¹⁶ 856 F.2d at 249. The Commission's brief had agreed with the trial lawyers that "*per se* and truncated rule of reason analysis *serve the goals* of 'administrative convenience and efficiency,'" but had explained that this does not make these rules inappropriate methods of analyzing restraints that constitute speech. Brief of Federal Trade Commission, *Superior Court Trial Lawyers* (D.C. Cir.), at 39 (quoting the trial lawyers' brief) (emphasis added).

¹⁷ 110 S. Ct. at 780.

¹⁸ *Id.* at 780 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984)).

so skilled as to pose little risk—and this would be unchanged were the cars or planes to be festooned with streamers and banners and employed as tools of communication.

Trial Lawyers' reaffirmation of the per se rule has important implications for Sherman Act jurisprudence. First and potentially most far-reaching, *Trial Lawyers* implicitly sounded a note of concern about the increasing use of market power screens. Second, there is tension between the Court's language and the more ambitious efforts to integrate per se analysis and the rule of reason. If nothing else, *Trial Lawyers* should reassure lower courts that per se analysis or its equivalent is acceptable.

A. MARKET POWER SCREENS

In a series of articles, then-Professor Frank Easterbrook advocated use of market power screens to dispose of unmeritorious cases.¹⁹ This suggestion has been widely adopted in vertical restraint cases:²⁰ courts conclude that the rule of reason applies, so market power must be proven; proof of market power requires rigorous definition of a market, proof of high market shares, and, sometimes, proof of entry barriers; plaintiff's proof is deficient, so defendant wins summary judgment or dismissal.²¹ Some courts have even used market power screens to evaluate horizontal restraints.²² *Trial Lawyers* should at least slow, if not reverse, this trend.

Per se rules are needed, the *Trial Lawyers* Court wrote, to avoid “ ‘an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries.’ ”²³ Requiring proof of market power would introduce “ ‘the enormous complexities of market definition into every price-fixing case.’ ”²⁴ Although the countervailing considerations may differ, this concern about injecting merger-type proceedings into nonmerger antitrust law is equally applicable to all market power screens.

¹⁹ *E.g.*, Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 19-23 (1984).

²⁰ The trend is nicely reviewed in Steuer, *The Turning Points in Distribution Law*, 35 ANTITRUST BULL. 467, 513-18 (1990).

²¹ *E.g.*, *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1507 & n.10 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1813 (1990).

²² *E.g.*, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 (1985) (a boycott is per se unlawful only if “the cooperative possesses market power or exclusive access to an element essential to effective competition”); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.); *see Briggs & Calkins, Antitrust 1986-87: Power and Access (Part I)*, 32 ANTITRUST BULL. 275 (1987).

²³ 110 S. Ct. at 779 (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

²⁴ *Id.* (quoting R. BORK, *THE ANTITRUST PARADOX* 269 (1978)).

Significantly, the Court did not rest its attack on market power screens solely on considerations of judicial administration. Relying on a critic of one of Judge Easterbrook's market screen articles, it wrote that "[f]or reasons including market inertia and information failures, . . . a small conspirator may be able to impede competition."²⁵ The Court added, quoting Judge Bork, that since firms unable to affect competition are unlikely to conspire to fix prices, "the fact of agreement defines the market."²⁶

The potential implications of *Trial Lawyers'* discussion of market power are far-reaching. One of antitrust's central issues is the chicken-and-egg nature of market power: without market power apparent restraints are unlikely to lessen competition, but firms are unlikely to enter into apparent restraints lacking countervailing procompetitive virtues *unless* those restraints are likely to lessen competition.²⁷ As a matter of theory it doesn't matter which issue one is addressed first; as a matter of litigation realities it makes all the difference in the world. The challenge in antitrust is to identify those restraints that should be condemned without a merger-type analysis, because as a practical matter they may not be condemned otherwise.

Trial Lawyers reminds us of the costs imposed by market power screens. The difficulty of proving market power is obvious from a review of the many factors listed in the Justice Department's Merger Guidelines.²⁸ The point is emphasized by the cases in which defendants have relied on those Guidelines to resist government attacks on mergers.²⁹ Yet comparisons to merger cases understate the challenge of proving market power in

²⁵ 110 S. Ct. at 781 (citing Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEX. L. REV. 41, 80 (1984), and noting that Markovits suggests "circumstances in which a firm that lacks market power may nonetheless benefit from anti-competitive tactics").

²⁶ 110 S. Ct. at 781 n.18 (quoting R. BORK, *THE ANTITRUST PARADOX* 269 (1978)). None of the briefs directed the Court's attention to this passage or to the article by Markovits.

It is only partly facetious to suggest that *Trial Lawyers* should remind plaintiffs to cite Bork's book. *Trial Lawyers* and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the past decade's two most aggressively pro-plaintiff Supreme Court opinions, each relied heavily on Bork's reasoning. See *Aspen*, *id.* at 603, 604 n.31, 605, 608 n.39 (quoting *ANTITRUST PARADOX*). The successful *Aspen* respondent featured *THE ANTITRUST PARADOX* in its brief. Brief for Respondent, at notes 43, 63, 79, and text at notes 26 & 78.

²⁷ See also Wall, *Efficiency and Market Power: The "Chicken and the Egg" of Horizontal Restraint Analysis*, 4 ANTITRUST 34 (Summer 1990).

²⁸ Reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,103. The challenge presented by a market power requirement is so great that one plaintiff's attorney has advocated circumventing it by recasting Section 1 cases as conspiracies to monopolize. Crew, *Continuing Viability of Pursuing "Traditional" Cases and New Litigation Theories*, 58 ANTITRUST L.J. 289 (1989).

²⁹ See *infra* note 105.

Sherman Act litigation, and the burden on the judiciary, because merger litigation demands less rigorous proof of market power. Section 7 asks only whether a merger “may” tend to lessen competition substantially, which some courts read as a license to be less demanding; but there are more important differences. A merger is unlikely to be challenged unless there are relatively few substantial competitors, which eases burdens of discovery and proof. In contrast, a Sherman Act case may involve scores of firms combining for good reasons or bad.³⁰ The Merger Guidelines worry only about whether market power may be *increased*, which is a different and often easier question than whether it exists.³¹ Moreover, the realities of typical preliminary injunction battles (and the 24-hour day) put a ceiling on the amount of time litigants and courts may invest. Although participants complain about the strain of merger litigation, far more resources would be expended and far greater precision would be expected were time unlimited. Unnecessarily requiring formal proof of market power is made especially problematic because the courts use the terms “market power” and “monopoly power” inconsistently. It is one thing to condemn a restraint only when the parties can charge more than marginal cost; it is quite another to require proof of Section 2-type monopoly power before condemning a restraint. The concepts should be treated differently but often are not.³²

The furor over the relationship between per se rules and the rule of reason³³ camouflages the pivotal issue, which is whether to require formal market definition and market share measurement. The Antitrust Division requires apparently formal proof of market power before condemning an arrangement that is “plausibly related to some form of economic integration” and is not “a naked agreement unrelated to any economic integration of the parties’ operations.”³⁴ The FTC asks whether a ques-

³⁰ Brief for the Federal Trade Commission, *Superior Court Trial Lawyers*, at 43 n.39.

³¹ J. Langenfeld & J. Morris, *Analyzing Agreements Among Competitors: What Does the Future Hold?* (unpublished manuscript June 27, 1990) (also arguing that a trade association can generate anticompetitive rents without an extremely large market share).

³² Briggs & Calkins, *supra* note 22, at 294-301.

Advocates of market power screens presumably would respond that it will often be obvious that a firm or firms lack market power, however defined, and cannot influence competition. There are such cases. My point is merely that requiring elaborate proof of market power can put a high hurdle in the path of plaintiffs and impose heavy burdens on the legal system, and that the problems caused by this hurdle and these burdens should be recognized.

³³ See *infra* notes 61-65 and accompanying text.

³⁴ The Division’s most extensive discussion of its approach is found in its Antitrust Enforcement Guidelines for International Operations (1988), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,109. The four-step rule of reason analysis therein described addresses joint ventures but has more general applicability. In analyzing a joint venture and its restraints, the Division, after determining that this is not a “naked agreement,” first “deter-

tioned restraint is "inherently suspect," and, if it is, evaluates any efficiency justification, considering market power only where such justification is plausible and valid.³⁵ *Superior Court Trial Lawyers* can be read as consistent with either approach.³⁶

It is more helpful, however, to consider *Trial Lawyers* as a companion case to *Indiana Federation of Dentists* and *Professional Engineers*. *Trial Lawyers* was a per se case, *Dentists* a rule of reason case, *Professional Engineers* a kind of judicial chameleon, seemingly changing forms.³⁷ Yet each considered a restraint's likely consequences and the proffered justifications, and then condemned the restraint without formal market definition and market share measurement. *Trial Lawyers* condemned a "classic restraint of trade," saying it was no defense that prices were reasonable, that higher prices might improve quality, or that the restraint had an "expressive component" and the FTC had not proven market power.³⁸ *Professional Engineers* ruled that a total ban on competitive bidding restrained trade on its face, and the proffered public safety defense confirmed the anti-competitive effect and, implicitly, was implausible. *Indiana Federation of Dentists* condemned a collective refusal by dentists to make X-rays freely available to insurance companies, and found a "quality of care" defense factually unpersuasive and of dubious legal relevance.

Indiana Federation of Dentists v. FTC can be understood best by contrasting it with the Seventh Circuit opinion that the Court reversed.³⁹ The Seventh Circuit made three points. First, "the dentists are adhering to a legal, moral, and ethical policy of quality and proper dental care,

mines whether the joint venture would likely create, enhance, or facilitate the exercise of market power" in a defined relevant market, using the Merger Guidelines. *Id.* at 20,600. Only in its fourth step does the Division consider whether procompetitive efficiencies outweigh the risk of competitive harm.

³⁵ See Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549, 604 (1988). The Commission first asks whether a questioned restraint is "inherently suspect." If not, a full-blown rule of reason analysis is required. If it is, the Commission asks whether it has a "plausible efficiency justification." If not, the practice is condemned. If an efficiency justification is plausible, the Commission determines whether that justification is really valid. If not, the practice is condemned; otherwise, the restraint must be tested under the traditional rule of reason. *Id.*

³⁶ Supporters of the Division's approach would argue that *Trial Lawyers* condemned a naked restraint; supporters of the FTC's would argue that it condemned an inherently suspect restraint lacking a plausible efficiency justification. Since *Trial Lawyers* expressed concern about too-frequently requiring proof of market power it might be seen as favoring the FTC's approach, which many regard as likely to examine market power less often, but the formulas permit such discretion in their application that one cannot be sure which agency would examine market power first.

³⁷ National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978). See *infra* note 74.

³⁸ 110 S. Ct. at 774, 778.

³⁹ 745 F.2d 1124 (7th Cir. 1984), *rev'd*, 476 U.S. 447 (1986).

requiring that the insurers examine and review all diagnostic aids before denying or approving a proper course of dental treatment."⁴⁰ This adherence was "not manifestly anticompetitive."⁴¹ Second, whereas the rule of reason requires proof of an anticompetitive effect in a defined relevant market, the Commission had failed to engage in customary market definition but instead had "apparently assumed, without substantial evidentiary support in the record, that because the . . . dentists acted in concert rather than individually, competition had to exist among and between dentists in their policy of dealing with the insurers."⁴² Third, there was no substantial evidence that the agreement had increased prices or otherwise harmed competition.⁴³

The Supreme Court disagreed. The agreement *was* anticompetitive. "A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare. . . ." ⁴⁴ The Commission's failure to engage in "elaborate market analysis" was unimportant for two independent reasons. First, the dentists' agreement was a "'naked restriction on price or output,'" which "'requires some competitive justification even in the absence of a detailed market analysis.'" ⁴⁵ Second, there were "actual, sustained adverse effects on competition," which can "obviate the need for an inquiry into market power."⁴⁶ But the Court's discussion of competitive effects was *not* referring to customary measures such as increased prices or reduced output (which measures, the Seventh Circuit had said, did not indicate harm to competition). Rather, the only effect on competition was that insurers were "actually unable to obtain compliance with their requests for submission of x rays."⁴⁷ In other words, it was sufficient to show that the dentists had adhered to their agreement. The Court was untroubled by the lack of evidence that prices had increased.⁴⁸

⁴⁰ 745 F.2d at 1139.

⁴¹ *Id.*

⁴² *Id.* at 1141-42.

⁴³ *Id.* at 1142.

⁴⁴ 476 U.S. at 459.

⁴⁵ *Id.* at 460 (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984)).

⁴⁶ *Id.* at 461 (quoting *P. AREEDA, ANTITRUST LAW* ¶ 1511, at 429 (1986), where market power was described as "but a 'surrogate for detrimental effects'").

⁴⁷ *Id.* at 460.

⁴⁸ *Id.* at 461-62 ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.") (citation to *Professional Engineers* omitted).

A third category of analysis, between the per se rule and the full-blown rule of reason, is emerging. This category is unlike the classic per se rule because defendants can prevail by showing a restraint was ineffectual⁴⁹ and courts will at least consider some defenses.⁵⁰ But the category is unlike the classic rule of reason because plaintiffs can prevail without engaging in formal market definition and market share measurement, at least unless defendants can show a procompetitive justification for the restraint.⁵¹

Such a third category, whether called a "thoughtful per se rule," a "quick look," a "truncated rule of reason," or something else, would be a useful addition even if it is less elegant than the multi-factor approaches endorsed by the Division and the FTC.⁵² If nothing else, explicit recognition of such a middle category could prevent mindless application of per se rules and of the full-blown rule of reason.⁵³

This absence of evidence about the restraint's effect on prices thus makes *Dentists* unlike *NCAA v. Board of Regents*, a case with which it is frequently coupled. Both cases purported to apply the rule of reason to what was described as a naked restraint, but then added that lack of market power does not justify a naked restraint. But *NCAA*, unlike *Dentists*, went on to find that the defendant had market power and that the restraint had raised prices and reduced output. 468 U.S. 85, 104–13 (1984).

⁴⁹ Cf. *Trial Lawyers*, 110 S. Ct. at 782 ("an assumption that, absent proof of market power, the boycott disclosed by this record was totally harmless—when overwhelming testimony demonstrated that it almost produced a crisis in the administration of criminal justice in the District and when it achieved its economic goal—is flatly inconsistent with the clear course of our antitrust jurisprudence"); *Dentists*, 476 U.S. at 460.

⁵⁰ Areeda has explained that courts are getting better at identifying impermissible justifications. Areeda, *A Second Century of the Rule of Reason*, 59 ANTITRUST L.J. 143, 149–50 (1990).

⁵¹ See *Dentists*, 476 U.S. at 459 ("Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services—such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' cannot be sustained under the Rule of Reason.") (quoting *Professional Engineers*; citations omitted); *NCAA v. Board of Regents*, 468 U.S. 85, 110 (1984) ("This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.") (footnote omitted).

⁵² *Supra* notes 34–36. A middle category also would be blunter than the sliding scale I have previously suggested, Briggs & Calkins, *supra* note 22, at 300–01:

Where conduct raises serious questions, a plaintiff should be able to satisfy any burden of coming forward with evidence of market power by introducing any of several kinds of evidence, including pricing, reasonable approximations of structure, or conduct inconsistent with vigorous competition. The defendant should then earn summary judgment or a directed verdict, on grounds of lack of market power, only by discrediting this evidence. Where a defendant's conduct is less egregious, a greater showing should be required of plaintiffs However, given the ambiguity of evidence of entry conditions, plaintiffs should rarely be required to prove that entry barriers are high.

(footnote omitted).

⁵³ Two of the best "quick look" opinions were written by Judge Posner. In *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598 (7th Cir. 1984), the Seventh Circuit considered

Even before *Trial Lawyers* some lower courts in rule of reason cases had found that defendants' conduct could obviate the need to show market power. For instance, in *E.W. French & Sons, Inc., v. General Portland, Inc.*,⁵⁴ Judge Farris's concurring opinion reasoned that market definition was unnecessary to find competitive harm when West Los Angeles concrete sellers conspired on prices and worked together to eliminate the only competitor not participating.⁵⁵ Conduct served even more clearly as a surrogate for market power—or, in reality, to eliminate the market power requirement—in *Wilk v. American Medical Association*.⁵⁶ At issue in *Wilk* was the AMA's alleged boycott of chiropractors. The court's rule of reason analysis invoked the now-standard Seventh Circuit rule that the "threshold issue in any rule of reason case is market power"⁵⁷ and affirmed a perfunctory finding of same,⁵⁸ but it also ruled that

an appraiser association's ethical rule barring fees set as a percentage of appraisals. The Court's "quick look" revealed the existence of a sound justification for the rule (avoidance of improper incentives or the appearance of fraud), that the rule probably would not actually affect fees (but only the method of computing them), and that if the rule had any effect on fees, it would tend to depress them (because percentage fees tend to inflate appraisals and thus the dollar amount of fees). In *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984), the Seventh Circuit took a "quick look" and then condemned as per se illegal a territorial market division scheme allegedly justified by the need for local member truck leasing firms to prevent free riding. Judge Posner wrote that the defense was unpersuasive because only services were being provided and members could charge separately for them (unlike for information, which poses more serious free rider problems). Without the free rider defense, there was no justification for the restraints.

⁵⁴ 885 F.2d 1392 (9th Cir. 1989) (Farris, J., concurring).

⁵⁵ *Id.* at 1403 ("If a group of firms is able to fix prices, it is because their customers have nowhere else to turn. Every price-fixing conspiracy thus identifies directly, in a real world context, a group of firms which are insulated from outside competitive pressures."). It is a little unclear why, if the facts showed a horizontal price conspiracy, the parties agreed to apply the rule of reason.

In *French* a ready-mix concrete firm alleged that it was driven out of business by a conspiracy between a competitor and a cement supplier that was part of a larger apparently horizontal conspiracy. The jury had been instructed that a conspiracy to eliminate a single competitor is lawful, and this was found to be reversible error. 885 F.2d at 1401. The Ninth Circuit reasoned that a conspiracy to eliminate one competitor that also harmed competition would be illegal. In his concurring opinion Judge Farris observed that implicit in the court's decision was a conclusion that the plaintiff had introduced sufficient evidence of competitive harm (because otherwise there would not be reversible error). His concurrence made the implicit explicit.

⁵⁶ 895 F.2d 352 (7th Cir.), *cert. denied*, 110 S. Ct. 2621 (1990).

⁵⁷ 895 F.2d at 359.

⁵⁸ Having defined the market as "the provision of health care services to the American public on a nationwide basis, particularly for the treatment of musculoskeletal problems," the district court's discussion consisted entirely of observations that (1) AMA members "constitute a majority of medical physicians" and receive much the greater portion of the fees paid to medical physicians, and (2) "[m]embers of the AMA constitute a substantial force in the provision of health care services." 671 F. Supp. 1465, 1478 (N.D. Ill. 1987). The court of appeals repeated these findings and added that the plaintiffs' expert said the AMA enjoys market power, that "AMA members received approximately 50% of all fees

this finding was unnecessary because there was "substantial evidence of adverse effects on competition."⁵⁹ Following the lead of *Indiana Federation of Dentists*, however, the court found these effects simply by evaluating the AMA rules at issue: because those rules were obviously anticompetitive, the usual market definition process was unnecessary.⁶⁰

In *Trial Lawyers*, the Supreme Court has now indicated its agreement with suggestions that conduct can define a market or satisfy or obviate any market power requirement. Since its observations were made while condemning what it called per se illegal price fixing, it is unclear how widely they apply. Nonetheless, the Court's concern about the costs associated with market power screens should have more general applicability and may contribute to the emergence of a third category of analysis, between per se rules and the full-blown rule of reason.

B. REAFFIRMATION OF THE PER SE RULE

Although it may contribute to the emergence of a category of analysis between per se rules and the rule of reason, *Trial Lawyers*' effect on the more ambitious attempts to combine those two methods of analysis is more ambiguous. A trend toward the partial convergence of those methods of analysis has been discernible since the Court's 1979 decision in *Broadcast Music*.⁶¹ The Court has said that "often no bright line" separates the two approaches;⁶² rather, the "essential inquiry" is the same⁶³ and

paid to health care providers," and that entry by new chiropractors was limited by barriers such as educational requirements. 895 F.2d at 360.

⁵⁹ 895 F.2d at 360.

⁶⁰ An AMA opinion declared it unethical to "associate professionally" with a chiropractor by "making referrals of patients to chiropractors, accepting referrals from chiropractors, providing diagnostic, laboratory, or radiology services for chiropractors, teaching chiropractors, or practicing together in any form." *Wilk v. American Medical Ass'n*, 671 F. Supp. 1465, 1473 (N.D. Ill. 1987), *aff'd*, 895 F.2d 352 (7th Cir.), *cert. denied*, 110 S. Ct. 2621 (1990). The court's finding of anticompetitive effects was as follows: "[I]t is anticompetitive to prevent medical physicians from referring patients to a chiropractor;" it is anticompetitive to prevent chiropractors from obtaining x-rays from radiologists and radiology departments; and "it is anticompetitive to prevent chiropractors from improving their education in a professional setting by preventing medical physicians from teaching or lecturing to chiropractors." 895 F.2d at 360 (quoting district court). The court appeared untroubled by "the fact that the number of chiropractic schools, the number of chiropractors, and the number of patient visits to chiropractors grew during the boycott." 671 F. Supp. at 1478.

⁶¹ *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

⁶² *NCAA v. Board of Regents*, 468 U.S. 85, 104 n.26 (1984).

⁶³ *Id.* at 104 ("[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.") (footnote omitted); *see also* *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) ("In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint . . .").

“easy labels do not always supply ready answers.”⁶⁴ Commentators and lower courts have attempted to depict and contribute to a blending of the two methods of analysis.⁶⁵

As seen above, *Trial Lawyers’* holding can be read as consistent with the leading integrated approaches blending per se rules and the rule of reason,⁶⁶ even though it condemned the restraint as per se illegal. The Supreme Court, the court of appeals, and the Commission all agreed that the challenged conduct was “a ‘naked restraint’ on price and output” and “‘a classic restraint of trade.’”⁶⁷ As Judge Ginsburg explained, even those who would sharply limit the reach of the per se rule would include this conduct within it;⁶⁸ most of those who would forswear the “per se” label would condemn the conduct almost as quickly.

Nonetheless, the Court *did* rely unabashedly on the traditional per se rule. The petitioners sought to play off the per se rules’ decline in favor by mocking the FTC’s “repeated incantation of the term ‘price fixing.’”⁶⁹ The Court was unimpressed, and, indeed, twice refuted criticisms of its approach by saying that the trial lawyers had engaged in “price-fixing.”⁷⁰ Thus the opinion’s atmospherics are largely of the old school.⁷¹ Whether

⁶⁴ *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8 (1979).

⁶⁵ *E.g.*, *Detroit Auto Dealers Ass’n*, 5 Trade Reg. Rep. (CCH) ¶ 22,653, at 22,333 (Feb. 22, 1989) (rules are “converging”); ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS, SECOND SUPPLEMENT 1983–1988, at I-32–I-33 (1988); Halverson, *The Future of Horizontal Restraints Analysis*, 57 ANTITRUST L.J. 33 (1988); Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859, 859 (1989) (“It is sometimes said there are two antitrust rules, per se and that of reason. This view is incorrect; there is only one form of analysis, the rule of reason. . . . The old and wrong view is that two forms of analysis exist.”).

⁶⁶ See *supra* notes 34–36 and accompanying text.

⁶⁷ 110 S. Ct. at 775 (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 110 (1984)); 856 F.2d at 234; 107 F.T.C. at 577.

⁶⁸ 856 F.2d at 236 (reviewing cases that have “decidedly shortened the reach of the per se rule” but quoting Judge Bork’s opinion in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033, for the proposition that “‘a naked horizontal restraint, one that does not accompany a contract integration, can have no purpose other than restricting output and raising prices, and so is illegal per se’”).

⁶⁹ Brief for Respondent/Cross-Petitioner Superior Court Trial Lawyers Association at 34 & n.24 (listing the 22 pages on which the FTC calls the boycott “price-fixing,” and giving an example of this “characterization-by-calling-it-so”).

⁷⁰ 110 S. Ct. at 782 n.19 (“we emphasize that this case involves not only a boycott but also a horizontal price-fixing arrangement”); *id.* at 774 (“it is not our task to pass upon the social utility or political wisdom of price-fixing arrangements”); see also 110 S. Ct. at 781–82 (quoting the famous footnote 59 in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)).

⁷¹ The atmospherics are not unambiguous. The Court quoted *Professional Engineers* as saying that the per se rule is one of “two complementary categories of antitrust analysis,” but said that the rule of reason “generates” these categories. 110 S. Ct. at 780 (quoting *Professional Engineers*, 435 U.S. 679, 692 (1978) (both opinions by J. Stevens). Also confusing

the opinion's holding or its language will have greater influence remains to be seen.

In any event, *Trial Lawyers* should reassure lower courts that per se analysis or its equivalent can be applied at least to classic restraints of trade. This is not the first time the Court has reminded lower courts of its commitment to per se rules. Like a parent disciplining a wayward child, the Court corrects lower courts that have forgotten the lesson, only to see them stray again. *Trial Lawyers* is the third such correction in the past decade,⁷² and the most vigorous.

Some courts had become hesitant to apply per se rules.⁷³ Presumably this hesitancy resulted from the Supreme Court's refusal to apply a per se analysis to what the Second Circuit had called price fixing in *Broadcast Music* and to what the Court itself called a " 'naked restriction on price or output' " in *NCAA* and *Indiana Federation of Dentists*.⁷⁴ In *Dentists*, the

was *Trial Lawyers*' closing. The Court wrote that one should not assume that the boycott was harmless "when overwhelming testimony demonstrated that it almost produced a crisis in the administration of criminal justice . . . and when it achieved its economic goal." The Court added that conspirators can be condemned even without "a degree of market power any greater than that already disclosed by this record." 110 S. Ct. at 782. This could be read as leaving open the question whether proof of less market power should be a defense.

⁷² See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

⁷³ *Sims, Developments in Agreements Among Competitors*, 58 ANTITRUST L.J. 433, 436 (1989) (per se rules had become "more like guidelines"); see, e.g., *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,828 at 62,342 (9th Cir. 1989) (en banc) (Noonan, C.J.) (two judges joined the opinion; two more concurred in the judgment; four dissented) ("It has been broadly doubted whether the dichotomy between the rule of reason and the per se rule still exists or is helpful to analysis.") (citation omitted).

⁷⁴ *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984)). In *Dentists*, the Court added that proof of actual competitive harm justified condemning the restraint even if it was not "sufficiently 'naked.'" 476 U.S. at 460. On the other hand, the per se rule against tying has come to resemble a rule of reason, see *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (Stevens, J.).

The confusion stems in part from Justice Stevens's opinion in *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978). The lower courts had condemned, as per se illegal, an ethical rule prohibiting competitive bidding. 404 F. Supp. 457 (D.D.C. 1975), *aff'd in part and remanded in part*, 555 F.2d 978 (D.C. Cir. 1977). The Government defended the result solely on the ground that the per se rule applied. Brief for the United States, *Professional Engineers*. The Court affirmed. It held that the lower courts had properly refused to consider the engineers' proffered justification that they were members of a learned profession acting to prevent competition from endangering public safety. But the Court said that "the asserted defense rests on a fundamental misunderstanding of the Rule of Reason." 435 U.S. at 681. The Court added that professionals' "[e]thical norms may serve to regulate and promote . . . competition, and thus fall within the Rule of Reason." *Id.* at 696. Yet it also said that "[o]n its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act": "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* at 692-93.

Ever since *Professional Engineers* was issued, observers have disagreed as to whether it is

Court wrote that it had been “slow . . . to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.”⁷⁵ Some courts had cited this language to refuse to apply, not just extend, *per se* rules.

An example of apparently excessive reluctance to apply *per se* rules is *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*⁷⁶ Relying on the *Indiana Federation of Dentists'* language quote above, the Sixth Circuit wrote that a jury should be instructed to judge even a classic movie split agreement under the rule of reason.⁷⁷ The court then explained that movie theaters “may be justified in combating the market power of film suppliers by group action,” and that a split agreement “may simply lower prices paid by exhibitors to distributors.” The court did not discuss whether parallel analysis would justify price-fixing by small suppliers facing strong buyers.⁷⁸

An even more striking example is *Palmer v. BRG of Georgia, Inc.*⁷⁹ Other than quoting the *Indiana Federation of Dentists'* observation,⁸⁰ the Eleventh Circuit did little more than summarize and endorse an unpublished trial court opinion.⁸¹ But that opinion seems bafflingly wrong.

The facts suggest classic market allocation. Two bar review courses—BRG serving only Georgia, the other (Harcourt Brace Jovanovich) serving forty states under the name BAR/BRI—were engaged in bitter competition in Georgia. While they were still competing, the two firms en-

a rule of reason or a *per se* case. *Compare, e.g., Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 357, 362 (Powell, J., dissenting) (*per se*) and *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*) (same) *with, e.g., Indiana Fed'n of Dentists*, 476 U.S. at 458 (citing *Professional Engineers* for proposition that Court has been “slow to condemn rules adopted by professional associations as unreasonable *per se*”) and *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60, 65-66 (1982) (Burger, Ch. J., dissenting) (*Professional Engineers* limits factors that may be considered under rule of reason).

⁷⁵ 476 U.S. at 458-59 (citing *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979)).

⁷⁶ 885 F.2d 313 (6th Cir. 1989).

⁷⁷ *Id.* at 316 (quoting *Indiana Fed'n of Dentists*, 476 U.S. at 458-59 (1986)).

⁷⁸ *Balmoral Cinema* gave an additional, more credible, reason for affirming a defense verdict. The plaintiff, rather than being an injured film distributor, was a film exhibitor who claimed that distributors had assisted other exhibitors' bid splitting by, among other things, refusing to accept bids from the plaintiff. Courts should hesitate before condemning an arrangement that, if illegal, would work to the defendant's disadvantage.

⁷⁹ 874 F.2d 1417 (11th Cir. 1989) (Hatchett, J.) (2-1), *amended*, 893 F.2d 293 (11th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3014 (U.S. Apr. 25, 1990) (No. 89-1667). [*Editor's Note*: The Supreme Court reversed *Palmer v. BRG of Georgia, Inc.*, 8-1, on Nov. 26, 1990.]

⁸⁰ 874 F.2d at 1423.

⁸¹ *Palmer v. BRG of Ga., Inc.*, Civ. No. C85-4377 (N.D. Ga. Jan. 9, 1987), *reprinted in* *Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*, at Appendix C [hereinafter *District Court Opinion*].

tered into negotiations leading to a 1980 agreement that reserved Georgia for BRG and the other forty-nine states for HBJ. HBJ granted BRG exclusive rights in Georgia to the BAR/BRI name and course materials. HBJ claims, but cannot prove, that shortly before it entered into the negotiations it had decided to withdraw from Georgia.⁸² In 1982, the noncompetition clause was deleted to settle an antitrust suit and BRG's rights in the BAR/BRI materials (but not the BAR/BRI name) became nonexclusive, although HBJ has not returned to Georgia.

The district court granted summary judgment for defendants because the arrangement "does not fit within any recognized category of per se liability."⁸³ It was not price-fixing because "neither agreement explicitly addresses the factor of price" and BRG wasn't required to consult on price. It was not "market or customer allocation" because it "was not a situation where competitors divided up a market in which both have previously done business, each taking a portion."⁸⁴

The court of appeals majority pronounced the lower court's opinion "thorough and legally sound."⁸⁵ In response to a petition for rehearing, which it denied, the court amended its opinion by adding the following:

We agree with the district court that the modified agreement (1982) is not a market allocation agreement to which per se liability applies. First, the agreement is not a "naked agreement" between competitors to allocate the market. Second, HBJ and BRG are not horizontal competitors. HBJ's affidavit states that it is no longer a competitor in the Georgia market. The appellants have failed to produce evidence to the contrary. In the absence of evidence other than the affidavit on this issue, we cannot conclude that HBJ is doing business in Georgia.⁸⁶

The court's reasoning does not withstand analysis. The district court's ruling that market allocation schemes are illegal only when they divide markets in which the parties formerly competed is indefensible and, indeed, appellees did not try to defend it.⁸⁷ Perhaps the court of appeals

⁸² *District Court Opinion, supra* note 81, at 139 ("no documentation of this decision has been offered" and plaintiffs "question this testimony"). Moreover, in early 1980, the parties apparently "discussed 'in passing' the possibility of BAR/BRI purchasing BRG," 874 F.2d at 1429 n.5 (Clark, J., dissenting), which seems inconsistent with HBJ's having firmly decided to abandon Georgia.

⁸³ *District Court Opinion, supra* note 81, at 148. The court also found that plaintiffs had submitted insufficient evidence to sustain a rule of reason case.

⁸⁴ *Id.* at 149 ("clearly the state of Georgia was not divided up under either the 1980 or 1982 agreements").

⁸⁵ 874 F.2d at 1424.

⁸⁶ 893 F.2d at 293.

⁸⁷ Surely it would be unlawful, for instance, for two dominant firms to agree that one will cease competing and they will share the profits. Conceivably the challenged arrangement could be regarded as an efficiency-enhancing joint venture. If that is what the court meant—and this was not the basis on which the case was defended—it gave little explanation.

meant that, as a matter of law, there was no agreement, i.e., that deletion of the noncompetition clause eliminated the problem. This is a plausible factual finding but it was not made by the district court, seems an unlikely candidate for summary judgment, and deserves explanation. Nor is it clear why HBJ and BRG are no longer competitors. An agreement not to compete should not immunize subsequent adherence to that agreement.

Perhaps the court found that any reasonable jury would believe that HBJ had decided to withdraw before it began negotiating the 1980 agreement. But an appellate court should not make such a finding without discussion, especially since the district court's only relevant finding was that HBJ withdrew from Georgia "following the 1980 agreement."⁸⁸ More important, the court did not explain how an unannounced, unrecorded decision by a competitor to exit a market converts that competitor into a vertical supplier even before it leaves. Even after leaving, HBJ remained a potential competitor, capable of reentering; before it left it was an actual competitor.⁸⁹

It is difficult to understand *Palmer v. BRG*. Perhaps this was simply another case where attacks on the per se approach had made a court unreasonably hesitant to apply it.⁹⁰ *Trial Lawyers* should remind such courts that per se rules or their equivalent are acceptable.⁹¹

II. CALIFORNIA V. AMERICAN STORES CO.

Little needs to be said about *American Stores*⁹² except to emphasize its importance for private enforcement. The Court ruled that states and private parties may seek divestiture, thus siding with the First Circuit⁹³

⁸⁸ *District Court Opinion, supra* note 81, at 149 (emphasis added).

⁸⁹ When HBJ allegedly reached its decision to exit it was unaware that BRG, the competitor from whom it was fleeing, had recently encountered a serious business setback. 874 F.2d at 1429 (Clark, J., dissenting).

⁹⁰ The plaintiffs in *Palmer* have requested certiorari. The United States has recommended that the case be summarily reversed and remanded. The recommendation is sound. The case is too wrong to be permitted to stand but too confused to justify a full hearing. Another simple solution would be to remand for reconsideration in light of *Trial Lawyers*. [*Editor's Note: The Supreme Court reversed, 8-1, on Nov. 26, 1990.*]

⁹¹ For other evidence that the announcement of the death of the per se rule was premature, see *Movie 1 & 2 v. United Artists Communications, Inc.*, 909 F.2d 1245 (9th Cir. 1990) (movie split agreements are per se illegal); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469 (10th Cir. 1990) (customer allocation per se illegal); *United States v. Cooperative Theatres, Inc.*, 845 F.2d 1367 (6th Cir. 1988) (per curiam) (illegal per se for two movie theater booking agents to agree not to solicit each other's customers); *Premier Elec. Cons. Co. v. NECA*, 814 F.2d 358 (7th Cir. 1987) (Easterbrook, J.) (agreement between contractors association and union to force nonunion contractors to contribute 1% to negotiating fund was per se illegal).

⁹² *California v. American Stores Co.*, 110 S. Ct. 1853 (1990) (Stevens, J.).

⁹³ *CIA. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985).

rather than the Ninth.⁹⁴ Commentators were generally in agreement.⁹⁵ The real dispute concerns the case's significance.

Some have suggested that *American Stores* is an historic decision. Amici told the Court that permitting states to seek divestiture would create "intolerable uncertainty,"⁹⁶ "would fatally undermine the very purpose" of the Hart-Scott-Rodino Act,⁹⁷ and even, "by threatening the efficacy and stability of collective bargaining, undermine the policies of the National Labor Relations Act."⁹⁸ One distinguished observer, who agreed that the decision creates a "big problem," declared this "the most important antitrust ruling in a long time."⁹⁹

My assessment is more modest. States have never been and are unlikely to become major players in the national merger scene.¹⁰⁰ Most state attorneys general view their role, properly, as one that includes, if anything, scrutinizing mergers with a particular local aspect or, at most, as serving as a backstop to federal enforcement.¹⁰¹ So long as federal enforcers appear to take their merger responsibilities seriously—and this seems likely to continue—few states are likely to seek divestiture in litigated merger actions.

Boosters of the importance of *American Stores* would respond that it has changed merger strategizing. Before, this view holds, parties to a

⁹⁴ IT&T Corp. v. GTE Corp., 518 F.2d 913 (9th Cir. 1975), *followed*, California v. American Stores Co., 872 F.2d 837 (9th Cir. 1989).

⁹⁵ The Court relied on the Areeda-Turner treatise, 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 328b (1978), a recent student note, *Divestiture as a Remedy in Private Actions Brought Under Section 16 of the Clayton Act*, 84 MICH. L. REV. 1579 (1986), and other law review articles. 110 S. Ct. at 1866 n.28.

⁹⁶ Brief of the California Retailers Ass'n and the California Manufacturers Ass'n as Amici Curiae in Support of Respondents, at 4.

⁹⁷ Brief of United Food and Commercial Workers Int'l Union and its Affiliated Local Unions 324 and 770 as Amici Curiae in Support of Respondents, at 6.

⁹⁸ *Id.* at 15.

⁹⁹ *States Gain Power to Pursue Antitrust Cases*, Wall St. J., May 1, 1990 [hereinafter *States Gain*], at A3 (quoting Joe Sims) (article adding that case "substantially increases the risks to companies involved in mergers"); see also Newman, *High Court Upholds Challenges to Mergers*, N.Y.L.J., June 4, 1990, at 5 ("Much of the predictability in merger enforcement provided by the Department of Justice and FTC Merger Guidelines is destroyed by the threat of private actions that can be and often are brought without reference to those guidelines.") (footnote omitted).

¹⁰⁰ See Report on State Merger Enforcement, by the State Merger Enforcement Task Force of the Section 7 (Clayton Act) Committee, American Bar Association Antitrust Section (1984), reprinted in 18 J. REPRINTS ANTITRUST L. & ECON. No. 2, at 361 (1988); *Supplement* (1986), reprinted in 18 J. REPRINTS ANTITRUST L. & ECON. No. 2, at 413 (1988).

¹⁰¹ Cf. Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST L.J. 42, 74 (1989) ("the states' primary mission should be those practices that harm consumers within a single state").

proposed merger might rebuff a state's inquiry; now parties fail to respond at their peril, and often will give advance notice to affected states.¹⁰² This characterization exaggerates the change. Even when the Ninth Circuit's opinion was regarded as good law, counselors hesitated to rebuff state enforcers.¹⁰³ Angering officials is risky. A state attorney general may be able to challenge a merger prior to closing, especially when he or she is assisted by a target firm or other interested party. Moreover, some state antitrust laws apply or might apply to mergers and might authorize divestiture. On the other hand, even after *American Stores* states cannot credibly threaten many major consummated mergers. Historically there have been few challenges, and resource constraints will likely prevent this from changing.¹⁰⁴ If the Antitrust Division with its greater experience and resources has difficulty winning merger cases,¹⁰⁵ states cannot expect much success. To be sure, *American Stores* slightly strengthens the hand of state investigators—but only slightly. A few merger practitioners seem more likely to give states advance notice, but many still choose to ignore the states except perhaps when working on the kind of locally-oriented merger, often involving retailers, that has typically attracted the states' attention.¹⁰⁶

Business may actually be a net beneficiary from this aspect of *American Stores*. A different outcome could have inspired state attorneys general to challenge major mergers under state law before state judges, which would be unfortunate. *American Stores* will tend to keep merger enforcement where it belongs, in federal courts applying federal law.

The *American Stores* right to seek divestiture will be enjoyed by private parties as well as states, and in Sherman Act as well as Clayton Act suits.¹⁰⁷

¹⁰² Newman, *supra* note 99, text at note 35 (recommending consideration of use of the National Association of Attorneys General Voluntary Pre-Merger Disclosure Compact); *States Gain*, *supra* note 99, at A3 ("The ruling is likely to prompt firms to cooperate more fully with state attorneys general than in the past.").

¹⁰³ E.g., McDermott, *Advising Your Client on Regional and National Mergers*, 58 ANTITRUST L.J. 239, 242-43 (1989).

¹⁰⁴ See *supra* note 100; Horn, *The States' View of Regional and National Mergers*, 58 ANTITRUST L.J. 233, 235 (1989) (observation by California's deputy attorney general that "as a practical matter, states will have limited ability and limited resources to go after and attack national or very large regional mergers").

¹⁰⁵ E.g., *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990); *United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990); *United States v. Country Lake Foods, Inc.*, 1990-2 Trade Cas. (CCH) ¶ 69,113 (D. Minn. June 1, 1990); see Calkins, *Developments in Merger Litigation: The Government Doesn't Always Win*, 56 ANTITRUST L.J. 855 (1987).

¹⁰⁶ See *supra* note 100; see also Constantine, *The States' Role in Challenging National Mergers is Vital*, 3 ANTITRUST 37, 38 (Spring 1989) (states have focused "mainly on retailing").

¹⁰⁷ *International Travel Arrangers v. NWA, Inc.*, 1990-2 Trade Cas. (CCH) ¶ 69,112 (D. Minn. June 16, 1990) (*American Stores'* reasoning equally applicable to private Sherman Act cases).

In fact, it may be invoked more frequently in complaints filed by private parties. For instance, plaintiffs in a price-fixing suit may be able to argue, with an economist's support, that a key factor facilitating the alleged cartel's success was a merger's elimination of a competitor. A request for divestiture might not be frivolous and presumably would make a monetary settlement more attractive.

Moreover, *American Stores* includes a hymn to private enforcement. Few plaintiffs' lawyers could improve on the Court's language: "Private enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."¹⁰⁸ *American Stores* is as much a private case as a state case, but neither aspect of it works fundamental change.

III. KANSAS & MISSOURI V. UTILICORP UNITED, INC.

American Stores, along with the previous term's *ARC America* decision,¹⁰⁹ might have suggested that the Supreme Court is enthusiastic about state antitrust enforcement. Any such illusions were shattered by Justice Kennedy's opinion in *Kansas & Missouri v. Utilicorp*.¹¹⁰

Utilicorp focused principally on the possible "cost-plus" exception to *Hanover Shoe's*¹¹¹ rule that direct purchasers may seek damages based on illegal overcharges, whether or not those overcharges were passed on, and to *Illinois Brick's*¹¹² corollary rule preventing indirect purchasers from seeking damages for those overcharges. The petitioner states argued for a new exception based on their status as *parens patriae* plaintiffs¹¹³ and, more generally, relied on that status to address *Illinois Brick's* concern about deterrence.¹¹⁴ The Court rebuffed both arguments. It dismissed summarily the argument for a *parens patriae* exception to *Illinois Brick*,

¹⁰⁸ 110 S. Ct. at 1860 (citation omitted). The Court wrote that the Clayton Act's provisions "manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers." The "statutory scheme . . . favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger." *Id.* at 1860-61.

¹⁰⁹ *California v. ARC America Corp.*, 109 S. Ct. 1661 (1989).

¹¹⁰ *Kansas & Missouri v. Utilicorp United, Inc.*, 110 S. Ct. 2807 (1990).

¹¹¹ *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

¹¹² *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹¹³ Section 4c of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c, authorizes state attorneys general to seek monetary relief on behalf of natural persons residing in their states injured by antitrust violations.

¹¹⁴ See *infra* note 116.

adding that it had "rejected this argument before."¹¹⁵ With respect to deterrence, the petitioners argued that *parens patriae* authority was designed precisely to remedy concerns that consumers will not sue.¹¹⁶ The Court was unimpressed: "Although state attorneys general have greater expertise, they may hesitate to exercise the *parens patriae* device in cases involving smaller, more speculative harm to consumers."¹¹⁷ The Court thus suggested that attorneys general may hesitate to use *parens patriae* in the kind of case for which it was intended. The Court supported its observation with an apparent reference to a discussion of the "headline-grabbing" tendencies of state attorneys general.¹¹⁸ Conspicuous by its absence was any discussion of the importance of state antitrust enforcement. Indeed, *American Stores'* endorsement of private enforcement makes the silence all the louder. Recent Supreme Court cases thus do not appear to be harbingers of an era of solicitude for state antitrust enforcement.

The principal issue in *Utilicorp*, however, was a generic *Illinois Brick* issue, involving a variation of the possible "cost-plus" exception recog-

¹¹⁵ 110 S. Ct. at 2818. The Court ruled that the *parens patriae* authority was merely a procedural device permitting states to enforce existing rights, and here there were (the Court found) none. The States first raised this argument in their Supreme Court brief on the merits. See Brief for the Petitioners, at 23-27; see also Brief of the National Conference of State Legislatures, International City Management Association, Council of State Governments, National Association of Counties, National Governors' Association, National League of Cities, and U.S. Conference of Mayors as Amici Curiae in Support of Petitioners (developing the argument at length). Respondent Utilicorp sharply attacked the states' "belated reliance on Section 4c." Brief for Respondent Utilicorp United, Inc., text at notes 15-19.

¹¹⁶ Brief for the Petitioners, at 20 ("The Court also suggested in *Illinois Brick* that the potentially small stake of indirect purchasers may impede antitrust enforcement if they are granted standing to sue. But the *parens patriae* mechanism of 15 U.S.C. § 15c is designed to remedy that exact concern.") (citation omitted); see also Brief of Forty-Six States as Amici Curiae in Support of Petitioners, text at notes 7-10 ("State attorneys general have the incentive and the experienced, specialized antitrust counsel to prosecute these suits vigorously on behalf of their citizens.").

¹¹⁷ 110 S. Ct. at 2816-17.

¹¹⁸ 110 S. Ct. at 2816, citing Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602, 613 (1979). Utilicorp had quoted the following discussion from that page:

"Given the political character of *parens patriae* enforcement, it is doubtful that it can be relied upon as an adequate antitrust deterrent. There may well be a tendency under *parens patriae* for state attorneys general to bring headline-grabbing, scapegoat-seeking suits against politically unpopular corporations, with little regard for the intrinsic antitrust merit of the suit and with little effort to press the suit to a successful conclusion. By the time the case is ready for trial, the state attorney general's office may be occupied by a new politician with little interest in carrying out the projects of his predecessor."

Brief for Respondent Utilicorp United Inc., text at note 12.

nized in *Hanover Shoe* and *Illinois Brick*.¹¹⁹ In their petition for certiorari, the *Utilicorp* petitioners presented the case as offering a choice between the Tenth Circuit's decision below, which had ruled that only fixed quantity, cost-plus contracts qualified for exemption, and the opinion Judge Posner had crafted for the Seventh Circuit in *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*¹²⁰ *Panhandle*, a case facially similar to *Utilicorp*, had created a new, deceptively narrow exception to *Illinois Brick*.¹²¹ Unfortunately for petitioners, their facts differed materially from those of *Panhandle*:

- *Panhandle* was a fairly simple case with one utility, one state, and one kind of contract; *Utilicorp* was a mess, with two states, scores of utilities, and numerous sets of regulations;

- In *Panhandle* regulation-mandated contracts formally required the utility pass on all fuel price increases,¹²² whereas in *Utilicorp* regulations may or may not have required complete passing on (the parties disagreed, but the better argument seemed to be that at least some fuel was not subject to such a requirement);¹²³

- In *Panhandle* the court found that the utility enjoyed "unexhausted monopoly power": regulation had kept rates below market levels, so the

¹¹⁹ *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968) ("We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted . . . would not be present."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977):

In such a situation [i.e., where there is "a pre-existing cost-plus contract"] the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case.

See also *California v. ARC America Corp.*, 109 S. Ct. 1661 (1989) (the Court in *Illinois Brick* "implicitly recognized" that its concern was "that at least some party have sufficient incentive to bring suit" by "noting that indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them").

¹²⁰ 852 F.2d 891 (7th Cir.) (en banc), cert. denied, 488 U.S. 986; see Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, at 7 ("[T]he issue presented is purely a question of law on undisputed facts: where there exists a mandatory, readily-proven pass-through of overcharges, which holding is correct—that of the court below in this case, or that of the Seventh Circuit in *Panhandle Eastern*?").

¹²¹ Although the holding was narrow, the court said its analysis would treat requirements contracts the same as fixed-quantity contracts, 852 F.2d at 898, which could have broadened the cost-plus exception.

¹²² 852 F.2d at 894; see also 839 F.2d at 1213 (Posner, J., dissenting from panel opinion).

¹²³ 866 F.2d at 1292 & n.2 (a division of *Utilicorp* "did not resell natural gas by way of a purchased-gas adjustment clause mechanism"); Brief for Respondent *Utilicorp United, Inc.*, text at note 9 (same); cf. 110 S. Ct. at 2814 (parties disagree on whether all sales were subject to requirements to pass through all overcharges).

utility (unlike competitive firms and firms subject to looser regulation) could and did pass on all price increases without sacrificing profits; the lower courts in *Utilicorp* had not discussed the issue;

● In *Panhandle* the court found that industrial purchasers had alternative sources of power and thus the utility did *not* enjoy unused monopoly power over them, so the utility could recover overcharges on purchases for resale to industry; in *Utilicorp* there were no such findings, so there was risk that claims based on sales to industry would be lost were the court to create an *Illinois Brick* exception.

In *Panhandle* the court found that the utility's "unexhausted monopoly power" over consumers was a substitute for a fixed quantity clause, so *Illinois Brick* did not apply. The *Utilicorp* petitioners had to phrase the issue more broadly. Unfortunately for them, however, the Justices never agreed on what the issue was—and their disagreement emphasized the risks of complicating litigation. The majority interpreted the "cost-plus" exception as limited to where a direct purchaser suffers no injury at all, such as (they said) where the quantity is fixed.¹²⁴ For them the question was whether to create a new exception for resales by regulated public utilities that may or may not have been required to pass on all price increases¹²⁵ and that may or may not have done so.¹²⁶ Perhaps unsurprisingly, they thought not, pointing in part to the parties' factual disputes.¹²⁷ The four dissenting Justices said the question was whether *Illinois Brick* should prevent indirect purchasers from recovering based on a complete and easily provable pass-on.¹²⁸ Also unsurprisingly, perhaps, they thought not; but theirs was the minority view.

¹²⁴ 110 S. Ct. at 2817-18; *see also* Brief for the United States as Amicus Curiae Supporting Respondent (same).

¹²⁵ 110 S. Ct. at 2814 (noting disagreement between petitioners and respondent over extent of sales subject to automatic rate increases).

¹²⁶ The Court observed that the question certified to the Tenth Circuit by the district court, and then answered by the Tenth Circuit, asked whether there should be an exception when "most or all of the price increase" was passed on. *In re Wyoming Tight Sands Antitrust Cases*, 695 F. Supp. 119, 1120 (D. Kan. 1988) (on motion for certification) (emphasis added); 852 F.2d at 1294 (answering certified question in negative); 110 S. Ct. at 2814 ("The certified question . . . leaves unclear whether the respondent had passed on 'most or all' of its costs . . ."); *see also* Brief for Respondent Utilicorp United, Inc., at Question Presented (the certified question should be the question asked).

¹²⁷ 110 S. Ct. at 2814 ("The difficulties posed by issues of this sort led us to adopt the direct purchaser rule, and we must decline to create an exception that would require their litigation."). The Court said the petitioners had "oversimplified the apportionment problem" since it was not clear whether and when price increases would have been passed on, and whether part of any such pass-on price increase might be artificial, because prices would have been increased anyway.

¹²⁸ 110 S. Ct. at 2818 (White, J., dissenting, in an opinion joined by Justices Brennan, Marshall, and Blackmun). This was the question identified by petitioners, who asked whether there was an exception "where there is an easily-proved, 100% pass-on of illegal

Given the language and concerns apparently motivating the *Hanover Shoe-Illinois Brick* decisions, any attempt to expand an exception faced an uphill battle.¹²⁹ *Illinois Brick*'s principal concern had been about complexity,¹³⁰ and exceptions complicate things; *Illinois Brick* specifically cautioned against exceptions for particular markets.¹³¹ Exceptions tend to permit additional litigants and additional issues. Uncertainty poses special problems in antitrust, moreover, because the stakes can be so high.

Given that *Panhandle* could not be relied upon, plaintiffs' only realistic hope was to make a strong showing that vigorous antitrust enforcement required an exception. The Court's discussion of what it called this "critical part of the case"¹³² was unsatisfactory,¹³³ but the states did not succeed in convincing a majority of Justices of the importance of suits by these indirect purchasers. Ironically, Professor Hovenkamp just published an article—too late to be considered by the Court—questioning some of the assumptions underlying *Illinois Brick*.¹³⁴ We are unlikely to learn whether

overcharges, effected by federal and state regulation." Brief for the Petitioners, at i. It also is the issue addressed by the trial court, which had ruled that discovery on the amount of any pass-on was unnecessary because even a "perfect pass-on" pursuant to a rate regulatory system would not justify an exception. *In re Wyoming Tight Sands Antitrust Cases*, 695 F. Supp. 1109, 1116 (D. Kan. 1988) (emphasis added); see also 866 F.2d at 1293 (no exception "even if we assume, as we do for the purpose of deciding the issues before us, that there was a perfect and provable pass-on of the allegedly illegal overcharge").

¹²⁹ *But cf.* 110 S. Ct. at 2818 (White, J., dissenting, with Justices Brennan, Marshall, and Blackmun). Justice White wrote the *Hanover Shoe* and *Illinois Brick* opinions, and the *ARC America* opinion that discussed those cases. Justice White's *Utilicorp* dissent was joined by the three *Illinois Brick* dissenters. See *Illinois Brick*, 431 U.S. at 748 (Brennan, J., dissenting, with Justices Marshall and Blackmun.); *Illinois Brick*, 431 U.S. at 765 (Blackmun, J., dissenting).

¹³⁰ Calkins, *Illinois Brick and its Legislative Aftermath*, 47 ANTITRUST L.J. 967 (1978); see *Illinois Brick*, 431 U.S. at 732 n.12 (citing Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-On Doctrine*, 46 S. CAL. L. REV. 98, 108 (1972)).

¹³¹ 431 U.S. at 744.

¹³² 110 S. Ct. at 2816 ("If we were convinced that indirect suits would secure this goal better in cases involving utilities, the argument to interpret § 4 to create the exception sought by the petitioners might be stronger.").

¹³³ Petitioners alleged that utilities lack incentive to file antitrust suits because regulation would require the passing on to consumers of any gains. (Indeed, the Court pointed to this passing on of gains as reason why it was unnecessary to permit consumers to sue on their own. 110 S. Ct. at 2814–15.) The Court argued essentially that utilities will file antitrust suits either at the prodding of regulators or because they probably could retain some of the recovery. 110 S. Ct. 2816. In making this argument, the Court showed rare confidence in the effectiveness of regulation. Moreover, taking comfort from the retention of part of the recovery seems at odds with *Illinois Brick*'s concern with "concentrating the full recovery" in one party, 431 U.S. at 735; see also *ARC America*, 109 S. Ct. at 1667 ("*Illinois Brick* was concerned that requiring direct and indirect purchasers to apportion the recovery . . . would result in no one plaintiff having a sufficient incentive to sue . . .").

¹³⁴ Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717 (1990). Hovenkamp argued that given the breadth of the statutory language and the economic reality that the direct purchaser usually will be relatively uninjured, only very clear deterrence needs should prevent recoveries by indirect purchasers. He questioned the frequency with which such a showing can be made. For instance, he suggested that

his views would have influenced the Court's thinking, however, because the Court's *Utilicorp* majority survives and, given that majority's hostility to *Illinois Brick* exceptions, it seems doubtful that the Court will be addressing the issue again soon.¹³⁵

IV. ATLANTIC RICHFIELD CO. V. USA PETROLEUM CO.

Unfortunately, at least for scholars, Justice Brennan's last antitrust opinion, *Atlantic Richfield*,¹³⁶ assumed away the interesting issue. The case was filed by gasoline discounters objecting that they were the targets of an ARCO maximum resale price maintenance campaign. The district court granted summary judgment for want of antitrust injury. That court said that antitrust injury could not be shown unless the challenged prices were " 'predatory,' " and it reasoned that predatory pricing could not be shown given the absence of price-cost data and "because, given petitioner's market share and the ease of entry into the market, petitioner was in no position to exercise market power."¹³⁷

On appeal, the plaintiff USA Petroleum did not challenge the trial court's finding that ARCO's prices had not been predatory. Instead, it argued and a Ninth Circuit majority agreed that it could prevail even if the prices were not predatory. The Ninth Circuit reasoned that the per se prohibition of price-fixing, including vertical maximum price-fixing, was intended to prevent interference with market forces, and USA Petroleum was injured by such an interference (and, indeed, ARCO intended to injure it), so USA Petroleum satisfied any antitrust injury requirement.¹³⁸

The Supreme Court applied the antitrust injury requirement more rigorously: "injury, although causally related to an antitrust violation,

deterrence may be enhanced more by the numerousness of potential plaintiffs than by the size of their incentives.

¹³⁵ After *Utilicorp*, even a cost-plus, fixed-quantity contract may not qualify for exemption. The Court reiterated that this was merely a *possible* exception. 110 S. Ct. at 2818. Moreover, although the Court quoted language from *Hanover Shoe* and *Illinois Brick* explaining that absence of injury to direct purchasers justifies such an exception, it is not clear that even these contracts can prevent any injury at all. *Panhandle Eastern*, 852 F.2d at 898 ("the seller under a fixed-quantity cost-plus contract might forbear to insist on a 100 percent pass through in order to curry favor with the buyer for the sake of future deals").

¹³⁶ *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990).

¹³⁷ 110 S. Ct. at 1888 (summarizing (unpublished) opinion and quoting Appendix to Petition for Certiorari 3b); cf. 859 F.2d at 702 n.7 (Alarcon, J., dissenting) (ARCO never had more than 17% of the market).

¹³⁸ 859 F.2d at 693-95. The Ninth Circuit also rejected *Atlantic Richfield's* claim that USA Petroleum had been injured only by an increase in competition. Any harm caused by illegal pricing is anticompetitive harm, reasoned the court, and, in any event, "when firms conspire to fix low prices in order to drive out competition, the long-term consequences may be higher prices and reduced service to consumers." *Id.* at 696.

nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny"¹³⁹—here, vertical, maximum price-fixing, not simply price-fixing in general. The Court then gave *Albrecht*¹⁴⁰ more attention than it had received in a long time. *Albrecht* is the now generally discredited opinion that permitted a newspaper distributor to use the antitrust laws to vindicate its right to charge more than the publisher-suggested price. Justice Brennan's careful exegesis of *Albrecht* explained that the competitive harm addressed therein was to distributors, whose pricing freedom was impaired, and to consumers, who could suffer when capped prices meant distributors could not afford to offer desired premium services, but *Albrecht's* rationale did not assume that competitors were harmed.¹⁴¹ Accordingly, the Court ruled that dealers and consumers may suffer antitrust injury but competitors may not.

The Court's approach is strikingly different from that of the Seventh Circuit in *Jack Walters*, with which the Ninth Circuit had disagreed.¹⁴² That approach would conclude that dealers probably would not suffer antitrust injury from vertical maximum price-fixing.¹⁴³ Perhaps needless to say, the Seventh Circuit did not parse *Albrecht* as carefully as Justice Brennan did.

USA Petroleum argued that even if its injuries were not those motivating *Albrecht*, they were the intended consequence of Atlantic Richfield's pricing agreements and should qualify as antitrust injury. The Court disagreed. Antitrust injury flows only from "an *anticompetitive* aspect of the defendant's conduct," and low prices cannot harm competition if they are not predatory.¹⁴⁴ The Court explained this by noting that non-predatory pricing cannot exclude rivals in the long run "unless they are relatively inefficient."¹⁴⁵ Since it was stipulated that the prices at issue were nonpredatory, the Court did not have to define that term.¹⁴⁶

¹³⁹ 110 S. Ct. at 1889 (relying on *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986)).

¹⁴⁰ *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

¹⁴¹ 110 S. Ct. at 1890. Indeed, *Albrecht* appeared to assume that competitors would benefit from the tendency of vertical maximum price-fixing to prevent the offering of preferred combinations of price and service. *Id.*

¹⁴² 859 F.2d at 697.

¹⁴³ *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 709 (7th Cir.) (Posner, J.), *cert. denied*, 469 U.S. 1018 (1984) (no antitrust injury when dealer faced nonpredatory low prices caused by manufacturer's vertical maximum price-fixing).

¹⁴⁴ 110 S. Ct. at 1892.

¹⁴⁵ 110 S. Ct. at 1891 n.7 (adding that "[e]ven if that were false, however, a firm cannot claim antitrust injury from nonpredatory price competition on the asserted ground that it is 'ruinous'").

¹⁴⁶ 110 S. Ct. at 1893 n.10 ("We have no occasion in the instant case to consider the proper definition of predatory pricing, nor to determine whether our dictum in *Matsushita*

With this line of reasoning the Court assumed away the difficult issue, namely, the identification of predatory prices. Although the case's procedural posture permitted the Court to decide it without defining "predatory," doing so made a challenging question seem easy. Professor Areeda, the leading advocate of cost-based predatory pricing rules,¹⁴⁷ does not claim that prices above marginal cost/average variable cost can never harm competition or exclude an equally efficient firm.¹⁴⁸ His argument, instead, is that the game of identifying predatory prices above that level is not worth the candle—that a bright line is needed to encourage aggressive pricing, and the bright line of marginal cost/average variable cost strikes the proper balance, sacrificing some legitimate claims in order not to deter desired pricing. This is a trade-off analysis, a pragmatic search for a workable rule.

The trade-off may or may not be the same for vertical maximum price-fixing as for a monopolist's aggressive pricing, but the Court never recognized the issue. It observed that "a vertical price-fixing scheme may facilitate predatory pricing,"¹⁴⁹ which suggests that the trade-off is different, but it did not explore the ramifications of this observation. Perhaps the Court meant "predatory pricing" to include only pricing that could not harm competition under any circumstances. If so, however, the Court should have made clear that it was contemplating a stricter test, since this is quite different from the usual Areeda-Turner-inspired standards.

As a practical matter, these issues may never be resolved. Few plaintiffs will venture to challenge vertical maximum price-fixing because the charge inspires little sympathy from judges or juries, requiring proof of predation makes an already unappealing task even less attractive, and *Atlantic Richfield* undermined whatever precedential support remained for labeling vertical maximum price-fixing per se illegal.

This last point is made most clearly by considering part of plaintiff's oral argument. It protested the suggested requirement of proof of below-cost pricing. This was inappropriate, it said, because such a requirement

that predatory pricing might consist of 'pricing below the level necessary to sell [the offender's] products,' is an accurate statement of the law.") (citation and cross-reference omitted).

¹⁴⁷ The seminal article is Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). The Court relied on it and subsequent writings by Areeda in *Atlantic Richfield*, 110 S. Ct. at 1892 & n.8, 1894 & n.13; *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 n.12, 119 n.15 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.9, 589, 591 (1986).

¹⁴⁸ P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 714.1b (Supp. 1989).

¹⁴⁹ 110 S. Ct. at 1892 n.9. The Court explained that vertical price-fixing can force downstream dealers to share predation's losses, although it is not clear why those dealers would agree to do so.

presumed that some vertical price-fixing is beneficial.¹⁵⁰ The Supreme Court essentially responded that the plaintiff was right, and some vertical price-fixing is procompetitive.¹⁵¹ The Court wrote at length about the potential benefits of vertical maximum price-fixing, especially now that most nonprice vertical restraints are lawful.¹⁵²

The Court said it assumed "arguendo" that *Albrecht* continues to be good law.¹⁵³ Yet as a practical matter Justice Brennan, who had joined the *Albrecht* opinion, drove the last nail into its coffin. Thus, although *Atlantic Richfield* is considered a procedural case, its substantive implications may be just as significant.

V. FUNCTIONAL DISCOUNTS: *HASBROUCK*

Functional discounts have been antitrust's emperor without clothes. A functional discount occurs, in the typical example, when a wholesaler pays a lower price than a retailer.¹⁵⁴ Antitrust counsellors have long believed that functional discounts are legal or almost always legal, and numerous secondary sources support this view.¹⁵⁵ Less clear, however,

¹⁵⁰ *Injury From Non-Predatory RPM Agreement is Subject of Supreme Court Oral Argument*, 57 *Antitrust & Trade Reg. Rep. (BNA)* 790, 791 (Dec. 7, 1989).

¹⁵¹ 110 S. Ct. at 1894 n.13 ("Vertical, maximum price-fixing thus may have procompetitive interbrand effects even if it is *per se* illegal because of its potential effects on dealers and consumers.") (citing Justice Harlan's dissenting opinion in *Albrecht*).

¹⁵² 110 S. Ct. at 1894 & n.13 (citing numerous authorities). Among the authorities cited by the Court was a recent article that urged the Court to rethink *Albrecht* but that also generally agreed with the Ninth Circuit's outcome in *Atlantic Richfield*, Blair & Harrison, *Rethinking Antitrust Injury*, 42 *VAND. L. REV.* 1539 (1989). That article enjoyed the unusual honor of being cited favorably twice by the majority and twice by the dissent. 110 S. Ct. at 1891, 1894 n.13; 110 S. Ct. at 1898 n.9, 1903 n.20 (Stevens, J., dissenting).

¹⁵³ 110 S. Ct. at 1889 n.5 ("We assume *arguendo* that *Albrecht* correctly held that vertical maximum price-fixing is subject to the *per se* rule.").

¹⁵⁴ The *Hasbrouck* Court accepted, as "adequate for [its] discussion," the definition suggested by the United States and FTC as amici: "A functional discount is one given to a purchaser based on its role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier." 110 S. Ct. at 2542 n.11 (quoting Brief for United States and Federal Trade Commission as Amici Curiae, at 10).

¹⁵⁵ The point was made most crisply in an amicus brief filed by former Assistant Attorney General Edwin Zimmerman: "For decades antitrust lawyers have advised their clients that selling to wholesalers at a discount does not violate the Robinson-Patman Act . . ." Motion for Leave to File and Brief of the American Petroleum Institute and the National Association of Manufacturers as Amici Curiae Supporting Petition, at 16; *see also, e.g.*, ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 250 (2d ed. 1984) [hereinafter ANTITRUST LAW DEVELOPMENTS] ("Where lower prices reflecting functional discounts are charged to wholesalers, they have generally been upheld . . ."); ABA ANTITRUST SECTION, MONOGRAPH NO. 4, THE ROBINSON-PATMAN ACT: POLICY AND LAW VOLUME I, at 54 (1984) ("In general, so long as wholesalers and retailers do not compete directly in the resale of goods, the Act permits a manufacturer to grant a functional discount to a wholesaler for distribution services."); E. KINTNER & J. BAUER, 3 *FEDERAL ANTITRUST LAW* 318 (1983)

has been the rationale for functional discounts' favored status. Some justify it in terms of competitive effect,¹⁵⁶ some in terms of lack of discrimination,¹⁵⁷ some in terms of availability,¹⁵⁸ some in terms of cost justification,¹⁵⁹ some for want of causation,¹⁶⁰ and some because any other conclusion would be unthinkable.¹⁶¹ We were not sure *why* functional discounts were legal or almost always legal, but we were sure they were.

*Texaco Inc. v. Hasbrouck*¹⁶² did not change any of this. Functional discounts continue to be legal or almost always legal and we are still not sure why. What has changed is that someone—notably Justice Scalia, concurring—is observing that in the unusual world of the Robinson-Patman Act no one has yet justified these discounts' privileged status.¹⁶³

("Functional discounts . . . are usually deemed lawful.") (footnote omitted); F. ROWE, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* 174 (1962) ("In practice, the competitive effects requirement permits a supplier to quote different prices between different distributor classes . . ."); H. SHNIDERMAN, *PRICE DISCRIMINATION IN PERSPECTIVE* 37 (1977) ("Ordinarily, the granting of a lower price to a customer class operating at a higher level of distribution will not injure customers who buy directly from the manufacturer but at a somewhat higher price because they operate farther down the distribution channel."); Calvani, *Functional Discounts under the Robinson-Patman Act*, 18 B.C. INDUS. & COMM. L. REV. 543, 549 (1976) ("Since the respective purchasers are on different levels of the chain of distribution, and thus do not compete with each other, it is argued—and generally held—that in this situation there is no competitive injury.") (footnote omitted); Scher, *How Sellers Can Live with the Robinson-Patman Act*, 41 BUS. LAW. 533, 548 (1986) ("functional discounts can certainly be granted lawfully").

¹⁵⁶ H. Shniderman, *supra* note 155, at 37 ("no injury is likely"); Calvani, *supra* note 155, at 549. Nor are the commentators clear about *why* there is no competitive effect. *E.g.*, Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 ANTITRUST L.J. 929, 934 (1984) ("Either because of this additional cost [to the wholesaler] or because competing buyers do not function at the same level, a functional discount is considered lawful since the likelihood of competitive injury is remote.") (footnote omitted).

¹⁵⁷ Celnicker & Seaman, *Functional Discounts, Trade Discounts, Economic Price Discrimination and the Robinson-Patman Act*, 1989 UTAH L. REV. 813, 816 (distinguishing functional discounts from "trade discounts").

¹⁵⁸ Celnicker & Seaman, *supra* note 157, at 836-42 (distinguishing between functional discounts and "trade discounts"); Rill, *supra* note 156, at 934 n.29 ("availability principle may also apply").

¹⁵⁹ E. KINTNER & J. BAUER, *supra* note 155, at 309-10 (also discussing competitive effect).

¹⁶⁰ F. ROWE, *supra* note 155, at 203 (independent pricing decisions of wholesalers "sever any causal link" between the price discrimination and any harm).

¹⁶¹ E. KINTNER & J. BAUER, *supra* note 155, at 318-20 (making manufacturer liability turn on wholesaler's prices would encourage violation of Sherman Act Section 1); F. Rowe, *supra* note 155, at 204 (incompatibility with antitrust laws).

¹⁶² 110 S. Ct. 2535 (1990) (Stevens, J.).

¹⁶³ Refusing to join in the customary lamentations about the failings of RP's drafters, Justice Scalia (with Justice Kennedy) wrote that the Act's language

is straightforward: any price discrimination whose effect "may be substantially . . . to injure, destroy, or prevent competition" is prohibited, unless it is immunized by the "cost justification" defense . . . There is no exception for "reasonable" functional discounts that do not meet this requirement. Indeed, I am at a loss to understand what *makes* a functional discount "reasonable" *unless* it meets this

Although Justice Scalia may be correct if one ungrudgingly interprets that statute, a majority disagreed.

Even though functional discounts are always or almost always legal, Texaco lost. A group of direct-buying retail gasoline stations recovered damages for injuries caused by Texaco's charging them higher prices than it charged to two firms that functioned in part as wholesalers. The retailers won because the Court was not prepared to rule that as a matter of law *every* functional discount is legal.

Texaco made three arguments. First, it argued that a functional discount is not discriminatory.¹⁶⁴ Texaco boldly relied on the same legislative history that had failed to persuade the Court when, in *FTC v. Anheuser-Busch, Inc.*,¹⁶⁵ it ruled that price discrimination "is merely a price difference." The Court rejected this first Texaco argument largely by reproducing passages from its *Anheuser-Busch* opinion.¹⁶⁶

Second, Texaco argued that Hasbrouck was harmed only by the independent pricing decisions of favored wholesalers, for whom Texaco should not be responsible.¹⁶⁷ This argument foundered on the language of the Act, which "specifically encompasses not only the adverse effect of price discrimination on persons who either grant or knowingly receive the benefit of such discrimination, but also on 'customers of either of them.'"¹⁶⁸

Texaco's third and principal argument reasoned, in effect, that functional discounts must be legal because, as everyone knows, they *must* be legal.¹⁶⁹ The Court generally agreed: "most functional discounts will be

requirement.

110 S. Ct. at 2555 (Scalia, J., concurring in the judgment). Justice White also wrote less colorfully that nothing in the Act especially protects functional discounts. 110 S. Ct. at 2553 (White, J., concurring in the result).

Justice Scalia argued that the only "plausible" argument supporting special treatment for functional discounts is availability, i.e., if any retailer could have purchased from a favored wholesaler, no retailer could have been harmed by that favoritism. Since the parties did not raise this argument, Justice Scalia (and the Court, 110 S. Ct. at 2551 n.30) did not decide it.

¹⁶⁴ Reply Brief of Petitioner Texaco Inc., at 12; Brief of Petitioner Texaco Inc., at 21-22.

¹⁶⁵ 363 U.S. 536, 549 (1960) (Warren, Ch. J.).

¹⁶⁶ Texaco correctly noted that *Anheuser-Busch*, unlike *Hasbrouck*, involved a primary line claim, but the Court correctly responded that none of *Anheuser-Busch's* reasoning was limited to primary line claims.

¹⁶⁷ Reply Brief of Petitioner Texaco Inc., at 13; Brief of Petitioner Texaco Inc., at 23.

¹⁶⁸ 110 S. Ct. at 2550 (quoting statute).

¹⁶⁹ *E.g.*, Brief of Petitioner Texaco Inc., at 16:

Anyone in the business of selling to retailers must be able to buy for less than he or she sells. In short, wholesalers *must* get a lower price than retailers. If they

legitimate discounts,” and “legitimate discounts” are lawful.¹⁷⁰ But the Court, observing that commentators “tend to agree that in exceptional cases what is nominally a functional discount may be an unjustifiable price discrimination,”¹⁷¹ ruled that not every functional discount is legitimate. It followed that Texaco’s were not legitimate, a finding that is unsurprising given that Texaco had sought to prevail as a matter of law and had not introduced evidence of legitimacy (and what evidence there was suggested the discounts could not be justified).

The legal standard, then, declares that “legitimate” functional discounts are legal; “gratuitous” ones¹⁷² are not. This standard raises four questions: (1) Which functional discounts are legitimate? (2) Why are they legal? (3) Who bears the burden of proof? (4) Who determines legitimacy?

(1) Which functional discounts are legitimate? Whereas both the Government as amicus and the Court said that only legitimate functional discounts are lawful, they disagreed on the meaning of legitimacy. Without seeming to attach much importance to it, the Government wrote that a functional discount is legitimate whenever it is “given to a firm that performs *some* services for the supplier . . . not performed by firms further down the chain of distribution.”¹⁷³ The Court defined “legitimate” more strictly to include an element of proportionality. It offered two different tests, one couched in terms of cost to the buyer;¹⁷⁴ one in terms

cannot, there will be no wholesalers. In addition, the margin between the buying price and selling price *must* be sufficiently large to satisfy the wholesaler that it is in the right business—that the potential exists not only to recover expenses but also to earn a satisfactory profit, making the risks, investment and effort worthwhile.

(emphasis in original).

¹⁷⁰ 110 S. Ct. at 2550. The Court quoted at length from the REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 208 (1955) [hereinafter AG’S COMMITTEE’S REPORT], a secondary source quoted by the Government as amicus but not cited by either party. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioners, at 21. In language quoted by the Court, the Committee wrote that “[p]rice cutting at the resale level is not in fact, and should not be held in law, ‘the effect of’ a differential that merely accords due recognition and reimbursement for actual marketing functions.” 110 S. Ct. at 2545. The Court declared that the differential described by the Committee “is not illegal.” *Id.* at 2546. It is interesting to note that Justice Stevens was a member of that Committee.

¹⁷¹ 110 S. Ct. at 2549; *see, e.g.*, authorities cited *supra* note 155.

¹⁷² *Id.* at 2546.

¹⁷³ Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioners, at 15 n.11 (emphasis added). Justice White lamented that the Government failed to “spell out the types of functional discounts that the Commission considers defensible.” 110 S. Ct. at 2552 (White, J., concurring).

¹⁷⁴ 110 S. Ct. at 2550 (“reasonable reimbursement for the purchasers’ actual marketing functions”).

of value to the supplier.¹⁷⁵ Cost to the buyer and value to the seller can be quite different, yet the Court did not choose between the tests. The opinion should be read as permitting functional discounts justified on either basis,¹⁷⁶ but whether it will be read this way may not be settled for years.

(2) Why are legitimate functional discounts legal? Principally because “a legitimate functional discount will not cause any substantial lessening of competition.”¹⁷⁷ The Court ruled that the *Morton Salt*¹⁷⁸ inference, which presumes secondary line competitive injury when competitors have been charged substantially different prices over time,¹⁷⁹ should not apply to legitimate functional discounts.¹⁸⁰ Even more reassuring to potential defendants, the Court went further and declared that legitimate functional discounts *do not* lessen competition and are thus lawful.¹⁸¹ Justice Scalia protested in vain that although functional discounts might not lessen competition in RP terms if functional discounts merely reimburse wholesalers for their costs (because indirect customers are unlikely to receive lower prices), the Court appeared to contemplate more generous functional discounts as nonetheless legitimate (i.e., discounts based on value to sellers) and the Court never explained why these more generous discounts could not lessen competition in RP terms.¹⁸² The Scalia position has merit if one reads RP ungrudgingly, but it attracted only two votes.

¹⁷⁵ *Id.* at 2546 (“reasonable reimbursement for the value to Texaco of their actual marketing functions”).

¹⁷⁶ This follows from the Court’s general solicitude for functional discounts and from its discussion of the AG’s COMMITTEE’S REPORT, *supra* note 170. That report argued for the legality of “a price differential ‘that merely accords due recognition and reimbursement for actual marketing functions.’” 110 S. Ct. at 2546 (quoting Report). The Court declared that such a discount “is not illegal.” *Id.* It went on to say that the Report “would not countenance a functional discount completely untethered to *either* the supplier’s savings *or* the wholesaler’s costs,” *id.* (emphasis added), thus implying that the Report (and the Court) would uphold a functional discount justified by one of the two standards. The Court made especially clear that functional discounts need not be justified solely by a wholesaler’s costs, by agreeing with the Government that had the Ninth Circuit required this it would have erred. 110 S. Ct. at 2547 n.22.

¹⁷⁷ 110 S. Ct. at 2545 n.18. The Court also wrote that it “generally agree[d]” with quoted language from the AG’s COMMITTEE’S REPORT, *supra* note 170, at 208, which reasoned that sellers offering legitimate functional discounts should not be responsible for the consequences of independent pricing decisions by their customers. 110 S. Ct. at 2545.

¹⁷⁸ *FTC v. Morton Salt Co.*, 334 U.S. 37, 50–51 (1948).

¹⁷⁹ *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (under *Morton Salt*, “injury to competition is established prima facie by proof of substantial price discrimination between competing purchasers over time”).

¹⁸⁰ 110 S. Ct. at 2544–45, 2550.

¹⁸¹ *Id.* at 2545, 2550.

¹⁸² *See also id.* at 2552–53 (White, J., concurring) (the Court fails to explain why legitimate functional discounts cannot injure competition in the RP sense).

(3) On whom is the burden of proof? *Hasbrouck* explained the legality of legitimate functional discounts as a matter of causation, which places the burden of proof on the plaintiff.¹⁸³ In contrast, sellers bear the burden of proof for the “cost justification” and “meeting competition” defenses—and, as a practical matter, face an uphill battle.¹⁸⁴ The Court said that sellers “need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount is reasonable” and thus legal.¹⁸⁵ The Court differentiated its approach from cost justification in part because that defense has met with mixed success, at best, whereas “one would expect that most functional discounts will be legitimate [and lawful] discounts.”¹⁸⁶

(4) Who decides whether functional discounts are legitimate? *Texaco* lost in *Hasbrouck* because the Court ruled that the legitimacy of its functional discounts *was* an issue, and not something conclusively to be presumed. The Court did not have to, and did not, say whether legitimacy is a question of law or of fact. However, the indicia of legitimacy, such as value to sellers and costs to buyers, are fact intensive, and presumably “reasonableness” is as well. Except in clear cases juries decide fact-intensive issues. Yet if juries decide legitimacy, sympathetic plaintiffs may win a significant number of cases—which should not happen, presumably, because according to the Court most functional discounts are lawful. Although this conundrum may be resolved eventually by solicitude for appropriate summary judgment motions, until then the fact-specific nature of the legitimacy determination will make life challenging for RP counsellors.

The Court also made RP counseling more challenging by devoting considerable attention to two special weaknesses in *Texaco*'s case, features that will make the case distinguishable at least on its facts from many future cases. First, the two wholesalers favored by *Texaco* resold most of their volume directly to consumers, i.e., as retailers. The Court observed that such “scrambled functions” have “frequently signaled the illegiti-

¹⁸³ The Court said it was in “substantial agreement” with James Rill’s explanation that “‘the burden of proof remains with the enforcement agency or plaintiff in circumstances involving functional discounts since functional pricing negates the probability of competitive injury, an element of a prima facie case of violation.’” 110 S. Ct. at 2545–46 n.18 (quoting Rill, *supra* note 156, at 935).

¹⁸⁴ *E.g.*, ANTITRUST LAW DEVELOPMENTS, *supra* note 155, at 238–47.

¹⁸⁵ 110 S. Ct. at 2545; *see also id.* at 2547 n.21 (“a causation defense in a functional discount case does not demand the rigorous accounting associated with a cost justification defense.”). Justice Scalia protested, “How is one to determine that a functional discount is ‘reasonable’ except by proving (through the normally, alas, ‘rigorous’ means) that it meets this [cost justification] test? Shall we use a nationwide average?” 110 S. Ct. at 2555 (Scalia, J., dissenting).

¹⁸⁶ 110 S. Ct. at 2550.

macy under the Act of what is alleged to be a permissible functional discount."¹⁸⁷ Second, Texaco actively encouraged its favored wholesalers to sell directly to consumers and recognized that the resulting retail price disparities were causing plaintiffs' market shares to plummet. "The special facts of this case thus make it peculiarly difficult for Texaco to claim that it is being held liable for the independent pricing decisions of [its wholesalers]."¹⁸⁸ These special facts were not central to the Court's reasoning, so their absence will not immunize a functional discount. Nonetheless, their presence in a pricing program should alert counsellors to a need for special scrutiny, and their absence is fair grounds for distinguishing *Hasbrouck*.

Hasbrouck speaks to more than just functional discounts. As noted above, it reaffirmed *Anheuser Busch's* rule that price discrimination is merely a price difference—a rule with wide-spread RP applicability.¹⁸⁹ Moreover, *Hasbrouck* is also important because the Court declined to extend *Truett Payne*.¹⁹⁰

In *Truett Payne* the Court rejected the notion that proof of an RP violation entitles treble damages plaintiffs to a presumption of injury in the amount of the discrimination. Rather, such plaintiffs "must make some showing of actual injury attributable to something the antitrust laws were designed to prevent."¹⁹¹ This and subsequent lower court opinions have made clear that a plaintiff may not base its damages claim on an assumption that it would have enjoyed a seller's lower prices.¹⁹² *Truett Payne* has been a boon to the RP defense bar, which has used it to win quick victories¹⁹³ and, presumably, to discourage suits.

The *Hasbrouck* plaintiffs rather neatly solved their *Truett Payne* problems.¹⁹⁴ *Hasbrouck's* expert calculated damages using three different assumptions about how Texaco could have eliminated the discrimination: by lowering prices to plaintiffs, by raising prices to wholesalers, and by

¹⁸⁷ *Id.* at 2550.

¹⁸⁸ *Id.*

¹⁸⁹ ANTITRUST LAW DEVELOPMENTS, *supra* note 155, at 222–23.

¹⁹⁰ *J. Truett Payne Co. v. Chrysler Motors Co.*, 451 U.S. 557 (1981).

¹⁹¹ 451 U.S. at 562. The Court said its decision was "virtually governed by our reasoning in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)."

¹⁹² *E.g.*, *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 394–95 (8th Cir. 1987); *Olympia Co. v. Celotex Corp.*, 771 F.2d 888, 892 (5th Cir. 1985).

¹⁹³ *Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1134–35, 1139 (1986).

¹⁹⁴ Their concern about the case was acute, since it had been the basis of an earlier Ninth Circuit defeat, *Hasbrouck v. Texaco Inc.*, 663 F.2d 930, 932 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982).

doing some of each.¹⁹⁵ According to the Court, in awarding damages the jury apparently credited the expert, "who had estimated what [plaintiffs'] profits would have been if they had paid the same prices" as the favored buyers.¹⁹⁶

Texaco protested that the "practical effect" of this three-alternatives gambit was to "vitiating *Truett Payne*."¹⁹⁷ In a brief argument not wholly without appeal, Texaco claimed that the lower courts had let automatic damages in through the back door, permitting a plaintiff to invite the jury to do what the plaintiff itself could not.¹⁹⁸ Of all Texaco's claims, this was the one that most worried the plaintiffs.¹⁹⁹

In an odd damages discussion, the Court failed to address the issue.²⁰⁰ Whether one reads Texaco's version of the damages question presented²⁰¹ or Hasbrouck's,²⁰² there is little connection to the Court's discussion. The possibly relevant part of that discussion was as follows:

¹⁹⁵ Brief of Respondents, Statement of the Case Section F; Brief of Petitioner Texaco Inc., at 10; see also *Hasbrouck*, 634 F. Supp. at 43 (in four of six hypothetical scenarios plaintiffs offered to the jury, the discrimination was eliminated partially or entirely by lowering prices to plaintiffs). Plaintiffs justified their use of the three alternatives by explaining that Texaco had considered each of them.

¹⁹⁶ 110 S. Ct. at 2541.

¹⁹⁷ Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, at 16.

¹⁹⁸ *Id.* at 15-16 ("Respondents assume they can get more than they are legally entitled to if they offer 3 or 6 scenarios and combine the permissible with the impermissible. Respectfully, that cannot be the law.") (footnote omitted); Brief of Petitioner Texaco Inc., at 31. The best argument to the contrary was presented by the Government, when it reasoned that nothing in *Truett Payne* "precludes the jury from concluding that the price discrimination in this case might have been eliminated by reducing the price that respondents paid." Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, at 8 n.6.

¹⁹⁹ Interview with Robert H. Whaley (Aug. 7, 1990). The plaintiffs must have been particularly troubled by the tension with *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 394-95 (8th Cir. 1987), which found reversible error when the plaintiff's expert offered the jury two damages theories, one of which assumed automatic damages.

²⁰⁰ In addition to the matters mentioned in the text, the Court said it did "not understand Texaco to be challenging the sufficiency of respondents' proof of damages." 110 S. Ct. at 2543. The Court wrote this in the face of separate "questions presented" devoted to damages, *infra* notes 201 and 202, and its opinion's separate section devoted to damages.

²⁰¹ Brief of Petitioner Texaco Inc., at i:

3. . . . [W]here the allegedly favored customer is a wholesaler, the allegedly disfavored customer a retailer, and the purported illegal price discrimination is a discount given to all wholesalers, may the retailer predicate injury and recover treble damages on the basis of how much better off he would have been had he too received the wholesaler discount, in whole or part?

²⁰² Brief of Respondents, at Questions Presented for Review:

3. In awarding damages for a violation of the Robinson-Patman Act, may the jury consider evidence of what prices the favored and disfavored buyer would have been charged in the absence of the violation, or must the jury assume that, absent

Even if some portion of some of respondents' injuries may be attributable to the conduct of independent retailers, *the expert testimony nevertheless provided a sufficient basis for an acceptable estimate of the amount of damages*. We have held that a plaintiff may not recover damages merely by showing a violation of the Act; rather, the plaintiff must also "make some showing of actual injury attributable to something the antitrust laws were designed to prevent." At the same time, however, we reaffirmed our "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury." Moreover, as we have noted, Texaco did not object to the instructions to the jury on the damages issue. A possible flaw in the jury's calculation of the amount of damages would not be an appropriate basis for granting Texaco's motion for a judgment notwithstanding the verdict.²⁰³

Although the highlighted language approves of the expert's testimony, the context was very different from that addressed by the parties. The Court minimized the importance of its decision, moreover, by noting that Texaco did not object to the jury instructions—although this is a bit of a red herring because the trial court's error, if any, was in admitting evidence, not in instructing the jury.²⁰⁴ Since the Court apparently regarded the damages issue as not properly before it and since the Court did not address the parties' arguments, the case should not be said to hold that plaintiffs' approach to damages was proper.

Even though it would read too much into the opinion, some lower courts may cite *Hasbrouck* as endorsing the three-alternatives approach.²⁰⁵ The Ninth Circuit's opinion *does* endorse this approach, moreover, and that opinion has nationwide prominence because the Supreme Court passed up an opportunity to reverse or disagree with it. Given the importance of RP injury and damages and the paucity of functional discount cases, *Hasbrouck's* damages discussion, odd as it is, may be at least as important as its treatment of functional discounts.²⁰⁶

the discrimination, the supplier would have charged the favored buyer a higher price?

²⁰³ 110 S. Ct. at 2552–53 (quoting *J. Truett Payne Co. v. Chrysler Motors Co.*, 451 U.S. 557 (1981)) (emphasis added) (citations and footnote omitted).

²⁰⁴ *Cf.* 842 F.2d at 1043–44 (admission of damage projections not reversible error in part because jury was instructed not to award automatic damages). The relevant language (from Instruction No. 28 was as follows: "[Y]ou may not determine a plaintiff's damages, if any, merely by determining the price difference between favored and disfavored buyers and multiplying that figure by the number of gallons involved, since . . . the measure of damage is that proximately caused by the price discrimination.")

On the other hand, the plaintiffs claimed that Texaco also failed to object to its damages testimony and exhibits. Brief of Respondents, text at note 46. Texaco's briefs neither concede this or deny it.

²⁰⁵ See *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990).

²⁰⁶ What *Hasbrouck's* damages discussion did not do was important in another respect as well. Texaco argued briefly that the thriving competition in the relevant market precluded any finding of competitive injury. Brief of Petitioner Texaco Inc., at 29. A similar analysis

VI. CONCLUSION

In a 1987 article a co-author and I discussed recent antitrust developments in terms of "power and access," focusing particularly on market power—the importance of which was increasing—and on access to the antitrust system.²⁰⁷ These two issues were also central to the past term's Supreme Court antitrust cases: the Court slowed the trend toward market power emphasis and refused to ease access to the antitrust system. The cases are important less for changing the law than for their implications for the future. The most important implications are found in *Trial Lawyers*, which reaffirmed the use of per se rules and implicitly expressed reservations about the use of market power screens.

can be found in *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988), a case not cited by *Texaco*. The Supreme Court chose not to mention the issue. It thus left intact the Ninth Circuit's declaration that "injury to competitors may be probative of harm to competition," 842 F.2d at 1040. The Third Circuit recently relied on this language to hold that at least in secondary line cases injury to a competitor can satisfy RP's requirement of competitive injury, *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990). This is a change from earlier Third Circuit teaching, *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 122 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) (directed verdict proper because no evidence of "a substantially adverse effect on competition, rather than merely an adverse effect on it, a competitor"), *followed in* *Kem-Tech, Inc. v. Mobil Corp.*, 1986-1 Trade Cas. (CCH) ¶ 66,947, at 61,869 (E.D. Pa. 1985).

Finally, *Hasbrouck's* damages discussion is significant because it perpetuates *Truett Payne's* blurring of the lines between the fact of damage and the amount. *Truett Payne* referred to the Court's "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury." 451 U.S. at 565. Justice Powell, with Justices Brennan, Marshall, and Blackmun, concurred in part but explained correctly that "the plaintiff has the burden of proving the fact of antitrust injury by a preponderance of the evidence" and only then may a court be lenient concerning proof of the amount of damages. 451 U.S. at 569-70 (Powell, J., concurring in part and dissenting in part); *accord* *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982). Yet *Hasbrouck* quoted the *Truett Payne* language endorsing a relaxed standard of proving injury. *See also* *J.F. Feeser*, 909 F.2d at 1539 (quoting this part of *Hasbrouck* and apparently relying on it).

²⁰⁷ *Briggs & Calkins, Antitrust 1986-87: Power & Access (Part I)*, 32 ANTITRUST BULL. 275 (1986).

APPENDIX

A BRIEF COMMENT ON THE CONSEQUENCES OF JUSTICE
BRENNAN'S RETIREMENT

What will be the consequences for antitrust of Justice Brennan's retirement and his replacement presumably by Judge Souter? Unfortunately, we know little about Judge Souter's views on antitrust. We do know Justice Brennan, although I can only touch on an antitrust legacy that deserves a lengthy article. Regardless of his reputation on social issues, Justice Brennan was no wild-eyed antitrust liberal. Consider the following cases, in each of which a majority of Supreme Court Justices including Justice Brennan voted for the defendant: *Atlantic Richfield*,¹ *Business Electronics*,² *Cargill*,³ *Northwest Wholesale Stationers*,⁴ *Southern Motor Carriers*,⁵ *Jefferson Parish*,⁶ *Associated General Contractors*,⁷ *Broadcast Music*,⁸ *A&P/Borden*.⁹ Justice Brennan went along with many of the past decade's most important Supreme Court defense victories.¹⁰

Nonetheless, a couple of outcomes would have changed had you replaced Brennan with Richard Posner, to choose a known alternative. The two cases that are most interesting are *Maricopa County*,¹¹ where a four-three majority including Brennan applied the per se rule to condemn a physicians' cost-containment program, and *Jefferson Parish*,¹² where five Justices including Brennan reiterated the per se rule against tying (although finding it inapplicable), whereas four Justices preferred to switch to the rule of reason. Presumably Posner would have voted differently and the Chicago School would have fared better.

¹ *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990) (Brennan, J.).

² *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (Scalia, J.).

³ *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986) (Brennan, J.).

⁴ *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (Brennan, J.).

⁵ *Southern Motor Carriers Rate Conf. v. United States*, 471 U.S. 48 (1985) (Powell, J.).

⁶ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (Stevens, J.).

⁷ *Associated General Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (Stevens, J.).

⁸ *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) (White, J.).

⁹ *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979).

¹⁰ In addition, Justice Brennan joined the opinion in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (Powell, J.), which, although upholding a verdict for the plaintiff, has principally benefited defendants.

¹¹ *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (Stevens, J.).

¹² *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (Stevens, J.).

But Souter isn't Posner. Lawyers are not born into the Chicago School. Confidence is required to favor economics over precedent, and Souter has not enjoyed Posner's many years of immersion in economics. Thus, significant change is only possible, not probable.

Justice Brennan also played an important role in the summary judgment trilogy, *Celotex*,¹³ *Matsushita*,¹⁴ and *Liberty Lobby*.¹⁵ Brennan dissented from each and wrote two strong opinions. Since he was out-voted one cannot say that substituting another jurist would have changed an outcome. Nonetheless, many antitrust issues arise in the summary judgment context, and the presence of someone as personable and persuasive as Brennan urging restraint in dismissing cases can make a difference. Defendants may be slightly pleased that this powerful voice for the plaintiff on summary judgment issues is no longer on the Supreme Court.

¹³ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

¹⁴ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

¹⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

