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ANNUAL SURVEY OF ANTITRUST DEVELOPMENTS 1974-75

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In a year marked by double-digit inflation and sagging business performance, antitrust was very much in the news. The President and Congress together produced a multitude of legislative proposals.[1] Major cases were filed by the government and by private plaintiffs,[2]

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Grateful acknowledgment is made to my colleague Ray V. Hartwell, III, B.A. (1969), J.D. (1975), Washington & Lee University, for his invaluable assistance in the preparation of this article.

[1] Among the measures signed into law were the Antitrust Penalties and Procedures Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974), discussed in note 5, *infra*, and a measure repealing the antitrust exemptions for state fair trade laws. *See* BNA ANTITRUST & TRADE REG. REPORT No. 743, at A-7 (1975).

Perhaps the most sweeping legislative proposal in terms of direct impact on the statutory scheme of the antitrust laws was the Antitrust Improvements Act of 1975. S. 1284, 94th Cong., 1st Sess. (1975). However, *parens patriae* amendments to the Clayton Act, which would grant state attorneys general broad prosecutory powers, have been introduced in several forms. S. 1284, *supra*, §§ 401-02 (1975); H.R. 2850, 94th Cong., 1st Sess. (1975); H.R. 38, 94th Cong., 1st Sess. (1975) (redesignated H.R. 8532 following substantial amendments). FTC consent decree procedures paralleling those provided for the Justice Department under the Antitrust Procedures and Penalties Act have also been proposed. H.R. 499, 94th Cong., 1st Sess. (1975).

A myriad of other proposals touching on regulatory reform and other antitrust-related substantive areas has been introduced. For a detailed critical analysis of these developments, *see* Handler, *Antitrust-Myth and Reality in an Inflationary Era*, 50 N.Y.U.L. REV. 211 (1975).

[2] In what promises to be perhaps the largest antitrust case since Standard Oil Co. v. United States, 221 U.S. 1 (1911), the Justice Department has filed suit against American Telephone & Telegraph Co., seeking to break up the giant corporation. Numerous private suits of ambitious scope have also been instituted. For example, several firms have charged IBM—the undisputed leader of the computer industry—with a variety of antitrust violations. *See, e.g.,* BNA ANTITRUST & TRADE REG.

and one or two landmark decisions emerged.[3] In many of the nation's universities and throughout Washington, the belief was expressed that the antitrust laws, properly redesigned and energetically enforced, could greatly assist in the restoration of a healthy and prosperous economy.[4] Partially as a result of this mood, Congress enacted and the President signed the Antitrust Procedures and Penalties Act[5] in November of 1974. While the effect of any of these developments on rampant inflation is debatable, there can be little question that the widespread belief in that effect contributed greatly to the legislation's passage; and the same credo fuels much of the debate about the new proposals tumbling into the legislative hopper in recent congressional sessions.

Although the Supreme Court is presumably remote from the heady debates on antitrust swirling through Washington's corridors of power, it too was active in antitrust last year. Of its seven antitrust decisions, one, invalidating lawyers' minimum fee schedules, can clearly be described as a landmark.[6] One decision in the securities area[7] may well prove to be a significant turning point in the development of the relationship between regulation and the antitrust law, and a second[8] spells out further the conditions for legislative exemp-

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REPORT No. 697, at A-10 (1975). Moreover, the *Goldfarb* decision appears to have sparked litigation involving professional restrictions on price competition, advertising, and the like. *See, e.g.,* BNA ANTITRUST & TRADE REG. REPORT No. 720, at A-7 *et seq.* (1975).

[3] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); United States v. National Ass'n of Securities Dealers, Inc., 422 U.S. 694 (1975).

[4] *See* Handler, *Antitrust-Myth and Reality in an Inflationary Era*, 50 N.Y.U.L. REV. 211 (1975).

[5] Pub. L. No. 93-528, 88 Stat. 1706 (1974); 15 U.S.C.A. §§ 1, 2, 3, 16, 28 and 29 (Supp. Feb. 1975). That Act raises the maximum fine permissible for Sherman Act violations for individuals from $50,000 to $100,000, and for corporations from $50,000 to $1,000,000. Violation of the Sherman Act is raised from a misdemeanor to a felony, and the maximum jail term is increased from one to three years. 15 U.S.C.A. § 1 (Supp. Feb. 1975). In addition the new Act amends the Expediting Act, 15 U.S.C.A. §§ 28-29 (Supp. Feb. 1975), to permit greater utilization of the Circuit Courts of Appeals and, finally, the Act subjects the consent decree process to greater public scrutiny. 15 U.S.C.A. §§ 16(b)-(h) (Supp. Feb. 1975). For example, when filing a proposed consent decree with a court the United States is required simultaneously to file a "competitive impact statement" explaining the proposal and its consequences. The court must consider the impact statement and other evidence bearing on the efficacy of the proposed decree, and cannot enter a consent judgment until it has determined that such entry is in the public interest.

[6] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[7] United States v. National Ass'n of Securities Dealers, Inc., 422 U.S. 694 (1975).

[8] Gordon v. New York Stock Exch., 422 U.S. 659 (1975).

tion from the antitrust laws. A bank merger case[9] continued a trend of defeats for the government's challenges of mergers under §7 of the Clayton Act.[10] Finally, the Court found time to deal, in two cases,[11] with the interstate commerce requirements of the Clayton and Robinson-Patman Acts.[12]

In general, these decisions continued the move away from antitrust activism and reflected the shift in the Court's idealogical balance of power. With the exception of the minimum fee case[13] and *United States v. ITT Continental Baking Co.*,[14] each of the Court's antitrust decisions reflected a more modest view of the scope of the antitrust laws. In fact, the government lost three of the four cases in which it was involved as a party.[15]

With the exception of *ITT Continental*, the Court's "new antitrust majority," described by Mr. Justice White in his dissent last spring in *United States v. Marine Bancorporation, Inc.*,[16] was on the

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[9] United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975).

[10] *See* United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. General Dynamics Corp., 415 U.S. 486 (1974). These decisions and the trend signaled by them are discussed in Shenefield, *Annual Survey of Antitrust Developments—Class Actions, Mergers, and Market Definition: A New Trend Toward Neutrality*, 32 WASH. & LEE L. REV. 299, 321-45 (1975) [hereinafter Shenefield, *A New Trend Toward Neutrality*].

[11] United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975); Gulf Oil Corp. v. Copp Paving Co., 491 U.S. 186 (1974).

[12] *American Building Maintenance* dealt with the "engaged in commerce" requirement of § 7 of the Clayton Act, 15 U.S.C. § 18. *Copp Paving* concerned the similar jurisdictional requirements of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), and of §§ 3 and 7 of the Clayton Act, 15 U.S.C. §§ 14 and 18 (1970).

The seventh case, United States v. ITT Continental Baking Co., 420 U.S. 223 (1975), was a 5-4 decision that an acquisition in violation of a Federal Trade Commission consent order could be considered a "continuing failure or neglect to obey" within the meaning of the civil penalty provisions of the Clayton Act, 15 U.S.C. § 21(1) (1970) and the Federal Trade Commission Act, 15 U.S.C. § 45(1) (1970) and thus subject to daily penalties under those statutes.

[13] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[14] 420 U.S. 223 (1975).

[15] The cases lost by the government were United States v. National Ass'n of Securities Dealers, Inc., 422 U.S. 694 (1975); United States v. American Building Maintenance Indus., 422 U.S. 271 (1975); and, United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975). The fourth case, which the government won, was United States v. ITT Continental Baking Co., 420 U.S. 223 (1975).

[16] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 642 (1974) (White, J., dissenting). *See* Shenefield, *A New Trend Toward Neutrality*, *supra* note 10, at 338-39. The new antitrust majority referred to by Mr. Justice White consists of Burger, C.J., and Stewart, Blackmun, Powell and Rehnquist, JJ. All of these justices are

prevailing side in every case. In four of the five cases in which there were dissents, Justices Douglas and Brennan were numbered among the dissenters.[17] In the Term's two 5-4 decisions, it was the vote of Mr. Justice Blackmun that produced victory, in *United States v. National Association of Securities Dealers, Inc.* for the defendants, and in *ITT Continental* for the plaintiffs.

What was only barely discernible in the 1973-74 Term of the Supreme Court[18] must now be recognized as an unmistakable fact. The Court is headed in the direction of a more modest interpretation of the antitrust laws. Neutrality in the application of these statutes—a distant goal only two terms ago—once again characterizes the Supreme Court's antitrust decisions.

II.

Interstate Commerce and the Clayton Act

This past Term's antitrust work began quietly enough with a decision[19] addressing the interestate commerce standards under the Clayton[20] and Robinson-Patman[21] Acts. By a 7-2 margin,[22] the Supreme

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appointees of Republican Presidents, and all except Justice Stewart, appointees of President Nixon.

In spite of Mr. Justice White's critical remarks last Term, it should be noted in fairness that he voted with the prevailing view in five out of the seven antitrust cases decided by the Court this Term.

[17] In Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974), Mr. Justice Douglas filed a dissenting opinion in which Mr. Justice Brennan joined. *Id.* at 204. Mr. Justice Douglas again spoke for the two dissenters in United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 286 (1975). Mr. Justice Blackmun filed a separate dissenting opinion in *American Building Maintenance. Id.* at 287. In United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 130 (1975), Mr. Justice Brennan's dissenting opinion was joined by Douglas and White, JJ. Justices Douglas and Brennan cast their final dissenting antitrust votes of the year when, along with Mr. Justice Marshall, they joined Mr. Justice White's dissent in United States v. National Ass'n of Securities Dealers, 422 U.S. 694, 735 (1975).

The fifth case in which dissents were filed was the United States' only victory during the term. Not surprisingly, the dissenters in *ITT Continental* were all members of the Court's "new antitrust majority." United States v. ITT Continental Baking Co., 420 U.S. 223, 243 (1975) (Stewart, J., dissenting, joined by Burger, C.J., and Powell and Rehnquist, JJ.).

[18] *See* Shenefield, *A New Trend Toward Neutrality, supra* note 10.

[19] Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).

[20] Act of Oct. 15, 1914, ch. 323, 38 Stat. 730. Sections 3 and 7 of the Clayton Act contain the relevant interstate commerce requirements. Section 3, 15 U.S.C. § 14 (1970), provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods,

Court restated the traditional view requiring a greater involvement in interstate commerce for Robinson-Patman or Clayton Act cases than has been the rule for Sherman Act analysis.[23]

> wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Id.

In pertinent part, § 7, 15 U.S.C. § 18, states:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . .

Id.

[21] Act of June 19, 1936, ch. 592, 49 Stat. 1526. Section 2(a), 15 U.S.C. § 13(a) (1970):

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . . .

Id.

[22] Powell, J., wrote the majority opinion, in which Burger, C.J., and Stewart, White, Marshall, Blackmun and Rehnquist, JJ., joined. Douglas, J., dissented, joined by Brennan, J.

[23] The Sherman Act, §§ 1 and 2 prohibits the restraint and monopolization of "trade or commerce among the several States, or with foreign nations. . . ." 15 U.S.C. §§ 1 and 2 (1970), formerly ch. 647, §§ 1 and 2, 26 Stat. 209. The jurisdictional reach of the Sherman Act, unlike that of the Clayton and Robinson-Patman Acts, has been interpreted as coextensive with the constitutional power of the Congress to regulate commerce. *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-35 (1948) ("affecting commerce" standard of Wickard v. Filburn, 317 U.S. 111 (1942), incorporated into the Sherman Act); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944) ("That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . admits of little, if any doubt.") *Id.* Thus, the decisions have clearly established that "an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce." Burke v. Ford, 389 U.S. 320, 321 (1967) (per curiam). *Accord, e.g.*, United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954) ("wholly local business restraints" can produce the effects condemned by the Sherman Act); United States v. Woman's Sportswear Mfrs.

When the Clayton Act was enacted in 1914, Congress set out to strengthen the antitrust laws. A quarter of a century of Sherman Act enforcement had by then clearly revealed significant gaps in the legislative drive against anticompetitive practices. Moreover, a laissez-faire view of economics held by the federal judiciary and a reluctance to apply criminal penalties to those many deemed to be successful businessmen stalled enforcement and led to highly restrictive decisions in the courts. Following the presidential election of 1912, in which the platforms of the three major political parties called for an all-out legislative effort to enhance antitrust enforcement, Congress convened in a bipartisan mood to clarify and extend the reach of the antitrust laws. One result was the Clayton Act.[24]

To expand the scope of the antitrust laws, Congress made the substantive provisions of the Clayton Act more explicit than those contained in the Sherman Act, thus reducing the room for judicial discretion.[25] In addition, the burden of proving the proscribed anticompetitive effect necessary for liability was substantially reduced.[26] Paradoxically, however, the more precise language of the Clayton Act creates a number of procedural and jurisdictional requirements that seem to restrict the applicability of its broader substantive provisions. Chief among these is the language of the various provisions of the Act that requires a close connection between the conduct challenged and the flow of interstate commerce. In §3 of the Act, for instance, the relevant language requires that the prohibited conduct must be engaged in by a person "in commerce, in the course of such commerce. . . ."[27] Similarly, the antimerger provisions of § 7 apply

Ass'n., 336 U.S. 460, 464 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."*Id.*); Uniform Oil Co. v. Phillips Petroleum Co., 400 F.2d 267, 269 (9th Cir. 1968) (where activities are wholly intrastate, plaintiff is required to prove that they had a "not insubstantial" effect upon interstate commerce).

[24] 15 U.S.C. §§ 12-27 (1970). Congress also enacted the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1970), in 1914.

[25] Rather than general prohibitions of the sort found in the Sherman Act, 15 U.S.C. §§ 1-3 (1970), the Clayton Act forbids exclusive dealing, acquisitions, and interlocking directorates that have certain proscribed effects on competition. 15 U.S.C. §§ 14, 18 and 19 (1970).

[26] In §§ 3 (exclusive dealing and tying arrangements) and 7 (acquisitions) of the Clayton Act, 15 U.S.C. §§ 14 and 18, for instance, the language of the statute requires proof only of practices that "may" substantially lessen competition. In contrast to the language of the Sherman Act condemning unreasonable restraints of trade, the Clayton Act language has been construed to prohibit practices that are only reasonably probable, although not certain, to injure competition. Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

[27] 15 U.S.C. § 14 (1970).

to corporations "engaged in commerce."[28] Like provisions exist in § 8[29] and § 10[30] of the Act. Indeed, the original § 2 of the Clayton Act, now substantially amended by the Robinson-Patman Act,[31] also applied only to persons "engaged in commerce."[32]

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[28] 15 U.S.C. § 18 (1970).

[29] 15 U.S.C. § 19 (1970). In pertinent part, § 8 provides:

> No person at the same time shall be a director in any two or more corporations . . . engaged in whole or in part in commerce . . . if such corporations are or have been competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

Id.

[30] 15 U.S.C. § 20 (1970). In pertinent part, § 10 provides:

> No common carrier engaged in commerce shall have any dealings . . . with another . . . firm . . . when the said common carrier shall have upon its board of directors . . . any person who is at the same time a director . . . of . . . such other . . . firm. . . .

Id.

[31] 15 U.S.C. § 13-13B (1970).

[32] 38 Stat. 730 (1914), 15 U.S.C. § 13 (1970). The original § 2 provided:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of Commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

Id.

The section was interpreted as allowing quantity discounts without regard to whether the buyer was a wholesaler or retailer. Mennen Co. v. F.T.C., 288 F. 774 (2d Cir. 1923). With the advent of large chain stores and mail-order houses this interpretation came to render the section largely ineffective. Large scale buyers such as A&P were able consistently to sell at lower prices than their local competitors. Unable to match the efficiency of the chains in the marketplace, the small merchants formed alliances with their wholesalers and distributors to lobby for legislative action designed to neutralize the advantages enjoyed by the chains. This campaign resulted in the enactment of the Robinson-Patman Act, which prohibited all price differentials other than those based on the seller's cost savings or the distributional activities of the buyer. H. BLAKE & R. PITOFSKY, CASES AND MATERIALS ON ANTITRUST LAW 1053-56 (1967).

The Robinson-Patman Act, enacted in 1936 as an amendment to § 2 of the Clayton Act, contains an even more specific and more intricate set of requirements covering requisite effect on interstate commerce. Indeed, three separate elements must be proved as part of any price discrimination case under § 2(a) of the Act.[33] In effect, (a) the seller must be engaged in interstate commerce, (b) the challenged discrimination must be committed in the course of the seller's interstate commerce business, and (c) at least one of the challenged discriminatory sales transactions must occur in interstate commerce.[34]

These more explicit requirements of the Clayton and Robinson-Patman Acts have been thought to narrow the scope of those Acts. Whereas, under the Sherman Act, transactions that are either in interstate commerce or that substantially affect interstate commerce may be covered,[35] Congress, by requiring in the Clayton and Robinson-Patman Acts that challenged conduct occur "in" commerce and that the actors be themselves "engaged in commerce," was apparently rejecting the broader "effect on commerce" test judicially engrafted on the Sherman Act. Generally, the cases have so held.[36] From time to time, arguments have been made that, though the language of the statutes is different, uniformity and simplicity require that their interstate commerce requirements should be regarded as the same. The argument frequently takes as its premise the notion thatCongress sought to exercise all of the constitutional authority at its command.[37] In other instances, it is based on interpreta-

[33] 15 U.S.C. § 13(a) (1970).

[34] Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), reads in pertinent part as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . where either or any of the purchases involved in such discrimination are in commerce. . . .

Id.

[35] *See* note 23 *supra*.

[36] *See, e.g.*, Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Littlejohn v. Shell Oil Co., 456 F.2d 225 (5th Cir. 1972), *rev'd en banc*, 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969); Abramson v. Colonial Oil Co., 390 F.2d 873 (5th Cir. 1973); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967); Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963). *See also* E. KINTER, A ROBINSON-PATMAN PRIMER 80-81 (1970); 16 C J. VONKALINOWSKI, BUSINESS ORGANIZATIONS § 26.02 (1971); Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 YALE L. J. 1155, 1168 (1958).

[37] The "affecting commerce" standard appears to have been read into § 2(a) by

tions of similarly worded requirements in similar statutes in non-antitrust areas.[38] Arguments of this kind were addressed and laid to rest by the Supreme Court, first in *Gulf Oil Corp. v. Copp Paving Co.*[39] and then in *United States v. American Building Maintenance Industries*[40] this past Term.

In the first of these cases, plaintiffs were operators of a plant manufacturing asphaltic concrete in California.[41] Copp sued certain oil companies that produced liquid petroleum asphalt and their subsidiaries that also manufacture asphaltic concrete. The complaint, seeking injunctive relief and treble damages, alleged a variety of antitrust violations including anticompetitive price discrimination in violation of § 2(a) of the Robinson-Patman Act, anticompetitive acquisitions in violation of § 7 of the Clayton Act, and violations of the exclusive dealing provisions of the Clayton Act.[42]

The complaint covered claims related both to the manufacture of asphalt oil and asphaltic concrete. Because of the physical characteristics of asphaltic concrete and the limited distance it can be transported from the plant, the defendants sought summary judgment in their favor with respect to all violations arising from conduct in the asphaltic concrete market. Following discovery, it was determined that the court's jurisdiction of these claims depended on the fact that some of the streets in the Los Angeles area were segments of the federal interstate highway system, and on a stipulation that the amount of asphaltic concrete used in their construction and repair was greater than a minimal amount. As a result, the court dismissed all claims against the defendants involving the market for asphaltic concrete.[43]

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some courts. *See, e.g.*, Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939). For a list of cases from which such an argument might be constructed see Comment, *Antitrust-The Jurisdictional Requirements of Robinson-Patman Act § 2(a) Clarified*: Gulf Oil Corp. v. Copp Paving Co., 32 WASH. & LEE L. REV. 939, 941 n. 11 (1975).

[38] For example, the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1970), contains an "in commerce" jurisdictional requirement that has been judicially construed as an "affecting commerce" standard. *E.g.*, Alstate Constr. Co. v. Durkin, 345 U.S. 13 (1953); Overstreet v. North Shore Corp., 318 U.S. 125 (1943).

[39] 419 U.S. 186 (1974).

[40] 422 U.S. 271 (1975).

[41] 419 U.S. at 189. Asphaltic concrete, used to surface roads and highways, is manufactured at plants by combining liquid petroleum asphalt and filler aggregates at very high temperatures. The material must be hot when put in place at the construction site and is very heavy and of low value. Consequently, asphaltic concrete can be sold and delivered only within a 35-mile range from the producing plant. *Id.* at 188.

[42] *Id.* at 190-91.

[43] 1972 Trade Cas. ¶ 74,013 (N.D. Cal. 1972). The summary judgment motion also sought to eliminate the claims relating to asphalt oil, but the district court refused to remove those issues from the case because of the interstate character of that market. Consequently that ruling was not before the Supreme Court.

On appeal,[44] the Ninth Circuit reversed, holding that production of asphalt for use in interstate highways made the producers "instrumentalities" of interestate commerce and thus placed them "in" that commerce as a matter of law.[45] Likewise, viewing the Clayton Act and Robinson-Patman Acts as intended to supplement the purpose and effect of the Sherman Act, the Ninth Circuit held that jurisdiction properly attached to those claims as well.[46] The Supreme Court granted certiorari, but limited its consideration to the questions arising under the Clayton and Robinson-Patman Acts.[47]

Mr. Justice Powell, writing for the majority, read the "in commerce" language of the provisions of the Clayton Act narrowly. In contrast to the extensive reach of the Sherman Act, the more restrictive language of the Clayton and Robinson-Patman Act provisions requires transactions "within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer."[48]

The Supreme Court disagreed with the Ninth Circuit that Copp, by introducing evidence of the use of the asphaltic concrete in the construction of interstate highways, had made the necessary "in commerce" showing. Mr. Justice Powell did not find persuasive the reasoning by analogy from the cases decided under the Fair Labor Standards Act.[49] While those cases held that interstate highways are instrumentalities of interstate commerce and therefore that employees engaged in the construction of such roads are employees "in commerce,"[50] the question presented by Copp arose under significantly different statutory schemes. Undoubtedly, under the Commerce Clause, Congress could regulate ostensibly local activities if interstate commerce were sufficiently involved, but the question that arose under the Clayton and Robinson-Patman Acts was how far Congress intended to reach.[51] Thus while Congress had deemed inter-

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[44] The appeal was interlocutory in nature under 28 U.S.C. § 1292(b) (1970). *In re* Western Liquid Asphalt Cases, 487 F.2d 202, 204 (9th Cir. 1973), *rev'd sub nom.* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).

[45] *Id.* at 205-06.

[46] *Id.* at 206.

[47] 415 U.S. 988 (1974).

[48] 419 U.S. at 195.

[49] *Id.* at 196-99.

[50] Overstreet v. North Shore Corp., 318 U.S. 125 (1943). *See also* Alstate Constr. Co. v. Durkin, 345 U.S. 13 (1953).

[51] 419 U.S. at 197. Mr. Justice Powell points out that the jurisdictional inquiry under the antitrust laws, because it involves a factual determination in each case, is quite different from the inquiry under statutes in which Congress itself has defined specific persons and activities as affecting commerce. *Id.* at 197 n. 12. *Compare* United

state highways subject to regulation in certain aspects, there was nothing in any relevant statutory scheme nor in the antitrust laws themselves expressing Congress' intention to apply the full weight of the antitrust laws to persons who supply materials to be used in the construction of such highways.[52]

The Court concluded that, in the first place, even assuming that the language of the Act meant something more than the relatively narrow "flow-of-commerce" concept, the kind of "nexus" approach advanced by Copp would be an irrational way to proceed. If there were a justification for such an expansive interpretation, it would depend upon a congressional intention to reach even the most localized of practices that result in harm to the national marketplace. The Court, however, reasoned that such a justification would require judicial determination of practical consequences, and not simply the statement of formal or nominal relationships. The Court concluded, therefore, that sales to interstate highway contractors were not sales "in commerce" as a matter of law within § 2(a) of the Robinson-Patman Act and §§ 3 and 7 of the Clayton Act.[53]

At this stage, the Court had decided enough to reverse the Ninth Circuit's judgment. Copp, however, offered a second theory to support the judgment arguing that Congress used the "in commerce" language to reach as far as possible under the commerce power. Copp argued that there should therefore be no difference between the Sherman Act and the Clayton and Robinson-Patman Acts. The Supreme Court found on the record before it that such contentions were equally unavailing to the plaintiffs.[54]

With respect to § 2(a) of the Robinson-Patman Act, the majority opinion alluded to the original language contained in the Patman bill passed by the House:

> [I]t shall also be unlawful for any person, *whether in commerce or not*, either directly or indirectly, to discriminate in price between different purchasers . . . where . . . such discrimination may substantially lessen competition. . . .[55]

The Conference Committee deleted the words "whether in commerce or not," leaving only the "in commerce" language presently in §

States v. Yellow Cab Co., 332 U.S. 218, 232-33 (1947), *with, e.g.* Maryland v. Wirtz, 392 U.S. 183 (1968); Katzenbach v. McClung, 379 U.S. 294 (1964); *and* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[52] 419 U.S. at 198-99.

[53] *Id.* at 199.

[54] *Id.*

[55] *Id.* at 199-200, *quoting* H.R. 8442, 74th Cong., 2d Sess. (1936) (emphasis added).

2(a).[56] Whatever the reason for this deletion, it suggests strongly that Congress did not intend to duplicate the reach of the Sherman Act.[57] Moreover, as Mr. Justice Powell pointed out, the 60 years since the enactment of the Clayton Act provisions yield hardly a single case in which a court of appeals has read the statutory language more broadly,[58] yet Congress had remained silent. Taking the longstanding interpretation, the continued congressional silence and the legislative history into account, the Court did not feel warranted in extending § 2(a) to cover purely local activities.

Sections 3 and 7 of the Clayton Act were less clear, the majority opinion admitted. Given the legislative history supporting the notion that these provisions were enacted to complement the Sherman Act, it would seem logical to interpret the strict jurisdictional requirements loosely. Such a conclusion might take greater force from the observation that when the Clayton Act was written, the "in commerce" language was thought to extend to the full reach of the commerce clause as that reach was then understood. It can certainly be argued that the particular words are anomalous in view of those background facts and should not be used to limit the reach of the Clayton Act.

Mr. Justice Powell admitted that the argument had some force;[59] but he declined to follow the argument to its conclusion, and decided in any event that the facts presented no evidence of effect on interstate commerce. Without a basis for considering the conclusion of the district court to be clearly erroneous, Mr. Justice Powell concluded that the "effects of commerce" theory, "even if legally correct,"[60]

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[56] 419 U.S. at 200, *quoting* H.R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. (1936).

[57] The opinion suggests that the motive for the deletion may have been either a desire to reach only price discrimination in interstate markets or a purpose to adhere to the limits of its commerce power reach as Congress then understood them. 419 U.S. at 200. *See* Comment, *Antitrust—The Jurisdictional Requirements of Robinson-Patman Act § 2(a) Clarified*: Gulf Oil Corp. v. Copp Paving Co., 32 WASH. & LEE L. REV. 939, 948 n.41 (1975).

[58] The opinion goes to some lengths to point out that Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954), a case that Copp relied upon to dispute the argument that only a sale moving across state lines can satisfy the Robinson-Patman Act, actually involved interstate sales and that the price discrimination condemned in that case fell within the literal language of the statute. Despite the Court's ready explanation of *Moore*, the opinion had unquestionably generated confusion in the lower courts. *Compare* Littlejohn v. Shell Oil Co., 456 F.2d 225 (5th Cir. 1972), *rev'd en banc*, 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973), *with, e.g., Littlejohn, supra*, 483 F.2d 1140 (5th Cir. 1973), and Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972).

[59] 419 U.S. at 202.

[60] *Id.* at 203.

lacked proof.[61]

The question concerning the exact meaning of the "in commerce" language of the Clayton Act, left somewhat ambiguous by the statement in *Copp* that, even if appropriate, the broad statement was not satisfied in that case, was resolved later in the Term in *United States v. American Building Maintenance Industries*.[62] American Building is an enormous supplier of janitorial services, possessing some 50 branches that serve more than 500 communities in North America. American Building acquired two smaller janitorial service companies in Southern California. While the acquiring company was actively engaged in interstate commerce, the district court concluded that the acquired companies, performing their services entirely within California and having only insignificant contacts with interstate commerce, were not "engaged in commerce" within the meaning of § 7 of the Clayton Act.[63] Accordingly, the Court held that there had been no violation of that provision of the antitrust laws.[64] The government appealed, raising the issue whether the phrase "engaged in commerce" as used in § 7 of the Clayton Act reaches corporations engaged only in intrastate activities that substantially affect interstate commerce, and if so, whether the acquired companies' activities in this case were sufficient to satisfy that standard.[65]

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[61] The dissenting opinion by Justice Douglas meets the majority head on. The dissenters see no evidence whatever that the word "commerce" under the Clayton Act means something less than it meant under the Sherman Act. As to the lack of proof, even under this broader standard, Mr. Justice Douglas thinks it improper to impose any such burden upon plaintiffs in an antitrust case at a preliminary stage before trial. To have concluded that there was no substantial impact on interstate commerce was, in the language of the dissent, to require the plaintiffs to prove ". . . on a motion that goes to the jurisdiction of the court, the merits of their case in order to obtain an opportunity to try it." *Id.* at 213 (footnote omitted). Moreover, the dissenting opinion takes the position that jurisdiction may be sustained, even on an "in commerce" theory. *Id.* at 308, *et seq.* Agreeing with Copp as to the relevance of cases arising under the Fair Labor Standards Act, Justice Douglas concludes that the jurisdictional reach of the antitrust laws is substantially similar to the reach under other regulatory statutes. Accordingly, the phrases "engaged in commerce" and the like should be read similarly. 419 U.S. at 410, *et seq.*

[62] 422 U.S. 271 (1975).

[63] *Id.* at 273-75. Section 7 of the Clayton Act reads in pertinent part:

> No corporation *engaged in commerce* shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . or any part of the assets of another corporation *engaged also in commerce*, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (1970) (emphasis added).

[64] 422 U.S. at 275. The findings and conclusions of the district court are unreported.

[65] *Id.* The Supreme Court noted probable jurisdiction. 419 U.S. 1104 (1975).

Once again,[66] therefore, the Supreme Court was forced to look closely at the "in commerce" language of the Clayton Act. Mr. Justice Stewart, writing for a majority of six, analyzed the government's arguments on the basis of prior Supreme Court decisions, and the legislative history and the express words of the statutes themselves. *Copp Paving* had certainly indicated, if it had not clearly announced, the position of at least seven justices of the Court on that issue. More direct prior precedent was to be found in *Federal Trade Commission v. Bunte Brothers, Inc.*,[67] in which the Court had squarely held that the § 5 jurisdiction of the Federal Trade Commission[68] was limited by the terms "in commerce," which did not reach local activities "affecting commerce."

> The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses and matters heretofore traditional enough to local law. . . . An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress.[69]

The *Bunte Brothers* interpretation was persuasive to the Court because both § 5 and § 7 were enacted by the same Congress and both were designed to deal with related aspects of the same problem.[70]

The government's arguments that the Clayton Act should be expansively interpreted in view of its express purpose to make antitrust enforcement more effective were equally unpersuasive. While conceding that it may have been anomalous to strengthen the antitrust laws through an Act that has limited jurisdictional scope, Mr. Justice Stewart nevertheless insisted that the "anomaly" could not be ignored. Moreover, in the majority's view, even if Congress understood its actions as implementing in the Clayton Act the full extent of its Commerce Clause power, it used language that did not accomplish

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[66] The decision in *Copp Paving* was announced December 17, 1974. While the government's jurisdictional statement in *American Building* was submitted in May 1974, its main brief on the merits was not submitted until February 1975.

[67] 312 U.S. 349 (1941).

[68] Section 5 of the FTC Act states in pertinent part: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 15 U.S.C. § 45(a) (1970).

[69] 312 U.S. at 354-55. Congress recently provided that "clearer mandate" by amending the Federal Trade Commission Act to replace the phrase "in commerce" with "in or affecting commerce." Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 201, 88 Stat. 2193, 15 U.S.C. § 45 (Supp. Feb. 1975). The amendments were expressly designed to expand the Commission's jurisdiction beyond the limits imposed by *Bunte Brothers*.

[70] 422 U.S. at 277.

that purpose. Congress has in the meantime enacted statutes that show a recognition of the distinction between legislation regulating activities "in commerce," and legislation asserting the full Commerce Clause power.[71] In short, as the majority saw it, neither the legislative history nor the remedial purpose of § 7 of the Clayton Act supported an expansion of the jurisdictional scope of the statute beyond that indicated by its express language. If *Copp Paving* had not closed the door, Mr. Justice Stewart's pronouncement that the phrase "engaged in commerce" as used in § 7 of the Clayton Act "means engaged in the flow of interstate commerce,"[72] certainly did.

The government's alternative argument that the acquired companies' activities satisfied even the narrower test was rejected by the majority.[73] Because the Benton companies neither produced, distributed nor acquired goods or services in interstate commerce,[74] and were in fact completely insulated from any direct participation in the interstate flow of goods or services, it could not be said that the acquired companies were themselves "engaged in commerce" within the meaning of § 7. Where the Benton companies did utilize materials from out of state, they purchased them from suppliers located in the same state where the flow of commerce had ceased.[75]

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[71] *E.g.*, National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1970). By contrast, when it amended and reenacted § 7 of the Clayton Act in 1950, the narrow "in commerce" formulation was retained.

[72] 422 U.S. at 283.

[73] *Id.* at 283-85.

[74] *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974).

[75] 422 U.S. at 285. Mr. Justice White concurred in the portions of the opinion concerning the scope of § 7 of the Clayton Act, but did not join in the reasoning of the majority supporting its judgment that the acquired companies were not in commerce. For Mr. Justice White, it was not necessarily logical to assume that companies that bought supplies from a local distributor, who had purchased them originally from out-of-state manufacturers, were necessarily insulated from interstate commerce. But the issue had not been raised by the government in that form at any level in the case. *Id.* at 286. (White, J., concurring). There were two dissenting opinions. The first, by Mr. Justice Douglas, joined by Mr. Justice Brennan, reiterated the dissent in *Copp Paving. Id.* at 286-87. Douglas and Brennan continued to disagree with the contention that the language of § 7 was intended to give that statute a narrower jurisdictional scope than the standard that has been read into the Sherman Act. Mr. Justice Blackmun, also dissenting, relied on the remedial purpose of § 7 of the Clayton Act instead. *Id.* at 287-88 (Mr. Justice Blackmun had sided with the majority in *Copp Paving.*) Assuming that the Clayton Act was designed to supplement the Sherman Act, and to "arrest in its incipiency" any restraint or substantial lessening of competition, United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 589 (1957), it was illogical to assign to Congress any purpose to limit the application of the Clayton Act. Accordingly, Mr. Justice Blackmun would apply the Clayton Act not only to corporations engaged in interstate commerce but also to those intrastate activities "substantially affecting interstate commerce." 422 U.S. at 288.

Together, *Copp Paving* and *American Building Maintenance* put the Supreme Court's seal of approval on a rather consistent interpretation of the "in commerce" language of the Clayton and Robinson-Patman Acts. Admittedly, the number of cases construing the Robinson-Patman Act language was substantial, whereas very few had treated the issue under the Clayton Act standard.[76] Now that the

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[76] Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3d Cir. 1953), although it involved a situation in which both the acquired and acquiring corporations were "engaged in interstate commerce" and therefore necessarily within the reach of § 7 of the Clayton Act, did address the issue. By contrast, the following circuit and district court cases had construed the "in commerce" provision of § 2(a) prior to *Copp Paving* and since *Mead's Fine Bread Co.* Scranton Constr. Co. v. Litton Indus. Leasing Corp., 494 F.2d 778 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir. 1972), *rev'd en banc*, 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); Cliff Food Stores, Inc. v. Kroger, Inc. 417 F.2d 203 (5th Cir. 1969); Abramson v. Colonial Oil Co., 390 F.2d 873 (5th Cir.), *cert. denied*, 393 U.S. 831 (1968); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967); Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); Fort Lauderdale v. East Coast Asphalt Corp., 329 F.2d 871 (5th Cir.), *cert. denied*, 379 U.S. 900 (1964); United States v. South Fla. Asphalt Co., 329 F.2d 860 (5th Cir.), *cert. denied*, 379 U.S. 880 (1964); Shreveport Macaroni Mfg. Co. v. FTC, 321 F.2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964); Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963) (Black, J., dissenting); Atlas Bldg. Prods. Co., v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 257 F.2d 417 (7th Cir. 1958); Miles v. Coca-Cola Bottling Co., 360 F. Supp. 869 (E.D. Wis. 1973); *In re* Western Liquid Asphalt Cases, 350 F. Supp. 1369 (N.D. Cal. 1972), *rev'd*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); Ford Wholesale Co. v. Fibreboard Paper Prods. Corp., 344 F. Supp. 1323 (N.D. Cal. 1972), *aff'd*, 493 F.2d 1204 (9th Cir. 1974), *cert. denied*, 419 U.S. 876 (1974); Webster v. Sinclair Ref. Co., 338 F. Supp. 248 (S.D. Ala. 1971); Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 330 F. Supp. 549 (E.D. La. 1971), *aff'd*, 469 F.2d 416 (5th Cir. 1972); Flotken's West, Inc. v. National Food Stores, Inc., 312 F. Supp. 136 (E.D. Mo. 1970); Liquilux Gas Servs. v. Tropical Gas Co., 303 F. Supp. 414 (D.P.R. 1969); Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 284 F. Supp. 148 (D. Minn. 1967), *rev'd*, 395 F.2d 388 (8th Cir. 1968); Baldwin Hills Bldg. Material Co. v. Fibreboard Paper Prods. Corp., 283 F. Supp. 202 (C.D. Cal. 1968); Industrial Bldg. Materials, Inc. v. Interchemical Corp., 278 F. Supp. 938 (C.D. Cal. 1967), *rev'd*, 437 F.2d 1336 (9th Cir. 1970); Ingram v. Phillips Petroleum Co., 259 F. Supp. 176 (D.N.M. 1966); Becker v. Safelite Glass Corp., 244 F. Supp. 625 (D. Kan. 1965); Cream Crest-Blanding Dairies, Inc. v. National Dairy Prods. Corp., 243 F. Supp. 331 (W.D. Mich. 1965), *aff'd per curiam*, 370 F.2d 332 (6th Cir.), *cert. denied*, 387 U.S. 930 (1967); Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc., 219 F. Supp. 400 (W.D. Pa. 1963); Davidson v. Kansas City Star Co., 202 F. Supp. 613 (W.D. Mo. 1962), *rev'd sub nom*; Bales v. Kansas City Star Co., 336 F.2d 439 (8th Cir. 1964); Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541 (E.D.N.Y. 1957).

Supreme Court has spoken, however, the only remedy for those who wish to extend the Clayton Act and the Robinson-Patman Act to embrace local conduct that affects interstate commerce is the legislative process.[77]

It is important to realize that the Court had at hand sufficient material that, in another day, might have produced different results. Consider, for instance, the statements concerning § 2(a) in *Moore v. Mead's Fine Bread Co.*:

> We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local sources. . . . If this method of competition were approved. . . . [t]he profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used. . . . [b]ut the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business.[78]

If the language of *Moore* is taken at face value, it can be argued that the Court had as early as 1954 construed the Robinson-Patman Act to apply to wholly local transactions financed, even indirectly, by the treasury of a corporation operating interstate. But while the Court may have considered this possibility in *Moore* there existed interstate sales, even though they happened to be not the lower, but the higher of the prices compared under the Robinson-Patman Act. This fact made the discussion of interstate financing almost wholly dictum.

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[77] Legislative measures designed to overrule *Copp Paving* and *American Building Maintenance* have already been introduced, *See, e.g.*, S. 1284, 94th Cong. 1st Sess. (1975), which contained the following provision:

> Sec. 701. Sections 2, 2a, 3, and 7 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, (15 U.S.C. §§ 13, 13a, 14 and 18), are amended by striking out the words "in commerce" wherever the term appears and inserting in lieu thereof the words "in or affecting commerce."

BNA ANTITRUST & TRADE REG. REPORT No. 707, at D-5 (1975).

[78] 348 U.S 115, 119-20 (1954).

Moreover, as Mr. Justice Powell pointed out in *Copp Paving,* it can equally logically be argued that the language refers only to the power of Congress under the Commerce Clause. That view is probably correct since in *Moore* the Supreme Court was dealing with a Tenth Circuit dismissal of the complaint on the ground that § 2(a) should not be read to cover the challenged discrimination because such a reading would give the statute a scope taking it beyond the commerce power.[79]

The Court could have seized on a telling aspect of the legislaive history surrounding the famous deletion of expansive language from the Robinson-Patman Act.[80] The conference report, in discussing that deletion, suggests that Congress thought it had covered as much of interstate or intrastate commerce as could constitutionally be reached under the commerce power. For as the *Copp Paving* brief quotes Congressman Utterbach:

> This [expansive language] was omitted as the preceding language already covers all discriminations, both interstate and intrastate, that lie within the limits of federal authority.[81]

From this language, it might follow that Congress intended to reach to the full limits of the Commerce Clause, as courts have expanded and extended that reach, and thus that the elastic language of the Robinson-Patman Act and the Clayton Act ought similarly to expand.

The problem is that, in coming back to the express language of the Acts, it can only be concluded that the language is not elastic. Whatever may be said with respect to the Sherman Act, the "in commerce" language of the Clayton Act and the more specific and more intricate commerce language of the Robinson-Patman Act do not readily remake themselves as the prevailing view of the commerce power changes. It is striking that as courts have altered their view of the commerce power, they have not in a similar fashion altered their interpretation of the commerce requirements of the Clayton and Robinson-Patman Acts. While it is accepted statutory interpretation not to follow the literal language of the statute if it is at war with the express purpose, in the case of these Acts the purpose is hardly clearly expressed, and there is more than one possible reason for the narrow language actually adopted. There may well have been good and sufficient policy reasons for raising the interstate commerce requirement

[79] Mead's Fine Bread Co. v. Moore, 208 F.2d 777 (10th Cir. 1953).

[80] *See* notes 55-57 and accompanying text, *supra*.

[81] H.R. Report 2951, 74th Cong. 2d Sess. (1936).

as a counterbalance to lowering the proof of anticompetitive effect. So while the interpretations of the Court in *Copp Paving* and *American Building Maintenance* are not free of doubt, they represent reasonable and considered conclusions, which, in light of the predominant judicial interpretation of these statutes in the lower courts, are probably sound and are certainly preferable from the point of consistency to guide the businessman.

The Court's reference in *Copp Paving* to the necessity of a "particularized judicial determination" that proceeds from "the circumstances presented in each case," is somewhat disquieting.[82] The Court, in applying the test to the *Copp Paving* facts, concluded that the "nexus" theory is improper because the chain of connection, at least as applied to the facts in that case, extends indefinitely, but what is lacking is any attempt to articulate the degree of proximity required before conduct may be said to be in interstate commerce. The Court's allusions to "practical consequences" in preference to "apparent and perhaps nominal connections" are unilluminating at best. Mr. Justice Stewart attempted to fill the gap in *American Building Maintenance* by setting out a verbal formulation that requires, in order to be "in commerce," that a corporation must itself be "directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce."[83] Apparently the citation of *Copp Paving* immediately following the formulation indicates that the notion proceeds from *Copp Paving*. Yet the *Copp Paving* verbalization is by no means a substitute for Justice Stewart's thought—a fact in danger of being lost because of the citation to *Copp Paving*.[84]

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[82] Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197 n.12 (1974).

[83] 422 U.S. at 283, *citing* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. at 186, 195 (1974).

[84] Mr. Justice Stewart cites the *Copp Paving* opinion at page 195. There the Court said:

> In contrast to § 1, the distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce.

Id.

In this passage the Court refers to the "flow" of interstate commerce, to the "practical, economic continuity in the generation of goods and services for interstate markets." That this is a more stringent requirement than that of the "affecting commerce" doctrine is easily grasped, since through the latter the commerce power could

Now that the Supreme Court has endorsed the prevailing view of the lower courts on the reach of these statutes, several conclusions that were widely held, though by no means certain, are firmly established. The first is that the "underwriting" theory, governing the situation in which localized acts are financed from the treasury of a corporation operating in more than one state, has finally been laid to rest.[85] One possible implication of this state of affairs is that clever management by an interstate seller of goods can avoid the coverage of § 2(a) of the Robinson-Patman Act if the goods are held to have "come to rest" within a single state before reshipment to retailers in the same state. Because the Supreme Court has applied the "flow of commerce" doctrine to that kind of situation,[86] it will not always be certain that local storage is sufficient to make the Robinson-Patman Act inapplicable. But some courts in specialized situations of this sort have found the "flow of commerce" had come to an end.[87]

Sales of commodities wihin the same state in which they are manufactured are clearly not covered by the Act.[88] Clearly, raw materials shipped into a state that are substantially altered in form and then resold to retailers within the state are beyond the reach of the Act.[89] Moreover, a careful stationing of distributorships or independent sales subsidiaries can provide surer immunity from the Act. Assuming the supplier itself does not sell across state lines, any price discriminations by an autonomous local subsidiary or distributor be-

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reach wholly intrastate transactions that never moved in the "flow" of interstate commerce. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942). Nevertheless, even the flow of interstate commerce can continue, indirectly, in transactions wholly intrastate in nature. *See* Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943). Mr. Justice Stewart in *American Building Maintenance* however, has stated that a corporation must be "directly . . . in interstate commerce" and not merely in the flow of that commerce.

[85] Perhaps the most notable confrontation of the "underwriting" theory with the prevailing judicial trend of interpretation of the commerce language in the Robinson-Patman Act took place in Littlejohn v. Shell Oil Co., 326 F. Supp. 45 (N.D. Tex. 1971), *rev'd*, 456 F.2d 225 (5th Cir. 1972), *vacated on rehearing en banc*, 483 F.2d 1140 (5th Cir. 1973), *cert. denied*, 414 U.S. 1116 (1973). *See* Note, 86 HARV. L. REV. 765 (1973); Comment, *Robinson-Patman Act: "In Commerce" Jurisdictional Requirement Broadened*, 57 MINN. L. REV. 1035 (1973). For a critique of the prevailing judicial view, see Salmon, *The Robinson-Patman Act "Commercial" Requirement: The Emasculation of Moore v. Mead's Fine Bread*, 8 U.S.F.L. Rev. 497 (1974).

[86] Standard Oil Co. v. F.T.C., 340 U.S. 231 (1951).

[87] Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967).

[88] *E.g.*, Central Ice Cream Co. v. Golden Rod Ice Cream Co., 184 F. Supp. 312 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir. 1961); Lewis v. Shell Oil Co., 50 F. Supp. 547 (N.D. Ill. 1943).

[89] Bacon v. Texaco, Inc., 1974-2 Trade Cas. ¶ 75,358 (5th Cir. 1974) (per curiam), *cert. denied*, 420 U.S. 1005 (1975).

tween customers within the state will be deemed to be sales by the intrastate distributor, not the supplier, and therefore beyond the commerce requirements of the Act.[90] Indeed, one case suggests that, at least in primary-line cases, an interstate firm whose low-price sales originate entirely from within a single state to the detriment of a local competitor is beyond the reach of the Act even though that same defendant also made interstate shipment from outside the state into areas of the state in which the local competitor did not compete.[91]

But whatever the implications, the Supreme Court has resolved any remaining doubts as to the reach of the Robinson-Patman Act's interstate commerce requirement. While ambiguity remains in the application of the Clayton Act, the direction this Court would take is now clearly indicated.

II.

GOLDFARB—ANTITRUST AND THE LEGAL PROFESSION

When the Goldfarbs, a Fairfax County, Virginia, couple, challenged the minimum fee schedule promulgated by the Fairfax County Bar Association, they challenged a practice of long standing in the legal profession. It has been estimated that some 30 states and hundreds of local bar associations had adopted minimum fee schedules to advise their members of appropriate fee levels.[92] Fee schedules have most frequently been advisory, suggesting minimum fees for a variety of legal services and also for hourly and contingency rates. A large segment of the bar quite obviously has never used these schedules, but it is probable that many lawyers have referred to such schedules as an aid in calculating fees. What removed these schedules from the realm of pure suggestion was the common tendency to think of lawyers who customarily undercut the minimum fee schedules as

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[90] Borden Co. v. F.T.C., 339 F.2d 953 (7th Cir. 1964); *cf.* Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416 (5th Cir. 1972); Abramson v. Colonial Oil Co., 390 F.2d 873 (5th Cir.) (per curiam), *cert. denied*, 393 U.S. 831 (1968).

The Federal Trade Commission has decided that an independent intrastate subsidiary is beyond the Robinson-Patman Act. *E.g.*, Dan Dee Pretzel & Potato Chip Co., 54 F.T.C. 1844 (1958).

[91] Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963).

[92] Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 Harv. L. Rev. 971 (1972). In connection with the discussion of *Goldfarb v. Virginia State Bar*, the reader should be aware that the author participated in the case as counsel for one of the parties. Accordingly, inasmuch as certain aspects of the case are still in litigation, this brief discussion will be confined to those aspects that are now concluded.

engaging in a professionally unethical practice.[93] Only in recent years have state and local bar associations begun to abandon the use of such schedules.[94]

Virginia was therefore hardly unique in its use of minimum fee schedules. The Virginia General Assembly has empowered the Supreme Court of Virginia to prescribe a code of ethics governing the professional conduct of lawyers and to establish appropriate disciplinary procedures.[95] Accordingly, the Supreme Court had adopted and promulgated Canons of Ethics and, subsequently, the Code of Professional Responsibility of the Virginia State Bar. Included in the Code of Professional Responsibility were specific references to suggested fee schedules.[96] These references and the general scheme of enforcement supporting the disciplinary rules at the minimum suggest official approval of the minimum fee schedule concept. In combination with the opinions issued by the State Bar that provided disciplinary procedures for consistent undercutting of such fee schedules,[97] the Virginia rules seemed to provide a basis for the issuance of suggested minimum fee schedules by local bar associations.[98] These were the ethical rules governing the practice of law in Fairfax County when the Goldfarbs sought the services of a lawyer in connection with the purchase of a new home.

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[93] *See* ABA Committee on Professional Ethics, Opinions, Nos. 302 (1961), 585 (1962) and 323 (1970). Opinion No. 323, while conceding that undercutting alone cannot be the basis for a charge of unethical behavior, declares that undercutting combined with other evidence may be sufficient. In the context of the *Goldfarb* case, the Virginia State Bar issued an opinion to the effect that a form of prohibited personal solicitation occurs when an attorney, for the purpose of increasing his legal business, intentionally and regularly charges less than the customary charges of the local bar for similar services, as reflected in a schedule of suggested minimum fees. Virginia State Bar Opinion No. 98 (June 1, 1960). In Opinion No. 170, the Bar determined that advisory fee schedules are one element to be considered in determining a proper fee, and that habitual charging of less than the minimum fee schedule for the purpose of solicitation may constitute evidence of professional misconduct. Virginia State Bar Opinion No. 170 (May 28, 1971).

[94] Note, *Bar Association Minimum Fee Schedules and the Antitrust Laws*, 1974 DUKE L.J. 1164, 1166 (1974).

[95] VA. CODE ANN. §§ 54 *et seq.* (Supp. 1973).

[96] *See, e.g.*, EC-218: "Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees.

[97] *See* note 93, *supra*.

[98] Another instance of state approval in Virginia occurred in 1962 and 1969, when the State Bar published Minimum Fee Schedule Reports setting forth existing fee schedules promulgated by various local bar associations. The 1969 Report stated:

> The recommended minimum fee figures in the Committee's report represent the consensus recommendation of members of the Committee as to fees which should be assessed in 1969 for the legal services indicated.

To obtain a mortgage, the Goldfarbs were required to purchase title insurance, and thus to retain an attorney to search the title. They contacted a local attorney and indicated a desire to minimize costs. The attorney responded that it was the policy of his office to keep charges "in line" with the minimum fee schedule of the local bar association. The Goldfarbs then surveyed 36 other lawyers to inquire about fees for title examination services, and received 19 written replies generally suggesting adherence to the local fee schedule. As a result, the Goldfarbs ended up paying the original attorney contacted $522.50 for a title examination—precisely the amount called for under the minimum fee schedule promulgated by the Fairfax County Bar Association.[99]

The Goldfarbs brought a class action against the Fairfax County Bar Association, the local association that had issued the suggested fee schedule, and the Virginia State Bar, charging that the promulgation of such a schedule constituted a violation of § 1 of the Sherman Act.[100] After a trial on the issue of liability, the district court held that the minimum fee schedule violated the Sherman Act.[101]

On appeal, the United States Court of Appeals for the Fourth Circuit reversed.[102] The circuit court held that the Sherman Act was inapplicable because as a matter of law the advisory minimum fee schedule did not have a sufficient effect upon interstate trade or commerce, and, in addition, because the practice of law was a learned profession and thus not "trade or commerce" within the meaning of § 1 of the Sherman Act. The Supreme Court granted the petition for certiorari,[103] and, in its own words, was:

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[99] The Fairfax County Bar Association minimum fee schedule was promulgated in 1969 together with the bar associations of Loudoun and Arlington Counties and the City of Alexandria. For title examinations, the fee schedule called for a minimum fee of 1% of the first $50,000 of the loan or purchase price, whichever is greater, one-half of 1% from $50,000 to $100,000, one-quarter of 1% between $100,000 and $1,000,000 and a negotiated amount above $1,000,000.

[100] 15 U.S.C. § 1 (1970). The suit sought treble damages and injunctive relief pursuant to §§ 4 and 16 of the Clayton Act. 15 U.S.C. §§ 15, 26 (1970).

[101] 355 F. Supp. 491 (E.D. Va. 1973). The trial court held that the role of the state agencies, including the Virginia State Bar, was state action exempt from antitrust challenge under the authority of Parker v. Brown, 317 U.S. 341 (1943). Accordingly, it dismissed the action as to the State Bar, leaving the local bar association the only defendant in the case.

The damage issue was severed and remains to be tried.

[102] 497 F.2d 1 (4th Cir. 1974). The opinion of the Court of Appeals for the Fourth Circuit occasioned considerable comment. *See, e.g.*, Note, *Bar Association Minimum Fee Schedules and the Antitrust Laws*, 1974 DUKE L. J. 1164 (1974); Note, *Minimum Fee Schedules—The Battle and the War: Goldfarb at the Fourth Circuit*, 60 VA. L. REV. 1415 (1974); *Fourth Circuit Review*, 32 WASH. & LEE L. REV. 417, 419 (1975).

[103] 419 U.S. 963 (1974).

> [t]hus confronted for the first time with the question of whether the Sherman Act applies to services performed by attorneys in examining titles in connection with financing the purchase of real estate.[104]

Chief Justice Burger, speaking for a unanimous Court, reversed and held that the promulgation of a minimum fee schedule by lawyers was a violation of § 1 of theSherman Act.[105] The Supreme Court's opinion viewed the publication of the minimum fee schedule as price fixing, and held that there was a sufficient effect on interstate trade or commerce to trigger applicability of the Sherman Act, and that there was no exemption conferred on the fee schedule by virtue of the state action exemption doctrine of *Parker v. Brown*.[106] Finally, the Supreme Court held that the so-called learned profession exemption did not exist.

A. *Lawyers' Minimum Fee Schedules as Price Fixing*

Price fixing is a per se violation of the Sherman Act.[107] Thus, an agreement by members of a bar association to adhere to a schedule of prices would be a classic case of price fixing, leaving aside the questions of immunity, exemption or effect on interstate commerce. The County Bar, however, argued that the advisory fee schedule was promulgated only to enable members to comply with ethical regulations, and was not accompanied by any agreement to adhere to the suggested fees.

Chief Justice Burger agreed that a purely advisory fee schedule, to provide guidelines or to facilitate an exchange of general price information, would present a different case.[108] But the Chief Justice

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[104] Goldfarb v. Virginia State Bar, 421 U.S. 773, 780 (1975).

[105] *Id.*

[106] 317 U.S. 341 (1943).

[107] Although § 1 of the Sherman Act outlaws restraints of trade, in general only *unreasonable* restraints actually violate the statute. Standard Oil Co. v. United States, 221 U.S. 1 (1911). Some practices, however, are regarded as so inherently anticompetitive that they are deemed to be per se violations, and inquiry into their reasonableness in a particular case is not permitted. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). Price fixing is in this category. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[108] The opinion cites in that connection American Column and Lumber Co. v. United States, 256 U.S. 377 (1921) and Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 580 (1925). But it also cites United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950), in which the Supreme Court held unlawful a "suggested" price schedule, without enforcement mechanisms, because "[s]ubtle in-

viewed the facts presented in *Goldfarb* as a classic illustration of price fixing. First, in the view of the majority, a purely advisory fee schedule would not include the "fixed, rigid price floor" found in the Fairfax schedule, nor would it be framed in terms of future transactions rather than past standards. Second, the enforcement mechanism provided by the State Bar was re-enforced by the "assurance that other lawyers would not compete by underbidding."[109] Concluding that the price stabilizing activities of the bar associations in *Goldfarb* were "unusually damaging" because consumers purchasing homes necessarily were unable to escape the effects of the minimum fee schedules, the Court decided that the promulgation of the schedule was an agreement to fix prices with a substantial effect on competition.[110]

Whatever the merits of the Court's analysis of the facts presented in *Goldfarb*, the suggestion that a pure exchange of information or a wholly advisory fee schedule, not backed up by disciplinary rules and regulations, would present a different case is intriguing.[111] The dissemination of fee information for giving legal services within a particular community would be analogous to trade association publication of industry statistics, which has been generally approved by the Supreme Court.[112] Lawyers will be given some pause, however, by *United States v. Container Corp. of America*,[113] in which an information exchange program involving the most recent prices charged to specific customers was held to have violated the Sherman Act.[114]

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fluences may be just as effective as the threat of use of formal sanctions to hold people in line." *Id.* at 489.

[109] 421 U.S. at 781-82.

[110] *Id.* at 782-83.

[111] The suggestion may be wholly illusory in the case of bar associations that have had minimum fee schedules since this would be sufficient evidence of past "price fixing" which, when combined with exchange of information and uniformity of price, might under available precedent be enough to trigger Sherman Act liability. *See, e.g.*, Milgram v. Loew's, Inc., 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

[112] *See, e.g.*, Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); United States v. American Linseed Oil Co., 262 U.S. 371 (1923).

[113] 393 U.S. 333 (1969).

[114] Upon requests from competitors, the appellees in *Container* furnished information as to the most recent price charged or quoted, with the expectation of reciprocity and with the understanding that quotes represented the price currently being bid. The appellees requested such information from their competitors only when unable to obtain it from another source. Although recognizing that the exchange of price information did not involve an agreement to adhere to a price schedule, *id.* at 334, the Court nonetheless found that the exchange of such information tended to stabilize prices within a "narrow ambit." Thus, the Court reasoned, the exchange had an anticompetitive effect. *Id.* at 336-37. The Court held that the reciprocal exchange of price informa-

Even the language of that case, however, suggests that appropriate information exchanges in the context of the legal profession might well escape censure:

> Price information exchanged in some markets may have no effect upon a truly competitive price. But the corrugated container industry is dominated by relatively few sellers. The product is fungible and the competition for sales is price. The demand is inelastic. . . .[115]

Given the care taken by the Court to avoid overruling or limiting *Maple Flooring*, the result seems to be that the Supreme Court is still of the view that the "peculiar circumstances of each case" must be examined;[116] and if the structure of the industry, the nature of the product and the mode of competition are the relevant factors, as *Container* suggests, the legal profession may well not be the kind of industry in which the Supreme Court is likely to find that a price information exchange has a harmful effect.

For instance, in contrast to the findings concerning the corrugated container industry, which was said to be dominated by relatively few sellers, the legal profession resembles much more closely the market for agricultural commodities, in which the number of sellers is so large that a variation in price by any one of them will have no effect whatever.[117] Similarly lawyers are not fungible although it can be

tion was concerted action sufficient to establish the combination or conspiracy ingredient of § 1, and that the resulting price stabilization had an anticompetitive effect, chilling the vigor of price competition.

The implications of the *Container* decisqon for each element of a § 1 violation are discussed in Comment, 83 HARV. L. REV. 227 (1969).

[115] 393 U.S. at 337. The Supreme Court has noted that "the collection and dissemination of trade statistics are in themselves permissible and may be a useful adjunct of fair commerce . . . ." Sugar Institute, Inc., v. United States, 297 U.S. 553, 599-600 (1936).

[116] Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 585 (1925). In *Maple Flooring*, the exchange of average cost data, freight rates, and summary sales statistics was held not to constitute an unlawful restraint on commerce. The sales statistics, which included price information, embraced only past and closed transactions and did not include either the names of purchasers or current prices. The information was transmitted to the members in summarized form by the secretary of the Association, without revealing the identity of members in connection with the information transmitted. The Court explained that "the members of trade associations [do not become] conspirators merely because they gather and disseminate information . . . bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses . . . ." *Id.* at 584.

[117] On the other hand, an enterprising plaintiff's attorney might theorize that within the market for legal services there are certain oligopolistic submarkets, domi-

argued that for certain simple legal services, such as the preparation of a simple will, an incorporation, or a name change, the *products* are fungible. Moreover, competition at least historically has not depended on price, even in the absence of minimum fee schedules.[118]

In such a market situation, assuming that *Container* does not articulate a per se rule,[119] it seems likely that at least some of the purposes offered as justifications for the institution of the minimum fee schedules could be achieved by this more restricted form of information exchange.[120] It can legitimately be argued that availability of price information can be crucial to the consumer, who thereby is able to discuss fees with a lawyer armed with some knowledge of the norm. New lawyers charging fees for the first time, or lawyers newly arrived in a community have a proper interest in the general level of fees in that community. Finally, judges required to award reasonable attorneys' fees can use available fee information.[121]

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nated by large, urban law firms. A court accepting this theory might find an antitrust violation, relying on *Container's* implication that in an oligopolistic market an exchange of fee information would necessarily have an illegal chilling effect on competitive pricing. *See* 393 U.S. at 337.

[118] Some assign as a reason for that observable fact the ethical strictures against lawyer advertising now being challenged in a variety of cases brought under the antitrust laws or the first and fourteenth amendments to the United States Constitution. *E.g.*, Consumers Union, Inc. v. American Bar Ass'n, No. 75-0105 R. (E.D. Va., filed Feb. 27, 1975) (alleging that rules prohibiting the publication of lawyers' fees violate the first and fourteenth amendment rights of consumers and consumer organizations); Person v. Ass'n of the Bar of the City of New York, No. 75-C-987 (E.D.N.Y., June 23, 1975) (alleging that advertising restrictions violate § 1 of the Sherman Act, the first amendment, and the Civil Rights Act of 1866, 42 U.S.C. § 1983 (1970)). *See* BNA ANTITRUST & TR. REG. REPORT No. 720 at A-10 (1975). Furthermore, senior officials within the Antitrust Division of the Justice Department have warned that the advertising rules may be subject to antitrust attack. *Id.* at A-7. An ABA committee has recently recommended that the advertising ban be dropped and that ethical codes be changed to permit responsible publicity. *Id.* No. 720, at A-19.

The first amendment issues raised by these suits may be clarified by the Supreme Court in a case dealing with the constitutionality of laws prohibiting the advertisement of prescription drug prices. Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris. noted*, 420 U.S. 971 (1975).

[119] Lower courts do not appear to construe it as a per se rule. *See, e.g.*, Wall Products Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971).

[120] For an analysis of the social and economic aspects of these justifications, see Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972).

[121] Numerous state court decisions have approved the use of minimum fee schedules as persuasive evidence of a reasonable fee. *See, e.g.*, Junker v. Junker, 188 Neb. 555, 198 N.W.2d 189 (1972); State ex rel. Baker v. County Court, 29 Wis.2d 1, 138 N.W.2d 162 (1965); Buckles v. Continental Cash. Co., 197 Ore. 128, 252 P.2d 184 (1953); Succession of Weil, 205 La. 214, 17 So.2d 255 (1944); Broughton v. Nance, 244

Presumably, those valid purposes would be weighed in any assessment of the "peculiar circumstances of each case" and might well provide the different case to which Chief Justice Burger alluded in the *Goldfarb* opinion. There would seem to be little reason why such activities should be permitted to industrialists in the trade association context but denied to lawyers in the bar association context.

B. *Effect on Interstate Commerce*

Price fixing may not violate § 1 of the Sherman Act if it does not restrain trade "among the several states." The acts complained of must either (1) occur within the flow of interstate commerce,[122] or (2) substantially affect interstate commerce.[123] Because the Goldfarbs conceded that the activities of the local bar association did not occur within the flow of interstate commerce, the question for determination in *Goldfarb* was whether the challenged activities met the "substantial effect" test.

The Fairfax County Bar Association contended in the Supreme Court, as the Fourth Circuit had held,[124] that the promulgation of an advisory fee for title examination did not have a substantial effect upon interstate commerce. The local bar association argued that no proof whatever of any actual effect could be found in the record and that since every aspect of the Goldfarbs' purchase of a home occurred in Virginia, no proof could have been shown.[125]

Ala. 499, 14 So.2d 505 (1943); Cox v. State Ind. Accident Comm., 168 Ore. 508, 123 P.2d 800 (1942).

[122] Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 739 n.3 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954); United States v. Yellow Cab Co., 332 U.S. 218 (1947).

[123] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948):

> [G]iven a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence.

Whether the alleged restraint can be said to cause a substantial adverse effect on interstate commerce must be determined on examination of the record. *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 202-03 (1974).

[124] 497 F.2d 1, 15-18 (4th Cir. 1974). The District Court, however, had been satisfied that interstate commerce was sufficiently affected to sustain jurisdiction under the Sherman Act. 355 F. Supp. 491, 497 (E.D. Va. 1973).

[125] 421 U.S. at 783. The Goldfarbs resided in Virginia prior to their purchase of a new home, all transactions relating to the purchase of the home, including the negotia-

Moreover, the Fairfax Bar Association argued that courts have often examined whether a challenged activity was "essentially local," and a finding of that sort might suggest the absence of sufficient effect on interstate commerce.[126] Finally, the local bar association contended that the "effect on commerce" test required a "substantial" effect.[127] The fact that home buyers, mortgage money and loan guarantees may in some other cases cross state lines was characterized as merely incidental and remote from a lawyer's examination of title to the property. Accordingly, under the "substantial effect" formulation, the Fairfax Bar Association contended, the issuance of the minimum fee schedule was without the requisite effect on interstate commerce.

The Supreme Court reversed the Fourth Circuit on the interstate commerce point.[128] For Chief Justice Burger, the arguments of the Fairfax County Bar Association misconceived the nature of the role of legal services in real estate transactions. The district court had found that a significant portion of funds for the purchase of homes in Fairfax County came from outside Virginia and that loans on Fairfax County real estate were frequently guaranteed by agencies of the United States Government headquartered in the District of Columbia.[129] For the Court, it was appropriate to infer that some plaintiffs in the class were required to take the title search services because of these interstate transactions.

> The necessary connection between the interstate transactions and the restraint of trade provided by the minimum fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a

tion for sale, contract of sale, title examination, securing mortgage loan, settlement and all legal services occurred within Virginia.

[126] 421 U.S. at 784 n.13. *See, e.g.*, United States v. Yellow Cab Co., 332 U.S. 218, 231 (1947); Lawson v. Woodmere, Inc., 217 F.2d 148 (4th Cir. 1954); Diversified Brokerage Services, Inc. v. Neil Adamson Co., 1974-2 Trade Cas. ¶ 75, 362 (S.D. Iowa 1974).

[127] Page v. Work, 290 F.2d 323, 333-34 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961) (the challenged conduct must have a "direct and substantial, and not merely inconsequential, remote or fortuitous" effect on interstate commerce); *see, e.g.*, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416, 418 (5th Cir. 1970); United States v. Bensinger Co., 430 F.2d 584, 588 (8th Cir. 1970); Diversified Brokerage Services, Inc. v. Neil Adamson Co., 1974-2 Trade Cas. ¶ 75, 362 (S.D. Iowa 1974). The Fourth Circuit accepted this argument. 497 F.2d at 17 n.51.

[128] 421 U.S. 783-85.

[129] 355 F. Supp. at 494. The Court of Appeals did not disturb the district court's findings of fact, but rather disagreed with its conclusions of law. 497 F.2d at 16.

> valid title of the borrower. . . . Thus a title examination is an integral part of an interstate transaction. . . .[130]

Consequently the Court concluded that where legal services are as a matter of law or practical necessity an "integral" part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes.[131]

An examination of the treatment of the interstate commerce issue suggests that the Court was resolved not to be deflected from its analysis of the minimum fee schedules by jurisdictional technicalities. Beyond that, it is difficult to be very clear about the import of the decision.

The cases cited by the Court to support its "nexus" holding are hardly very strong. Indeed, its discussion of *United States v. Yellow Cab*,[132] on which the local bar association relied heavily, is confusing. Chief Justice Burger rejected the analogy between the search of title in a real estate transaction and the intrastate taxi ride from home to railroad station that frequently initiates an interstate railroad journey.[133] While that journey for many people is an "integral" part of the trip, the Supreme Court found it distinct and separate in terms of "time and continuity." Why it is any more distinct and separate than is a title search in connection with the purchase of a home does not emerge clearly from the opinion. Both the taxi cab ride and the title search are distinct in time, though related; they involve different individuals from the principal transactions; in terms of continuity, they are indistinguishable.

Other cases cited by the Court are equally infirm precedents. *United States v. Frankfort Distilleries*[134] concerned a conspiracy to compel interstate producers of alcoholic beverages to enter into price maintenance contracts, which is a radically different situation from that present in *Goldfarb*. *Mortague & Co. v. Lowery*[135] likewise dealt with refusals by interstate sellers of tile to deal with a California customer. Even *United States v. Women's Sportswear Manufacturers Association*[136] involved a restraint operating directly on admittedly interstate commerce. As such, none of these cases illumi-

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[130] 421 U.S.at 783-84 (footnotes omitted).

[131] *Id.* at 785.

[132] United States v. Yellow Cab Co., 332 U.S. 218 (1947).

[133] 421 U.S. at 784 n.13.

[134] 324 U.S. 293 (1945).

[135] 193 U.S. 38 (1904).

[136] 336 U.S. 460 (1949). The Court discussed this case and those cited at notes 134 and 135 *supra*, in 421 U.S. at 784-85.

nate the degree of connection required between a restraint and interstate commerce before it can meet the Sherman Act standard of effect. In fact, reading them at face value and as traditionally interpreted, the cases might be thought weak in their support of the Court's conclusion.

If one accepts the premise that all services necessarily connected with the interstate purchase of a home are part of interstate commerce, [137] presumably the same logic would apply to a variety of activities hitherto thought wholly intrastate and without any effect on interstate commerce. Under the Court's reasoning, it may well be that the sort of termite inspection nearly universal in certain parts of the country in connection with the sale of houses is in interstate commerce. But the portion of the journey bringing the new homeowners from railroad stationto the new home is beyond the reach of the Sherman Act. Whether this paradoxical state of affairs leads one to have much confidence in the "particularized judicial determination" called for by Mr. Justice Powell in *Copp Paving* is very much in doubt.

C. *State Action Exemption*

A restraint of trade, otherwise unlawful under § 1 of the Sherman Act, may be saved in certain circumstances by the state action exemption.[138] Because minimum fee schedules in some states are associated with the state's regulation of the legal profession, the question of state action exemption must ordinarily be confronted in dealing with the fee schedule issue.

The Fourth Circuit had affirmed the district court's conclusion that the State Bar was not liable because its conduct was state ac-

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[137] There has been little unanimity among the federal courts concerning the interstate character of real estate transactions and mortgage lending institution activities. *See* Marston v. Property Managers Ass'n, 422 F.2d 836 (6th Cir. 1970) (per curiam); Bratcher v. Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967) (per curiam); Stavrides v. Mellon Nat'l Bank & Trust Co., 353 F. Supp. 1072 (W.D. Pa.), *aff'd*, 487 F.2d 953 (3d Cir. 1973); Cotillion Club, Inc. v. Real Estate Bd., 303 F. Supp. 850 (E.D. Mich. 1964); United States v. Chicago Mortgage Bankers Ass'n, 123 F. Supp. 251 (N.D. Ill. 1954).

[138] Parker v. Brown, 317 U.S. 341 (1943). The precise contours of the exemption are unclear and courts have defined the requirements for coming within the scope of the exemption in different ways. *Compare*, E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966), *with* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). *See* 16 J. VONKALINOWSKI, BUSINESS ORGANIZATIONS § 46.03 (1975); Comment, 71 COLUM. L. REV. 140 (1971); Comment, 55 VA. L. REV. 325 (1969).

tion, and therefore exempt from Sherman Act applicability. Specifically, the court held that the State Bar role met three standards for valid state action: the State Bar's activity was for the benefit of the public, took place as the result of legislative command, and was actively supervised by the state.[139] The Fourth Circuit found that while the Fairfax County Bar Association intended its fee schedule to be of benefit to the public, it was neither actively supervised by the state nor did it receive its efficacy from legislative command. Therefore, its activity was not exempt under the doctrine of *Parker v. Brown*.[140]

Chief Justice Burger found it unnecessary to engage in a complete *Parker v. Brown* analysis since in his view the case never got past the threshold inquiry. For the majority, the initial question in determining whether *Parker* was applicable was whether the alleged anticompetitive activity, said to be state action exempt from Sherman Act liability, "is required by the State acting as sovereign."[141]

Because minimum fee schedules in Virginia were required neither by legislative enactment nor Supreme Court rule, the Court ruled, their promulgation by the State Bar and the local bar association was not an activity "required by the State acting as sovereign." Mere mention of schedules in ethical codes put into effect by the Supreme Court was no sufficient, nor was the apparent approval of minimum fee schedules by the State Bar pursuant to delegation by the Virginia Supreme Court of the power to issue ethical opinions.

> It is not enough that, as the initial County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.[142]

Then came the startling aspect of the Court's handling of the *Parker* issue. Although the Fourth Circuit had held the actions of the State Bar exempt as a state agency,[143] the Supreme Court declined to confer the exemption on the State Bar and held it liable along with the local bar association.

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[139] 497 F.2d at 4-12.

[140] *Id.* at 12-13.

[141] 421 U.S. at 790.

[142] *Id.* at 791.

[143] Even dissenting Judge Craven had declined to find liability because, in his view, the participation of the State Bar in the matter was of minimal importance. 497 F.2d at 21 (Craven, J., concurring and dissenting).

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.[144]

Because the State Bar had supplied the disciplinary support for preventing deviation from the county bar minimum fees, the Supreme Court viewed it as having volunteered to join in what otherwise would have been a totally private anticompetitive activity. In that posture, the State Bar could not claim Sherman Act exemption.[145]

The Supreme Court's view, while justifiable under *Parker*, may not be wholly realistic. Neither legislature nor Supreme Court in Virginia, or in any other state, is in session year round, and much of the business of state government—as at any other level of government—is delegated to subsidiary agencies. Particularly in the regulated sector of the economy, state agencies are established to do the job of regulating, and are expected to implement the regulatory scheme without detailed instructions from the legislature.

In the legal profession, in Virginia, the legislature and the Supreme Court established a state agency to regulate the profession. This agency, the State Bar, undertook to regulate the profession armed with such policy direction as the legislature and the Supreme Court were able to furnish.[146] Admittedly, there have been no direct

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[144] 421 U.S. at 791 (footnote omitted).

[145] *Id.* at 791-92. The Supreme Court opinion cites the State Bar's fee schedule reports as providing the impetus, on at least two occasions, for the adoption of the minimum fee schedules by the Fairfax County Bar Association. Moreover, the State Bar's ethical opinions gave lawyers every reason to adhere to the schedules because the threat of professional discipline for their disregard was clear. The opinions without the threat would have induced compliance, in the view of the Supreme Court, because lawyers would be unlikely to risk departure from what was considered to be ethical professional behavior. *Id.* at 791 n.21.

[146] Those guidelines in Virginia included the Canons of Ethics and the Code of Professional Responsibility, both promulgated by the Supreme Court. Canon 12 of the Canons of Ethics provided that, in setting a fee, a lawyer may properly consider, among other things, "the customary charges of the Bar for similar services." Canon 12 went on to provide that, in determining those customer charges, a lawyer could properly "consider a schedule of minimum fees adopted by a Bar Association." Moreover, the Virginia Code of Professional Responsibility, which succeeded the Canons of Ethics in 1971 and was adopted as part of the Virginia Supreme Court Rules, provides that "suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees." Virginia Code of Professional Responsibility, EC 2-18. Similarly DR 2-106(B)(3) of the Code of Professional Responsibility provides that one factor to be considered in determining the reasonableness of

orders that bar associations shall adopt minimum fee schedules, but there is clear evidence of consistent approval of the minimum fee schedule concept.

Armed with that approval, it can be argued that the State Bar undertakes a regulatory role. Among its actions are the issuance of advisory opinions, at least two of which seem to demonstrate the intention to prohibit personal solicitation, an ethics offense, by the use of minimum fee schedules.[147] Both opinions rely upon the fee schedule concept and declare that consistent disregard of the minimum fee provided in a local advisory schedule may constitute evidence of professional misconduct if it is undertaken for the purpose of solicitation. Furthermore, the State Bar published Minimum Fee Schedule Reports. The 1969 Report included language making clear that the State Bar Committee was recommending reasonable fees for certain legal services.[148]

What existed in *Goldfarb*, then, was policy direction from the State "acting as sovereign" and regulatory activity by the State Bar. To say that minimum fee schedules were not required by the Supreme Court, while technically correct, somewhat misses the point. To those whose conduct was regulated by the State Bar, there was likely very little question where the Commonwealth of Virginia stood on the issue. No Virginia lawyer could afford to anticipate the Supreme Court's disregard of the clear policy directions, which governed those lawyers for all practical purposes, in favor of some requirement of an explicit mandate.

Moreover, the Court's surprising announcement that the State Bar should not be considered a state agency for the purpose of this case requires some examination. Chief Justice Burger agreed that the State Bar was a state agency "for some limited purposes. . . ."[149] Presumably, those "limited purposes" include the regulation of the ethical practices of the legal profession, which is precisely what the State Bar was doing by issuing its ethical opinions and minimum fee schedule reports. Furthermore, the notion that a state agency can lose its state identity for certain purposes, according to a set of standards that are not clearly defined anywhere in the Court's opinion, is puzzling, and is not really illuminated by the citations in the opinion.[150]

a fee is "[t]he fee customarily charged in the locality for similar legal services." Virginia Code of Professional Responsibility, DR 2-106(B)(3).

[147] Virginia State Bar Opinion Nos. 98 (June 1, 1960) and 170 (May 28, 1971).

[148] Minimum Fee Schedule Report for Virginia State Bar (1969).

[149] 421 U.S. at 791.

[150] The Court cited Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973). But in that

In addition, the Supreme Court stated that the State Bar's fee schedule reports "provided the impetus for the county bar, on two occasions, to adopt minimum fee schedules."[151] Assuming the State Bar to be a state agency with regulatory power over the legal profession, it must have seemed to the local bar association that the State Bar's recommendation as to reasonable fees, together with the allusion to minimum fee schedules in the Code of Professional Responsibility, constituted a strong indication that minimum fee schedules were to be adopted in the local communities. To say after all of this, as Chief Justice Burger did, that what is involved is "essentially a private anticompetitive activity" joined voluntarily by the State Bar is a distinctively original assessment of the facts in the case.[152]

The import of the Court's opinion is that a state legislature can authorize a minimum fee schedule on a statewide basis by explicit enactment. It seems clear that a legislature may not permit blatantly anticompetitive activity without some special justification.[153] But where a state legislature, after the *Goldfarb* decision, had determined the minimum fee schedule concept for good faith polity reasons, it would require a bold judge indeed to overturn the statute on Sherman Act grounds.[154] Whether any legislature will take that step, however, is very much open to doubt.

D. *Learned Profession Exemption*

For the first time, the Supreme Court squarely faced the issue whether there existed a "learned profession" exemption from the

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case, in the context of a hearing by the Alabama State Board of Optometry in connection with the possible revocation of licenses to practice optometry, the Supreme Court held that the Board was disqualified on grounds of possible personal interest. The case is therefore not very instructive, since no adjudicative hearing was involved in *Goldfarb*—indeed no disciplinary proceeding involving minimum fee schedules had ever been instituted in Virginia—and the notion of pecuniary self interest, fairly clear in *Berryhill*, was virtually totally absent with the State Bar. While the State Bar is governed by practicing lawyers, it includes all practicing lawyers in the state, as the Alabama State Board of Optometry did not include all optometrists and the financial status of the leaders of the State Bar would in no way be affected by the presence or absence of the minimum fee schedule concept. Finally, in *Berryhill*, the State Board had filed the same case in a state court seeking an injunction against the practices complained of, leading the Supreme Court to doubt its total objectivity in the subsequent hearing. This factor was totally absent in *Goldfarb*.

[151] 421 U.S. at 791 n.21.

[152] *Id.* at 792.

[153] *Cf.* Norman's On the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971).

[154] *Cf.* Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966).

antitrust laws.[155] In other cases, from time to time, the issue had been briefly touched on in passing.[156] In *Goldfarb*, however, a square holding on the subject was necessary, since anticompetitive activity by lawyers might still have been lawful if governed by the exemption.

Two major arguments proposing some form of learned profession exemption were presented to the Court. First, it was argued that the Sherman Act, extending only to trade or commerce, did not embrace the learned professions, both as a matter of congressional intent and also in line with the interpretation of that statute by judicial construction. Second, it was suggested that even though a total exemption might not exist, the status of the learned professions and the competing policies reflected by professional regulation necessitated a different treatment of restrictions in the professional context than in the normal industrial context. In effect, it was argued that courts ought to assess individual restrictions on their merits, weighing their justifications, rather than assuming that the per se rules applicable in other contexts ought mechanically to be applied in the case of the learned professions.

The Supreme Court concluded there was no total exemption from the Sherman Act. On the premise that Congress had intended to reach as far as it could under the Commerce Clause, Chief Justice Burger stated that no exclusion was intended and that there was nothing inherent in a learned profession that rendered it unfit for antitrust treatment. Moreover, the Court did not accept the suggestion that the restrictions on the legal profession were for the benefit of the public. Instead, the Court concluded that the practice of law has a business aspect and that these aspects are controlled by the antitrust laws.

> In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.[157]

Then, in a footnote that may become as famous as the original footnote 17, the Court may have agreed with the second aspect of the

[155] 421 U.S. at 785-88.

[156] *See, e.g.*, United States v. Oregon State Medical Society, 343 U.S. 326, 336 (1952); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 492 (1950); American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 610 (1935); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 436 (1932).

[157] 421 U.S. at 788.

learned profession exemption argument, namely that the learned professions deserved special treatment under the antitrust laws:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.[158]

The Court was, however, careful to say that it was expressing its views only on the situation presented in *Goldfarb*.[159]

Footnote 17 will undoubtedly turn out to be crucial. If the Court had simply declared that no learned profession exemption existed, it would have been open to lower courts to infer that no special treatment for professions was to be permitted. Nevertheless, both the local bar association and the Goldfarbs argued in their briefs before the Court that some form of special treatment, taking into account the public interest aspects of the profession, ought to be balanced against the policies of the antitrust laws.

For instance, the question of price advertising, now very clearly in controversy in a number of courts,[160] prohibited by clear rules of ethics of the legal profession, would be treated quite differently under

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[158] *Id.* at 787-88 n.17.

[159] Interestingly, this mode of analysis is different from the approach adopted in *Gordon* and *NASD*, where immunity rather than modified application of the antitrust laws was chosen. *See* text accompanying notes 202-22 *infra*. *But cf.* Jocobi v. Bache & Co., Inc., 520 F.2d 1231 (2d Cir. 1975).

[160] *See, e.g.*, New York Pub. Interest Research Group v. Regents, No. 74-2260 (2d Cir., March 17, 1975) (per curiam) (allowing pharmacists to intervene as of right in action seeking to enjoin enforcementof state regulation prohibiting price advertising of prescription drugs); Person v. Ass'n of the Bar of the City of New York, No. 75-C-987 (E.D.N.Y., June 23, 1975); Consumers Union, Inc. v. American Bar Association, No. 75-0105-R (E.D. Va. February 27, 1975); Virginia Citizens Consumers Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris. noted*, 429 U.S. 971 (1975), argued Nov. 11, 1975, 44 U.S.L.W. 3297; Mississippi State Bd. of Pharmacy v. Steele, No. 48-2121 (Miss. 1975) (regulations prohibiting drug price advertisement held violative of private rights and contrary to public interest); Indiana Pub. Interest Group v. Cohan, No. 36196 (Indiana Cir. Ct., filed August 27, 1975); State v. Bd. of Pharmacy, No. 41707 (Hawaii Cir. Ct., September 26, 1974) (consent judgment allowing reasonable advertising).

the modified learned profession doctrine than under the more conventional application of the Sherman Act.[161] Moreover, the ethical rules against improper solicitation would run afoul of the Sherman Act strictures on division of markets, which in the normal industrial context are illegal per se.[162] Presumably, the ethical rules against charging whatever the traffic would bear for legal services, pricing on a contingent basis for criminal cases or fee-splitting for referrals would be improper if the Sherman Act were held to apply unmodified to the legal profession.

Footnote 17 thus opens the way for the courts to consider reasonable justification for professional restrictions. And yet it is clear that, under the rule of reason cases, the proper justification must be adequate to justify fully the restriction, and the restriction itself cannot be more extensive than necessary to achieve a legitimate purpose.[163] Meeting such a standard will pose a substantial problem for the professions.

It had been argued to the Supreme Court that the introduction of price competition into the legal profession would be destructive, not only of the profession in its current form, but of quality legal services. The argument depends upon the economic theory of destructive competition, which teaches that, when price comparisons are determinative to most consumers and when those consumers are unable to make quality comparisons among products, there exists a positive disincentive for the investment of time in producing quality products.[164] The cost of shortcuts is lower, thereby providing a more attractive price to the consumer who cannot tell the difference in quality. The greater the difficulty of the consumer in judging quality:

> the greater the temptation of competitors to cut corners, since the competitor that skimps does not at once lose all its customers while the one that scrupulously maintains quality may be inadequately rewarded for the higher costs of doing so.[165]

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[161] *See, e.g.*, United States v. Gasoline Retailers Ass'n, Inc., 285 F.2d 688 (7th Cir. 1961).

[162] United States v. Topco Associates, Inc., 405 U.S. 596 (1972); Timken-Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

[163] *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967); Standard Oil Co. v. United States, 221 U.S. 1 (1911); Oppenheim, *Federal Antitrust Legislation; Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1151 (1952).

[164] The theory is discussed in 2 KAHN, THE ECONOMICS OF REGULATION 176 (1971).

[165] *Id.*

The Supreme Court dismissed the argument with the remark that this is the classic basis for seeking exemption from the antitrust laws, implying that such exemption, if it is to be awarded, must come from Congress.[166] It is obviously possible that price competition will serve to lower the prices for legal services, a concomitant of which may be that the quality of legal services is also in some respects lowered. It has been suggested, however, that some reduced quality of some legal services is not entirely bad since lower costs will lead to greater consumption of legal services. And while there may be a number of clients who have justifiable complaints against lower quality legal services, there will presumably also be many clients who benefit by availing themselves even of greatly stripped down legal services. If the result is, on the whole, cheaper but more widely available legal services, it may well be worth the price.

The Supreme Court's opinion in *Goldfarb* acknowledges that states have a legitimate interest in regulating the ethical standards of the legal profession. Moreover, the opinion recognizes that the state may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."[167] This statement, when taken together with the special treatment suggested for the professions, means in all likelihood that an adequate state justification for restrictions on professional activity will be upheld under the rule of reason. But what is required by *Goldfarb* is that restrictions not justified in the public interest be removed, and that any restrictions that are more extensive than required by a public interest standard be narrowed and focused on the policy objective sought to be obtained. General references to the dignity of the profession and its financial well-being will not, in this formulation, be regarded as sufficiently compelling to justify anticompetitive behavior. *Goldfarb* permits a state, after careful consideration of the policy objective sought to be attained in bar regulation, either to enact statutes or to issue Supreme Court rules that will immunize required conduct from the antitrust laws.[168] Members of the legal profession, and those charged with regulation and responsibility for the bars in each of the states, should be prompted by the

[166] 421 U.S. at 786.

[167] *Id.* at 792, *citing* United States v. Oregon State Medical Society, 343 U.S. 326, 336 (1952); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 611-13 (1935).

[168] Note that no immunity is available in suits challenging the constitutionality of regulated conduct, although the state justification will be balanced against the rights restricted. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971).

decision in *Goldfarb* to rethink much of what has been for years taken for granted.

III.

GORDON AND NASD—ANTITRUST IN THE SECURITIES INDUSTRY

During the past Term, the Supreme Court handed down two decisions that illuminate application of the antitrust laws in a regulated industry setting.[169] The fact that these two decisions took place in the securities industry is of special interest, since there more than in any other regulated industry, the cases have attempted to delineate the antitrust—regulation boundary.

The principles underlying application of antitrust to the securities industry were initially articulated by the Supreme Court in *Silver v. New York Stock Exchange*.[170] There, two broker-dealers, not members of the New York Stock Exchange, made arrangements with members for direct-wire telephone connections, which were essential for business purposes. The Exchange granted temporary approval, but subsequently ordered its members to remove the connection. In a suit charging that the NYSE's conduct violated §§ 1 and 2 of the Sherman Act,[171] the district court granted summary judgment for the plantiffs. Although the Exchange had authority to regulate its members' dealings in listed securities, in the court's view, any relations with nonmembers in connection with over-the-counter stock transactions were not sufficiently germane to the NYSE's statutory duties of self-regulation to justify according immunity to the clearly anticompetitive actions challenged by the plaintiffs.[172]

On appeal, the Supreme Court recognized that the challenged conduct would be a per se violation of the antitrust laws in the absence of regulation.[173] Thus, the issue before the court in *Silver* was whether the Securities Exchange Act[174] creates a duty of Exchange self-regulation so pervasive that repeal of the antitrust laws must be to some extent implied.[175] The problem, the Court recognized, was one of reconciling the:

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169 United States v. National Ass'n of Securities Dealers, Inc., 422 U.S. 694 (1975); Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975).

170 373 U.S. 341 (1963).

171 *Id.* at 345.

172 *Id.* at 346.

173 *Id.* at 347.

174 15 U.S.C. § 78a *et seq.* (1970), *enacted* 48 Stat. 881 (1934).

175 373 U.S. at 347.

> pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self-regulation which may well have anticompetitive effects in general and in specific applications.[176]

In light of the applicable statutes and rules,[177] the Court found it impossible to say that self-regulation affecting Exchange nonmembers was "outside the boundaries of the public policy" established by the 1934 Act.[178] The proper approach, the Court concluded, would reconcile the statutory schemes rather than ousting one of them:

> Repeal is to be . . . implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.[179]

The Court then noted that the 1934 Act gives the SEC authority to request changes in exchange rules and therefore impliedly, to disapprove rules, but no jurisdiction to review specific applications of such rules. Thus, the Court concluded there was no need to consider whether plaintiffs should have initially invoked the remedial powers of the SEC.[180]

> Moreover, the Commissions lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory powers. . . . The issue is only that of the extent to which the character and objectives of the duty of exchange self-regulation contemplated by the Securities Exchange Act are incompatible with the maintenance of an antitrust action.[181]

The Court further stated:

> There is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competi-

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[176] *Id.* at 349.

[177] *See* §§ 6(b), (d) of the Securities Exchange Act, 15 U.S.C. §§ 78f(b) and 78(d) (1970).

[178] 373 U.S. at 357.

[179] *Id.*

[180] *Id.* at 358.

[181] *Id.* at 358 (footnotes and citations omitted).

> tion which cannot be justified as furthering legitimate self-regulative ends.[182]

Thus, in *Silver*, the nonapplicability of the antitrust laws would defeat the national policy in favor of competition without furthering the countervailing policy of the Securities Exchange Act.[183] The antitrust laws applied in *Silver* because they provided the only available mechanism for review of the Exchange's actions under its rules.

The Court, however, was careful to note that should other means of scrutinizing Exchange conduct be available, some sort of antitrust immunity might exist. Specifically, the Court stated:

> Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented.[184]

The Court acknowledged that its decision might lead to uncertainty, but offered some reassurance:

> But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act.[185]

Thus, although the statutory scheme governing the Exchange is not sufficiently pervasive to create a total exemption, some instances of self-regulation which "fall within the scope and purposes of the [Act]· may be regarded as justified in answer to the assertion of an antitrust claim."[186]

As predicted, *Silver* has produced disparate assessments of the role of antitrust in the regulated industry context. For example, some of the Court's language in *Silver* intimates that the antitrust laws should be applied differently to regulated businesses. Statements about the flexibility of "traditional antitrust concepts" under "the aegis of the rule of reason" may be read as an indication that, instead of per se rules, a rule of reason analysis should be employed, with the

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[182] *Id.*

[183] *Id.* at 360.

[184] *Id.*

[185] *Id.*

[186] *Id.* at 361. The Court went on to hold that in denying petitioners the direct-wire connections without according them notice and hearing, the Exchange exceeded the scope of its authority to engage in self-regulation under the 1934 Act. Therefore, its actions were not in that instance immune from attack under the antitrust laws. *Id.* at 361-67.

policies of the regulatory scheme weighed as a relevant factor.

The Seventh Circuit appeared to take this approach in *Thill Securities Corp. v. New York Stock Exchange*,[187] In *Thill*, the Court of Appeals held that an Exchange rule against sharing commissions with nonmember broker-dealers was not exempt from antitrust attack even though the conduct complained of was subject to SEC review. The Exchange admitted that its "anti-rebate" rule would be a per se violation of the antitrust laws in an unregulated context,[188] but nevertheless claimed immunity on the ground that the rule was "an integral part of the 'fixing of reasonable rates' " authorized by § 19(b) of the Securities Exchange Act.[189] The Seventh Circuit did not agree that the "mere possibility of SEC review wraps the conduct of the Exchange in an impregnable shield of antitrust immunity."[190] Instead, the court relied on *Silver*'s declaration that repeal of the antitrust laws was to be implied only if necessary, and reasoned that the general power of the SEC to adopt rules touching on an area does not necessarily place related conduct outside the scope of the antitrust laws. "Rather it is at this point that the analysis of reconciliation really begins."[191] The court indicated that a rule of reason analysis should be applied. Furthermore, the court specifically noted that SEC review of Exchange rules would not render the antitrust laws inapplicable.[192] However, the *Thill* court never addressed the question of *how* the antitrust laws should be applied. Therefore, its seemingly broad reading of *Silver* may be attributable simply to a strict interpretation of what constitutes a "necessity" for implied immunity, and not to any judicial desire to stimulate flexible application of antitrust concepts to the regulated industries "under the aegis of the rule of reason."

Although there may be some dispute as to what view of *Silver* was taken by the Seventh Circuit in *Thill*, other decisions leave little doubt that the lower courts have in general read *Silver* narrowly. Thus, the rule that emerges from some lower court rulings is that

[187] 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

[188] 344 F.2d at 267.

[189] *Id.*

[190] *Id.* at 269.

[191] *Id.* Thus, the *Thill* court would oust the antitrust laws entirely only if their application would frustrate the purpose of the Securities Exchange Act or make it substantially ineffective. *Id.* at 270, *citing* United States v. Third Nat'l Bank, 390 U.S. 171, 189 (1968).

[192] *Id.* at 272, *citing* United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); California v. FPC, 369 U.S. 482 (1962).

where the regulatory scheme is inconsistent with a finding of per se illegality, justification under the rule of reason is equated with implied immunity from the antitrust laws. For example, in *Kaplan v. Lehman Brothers*,[193] the Seventh Circuit affirmed a district court holding[194] that *Silver* barred a per se attack upon the stock exchanges' practice of fixing minimum rates for commissions. The court noted that under § 19(b) of the 1934 Act,[195] "Congress enumerated twelve subjects of the exchange's rulemaking power to which the SEC's power to alter or supplement would extend. . . ."[196] Listed among these matters is "the fixing of reasonable rates of commission, interest, listing, and other charges."[197]

The Seventh Circuit thus found that Congress had given the Exchange authority to prescribe reasonable rates of commission and that those rates, under *Silver*, were not subject to per se attack. In addition, the court suggested that the plaintiffs could not challenge the reasonableness of the rates under the antitrust laws, since rate making was committed to the Exchange subject to SEC review.[198] Thus, the *Kaplan* court in effect held that whether the antitrust suit challenged commission rates as unreasonable or unlawful per se, the rate structure was impliedly immune from antitrust challenge.

Shortly after *Kaplan*, another attack on commission rate practice was struck down in *Baum v. Investors Diversified Services, Inc.*[199] In *Baum*, plaintiffs brought a Robinson-Patman Act claim challenging a cumulative quantity discount given to some shareholders of mutual funds. The court recognized that the SEC, through its conduct, had given approval to the use of quantity discounts.[200]

The Act contained no express language permitting the establishment of a quantity discount system, despite the SEC's apparent approval of the discounts. However, the court viewed the silence of the Act as immaterial, stating that it was sufficient that:

[193] 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967).

[194] 250 F. Supp. 562 (N.D. Ill. 1966).

[195] 15 U.S.C. § 78s (1970).

[196] 250 F. Supp. at 564.

[197] *Id.* at 565, *quoting* § 19(b)(9).

[198] Plaintiffs had argued that only competitive rates were "reasonable" within the meaning of that word as used in § 19(b)(9) of the 1934 Act. The Court similarly rejected this argument stating that it ignored the presence of the word "fixing" in the same section of the Act.

[199] 286 F. Supp. 914 (N.D. Ill. 1968), *aff'd*, 409 F.2d 872 (7th Cir. 1969) (on ground that mutual funds are not "commodities").

[200] 286 F. Supp. at 923-24.

> [T]he SEC would be warranted in permitting such a system as an exercise of its supervisory powers over prices and rates under Section 22. That the Act is silent on the type of price and rate structure to be utilized, is a further sign of the pervasive regulatory control delegated to the SEC in this area by Congress.[201]

Thus, the court found the discount system immune from antitrust attack merely because a contrary result would have been inconsistent with unexercised review powers of the SEC.[202]

The Fifth Circuit, in *Harwell v. Growth Programs, Inc.*,[203] read *Silver* in essentually the same way as the courts in *Kaplan* and *Baum*:

> Implicit in the judgment of the whole court in *Silver*, majority, concurring and dissenting, is the basic concept that the Securities Act prevails over the antitrust act, when the provisions of the two are in conflict. . . . *Silver* then furnishes the guide which must be followed, i.e., that the repeal of the antitrust barrier to defendants' actions occurs only if those actions are necessary to make the statutory scheme for regulation of securities dealers work, and then only to the minimum extent necessary.[204]

It is evident from these decisions that the Supreme Court's use of the phrase "rule of reason" in *Silver* has not been taken literally by most lower courts. In effect, those courts have not applied the rule of reason at all, but rather, have found implied exemptions from the antitrust laws where those laws conflict with the regulatory scheme in question.[205]

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[201] *Id.* at 926.

[202] The action was also dismissed because mutual funds shares were held not to be "commodities," and because no facts were alleged to support the finding of a probable effect on competition. *Id.* at 918-22.

[203] 451 F.2d 240 (5th Cir. 1971), *reh. denied*, 459 F.2d 461 (5th Cir.), *cert. denied*, 409 U.S. 876 (1972).

[204] 451 F.2d at 247.

[205] In some cases it is difficult to determine whether a particular activity challenged under the antitrust laws is necessary to make the regulatory scheme work. In such cases, the court may hold that primary jurisdiction exists in the regulatory agency to determine whether a challenged activity is valid under the regulatory scheme. The Supreme Court recently decided such a case in Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973).

In *Ricci*, a former commodity exchange member brought an antitrust action charging that the defendants had conspired to restrain his business by transferring to another person his Exchange membership without notice or hearing as required by

Against this background, the Supreme Court heard argument in *Gordon v. New York Stock Exchange, Inc.*[206] In early 1971, Gordon sued the New York Stock Exchange and the American Stock exchange on behalf of himself and a class of small investors alleging violation of §§ 1 and 2 of the Sherman Act.[207] In particular, the complaint challenged a variety of Exchange rules and practices and,

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Exchange rules and the Commodity Exchange Act. The Court held that the antitrust proceeding should be stayed until the Commodities Exchange Commission (CEC) could pass on the validity of the conduct under the Act.

The Court gave three reasons for staying the proceedings. First, the antitrust court needed to determine whether the Act was incompatible with the maintenance of an antitrust action. Second, some facets of the dispute were within the statutory jurisdiction of the CEC. Third, adjudication of that dispute by the CEC promised to be of material aid in resolving the immunity question. The following language is of interest.

> If the transfer of Ricci's membership was pursuant to a valid rule, the immediate question for the antitrust court is whether the rule itself and Ricci's exclusion under it are insulated from antitrust attack. The question has substance, for the Commodity Exchange Act, like the Securities Exchange Act, contemplates that the Exchange and its members will 'engage in restraints of trade which might be unreasonable absent sanction' by the Act. . . . On the other hand, if . . . loss of [Ricci's] membership was contrary to Exchange rules, the antitrust action should very likely take its normal course, absent more convincing indications of congressional intent than are present here that the jurisdictional and remedial powers of the Commission are exclusive.

Id. at 303-304.

The dissenters in *Ricci* contended that the SEC had no jurisdiction and that, in any event, it could not contribute anything useful to the antitrust determination.

A recent case decided since *Gordon,* Jacobi v. Bache & Co., 520 F.2d 1231 (2d Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3335 (U.S. Nov. 3, 1975) (No. 75-660), declined to find immunity for a NYSE rule governing the pass-through of service charges, on the grounds that the rule was only peripherally related to the Exchange's jurisdiction under § 19(b) of the Securities Exchange Act, and that the SEC disclaimed the exercise of any supervisory power. Instead, the court analyzed the restriction under the rule of reason and found the rule reasonable in light of its purpose and effect. The Second Circuit construed *Silver* to mean:

> that within the area of supervised self-regulation contemplated by the Securities Exchange Act, *per se* concepts are generally displaced and the courts are to examine whether the particular restraint, even though it would be a *per se* violation if performed by others, was reasonable.

520 F.2d at 1238.

[206] 422 U.S. 659 (1975). Blackmun, J., delivered the opinion for a unanimous Court. Douglas, J., and Stewart, J., joined by Brennan, J., filed separate concurring opinions.

[207] *Id.* at 660-61. The Complaint also named member firms of the exchanges as defendants.

most importantly, alleged that the system of fixed commission rates utilized by the Exchanges at that time for less than the largest transactions constituted price fixing in violation of the Sherman Act.[208] The district court granted the defendants' motion for summary judgment on the ground that the challenged actions were immune from attack under the antitrust laws,[209] and the Second Circuit affirmed.[210] The Supreme Court granted ceriorari of the question whether the fixed commission rates were beyond the reach of the antitrust laws,[211] and affirmed the result below.

The opinion began with an analysis of the question of reconciliation of the antitrust laws with the regulatory scheme in the securities industry, involving a thorough review of the legislative history of the regulatory provisions applicable to fixed commission rates. The opinion pointed out that commission rates for stock transactions have been set by agreement since the establishment of the first stock exchange.[212] Beginning with the first review of stock exchanges by the Congress in 1913, the fixed rate policies were noted and apparently not objected to. The Securities Exchange Act of 1934 was preceded by hearings that addressed the subject explicitly, and when finally enacted, the Act gave the SEC the power to fix and insure "reasonable" rates.[213] The opinion went on to catalogue the substantial

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[208] *Id.* at 661. The Complaint requested injunctive relief and treble damages amounting to $1.5 billion, together with an award of attorneys fees of $10 million plus interest and costs.

[209] 366 F. Supp. 1261 (S.D.N.Y. 1973).

[210] 498 F.2d 1303 (2d Cir. 1974).

[211] 419 U.S. 1018 (1974).

[212] 422 U.S. at 663. The Buttonwood Tree Agreement of 1972 stated:

> We the subscribers, Brokers for the Purchase and Sale of Public Stock, do herely solemnly promise and pledge ourselves to each other, that we will not buy or sell from this day for any person whatsoever, any kind of Public Stock at a less rate than one-quarter percent. Commission on the Specie value, and that we will give a preference to each other in our Negotiations.

F. EAMES, THE NEW YORK STOCK EXCHANGE 14 (1968 ed.).

[213] 422 U.S. at 664-67. Section 19(b) of the Act provided:

> The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange . . . , by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or

attention paid by the SEC to Commission rates since the Act became law. This attention led to a reevaluation of the fixed commission rate structure and then finally, in 1975, to the phasing out of fixed commission rates.[214]

The Court then considered whether the legislative history and the regulatory history suggested the inapplicability of the antitrust laws. Articulating the familiar axioms of construction that repeal of the antitrust laws by implication is not to be favored and that only where there is a plain repugnance will repeal be implied,[215] the Court began its analysis with the *Silver* principles. Justice Blackmun concluded that this was the "different case", which the Court did not decide in *Silver*, since the SEC had direct regulatory power over exchange rules and practices with respect to the "fixing of reasonable rates of commission."[216] As a result, it became appropriate to inquire as to the proper reconciliation between the regulatory and antitrust statutes. The Supreme Court found the standards for implied repeal satisfied, inasmuch as to apply the antitrust laws to commission rates would unduly interfere with the operation of the Securities Exchange Act.[217]

> appropriate to effect such changes) in respect of such matters as . . .
> (9) the fixing or reasonable rates of commission, interest, listing and other charges.

15 U.S.C. § 78s(b) (1970).

[214] New legislation enacted into law June 5, 1975, amends § 19(b) of the Securities Exchange Act providing, *inter alia*, that "no national securities exchange may impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members." Section 6(e), 89 Stat. 107. The SEC may permit exceptions to this general prohibition after November 1, 1976, if it finds (1) the rates are reasonable in relation to costs of service, and (2) if the rates "do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title, taking into consideration the competitive effects of permitting such schedule or fixed rates weighed against the competitive effects of other lawful actions which the Commission is authorized to take under this title." § 6(e)(1)(B)(ii).

[215] 422 U.S. at 682-83. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973); Silver v. New York Stock Exch., 373 U.S. 341, 357-58 (1963).

[216] 422 U.S. at 685.

[217] *Id.* at 685-86. The Court decides that the determination of the advisability of implied repeal is to be decided by the courts in which the antitrust claims are raised. Where necessary to take advantage of special expertise, courts may defer to the regulatory agency involved. Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 306-08 (1973). The Court disagreed with the suggestion of the United States, which filed a brief *amicus curiae*, to the effect that the immunity issue should be decided on a full record. Justice Blackmun thought summary disposition entirely adequate. The Court regarded *Ricci* as inapposite because in that case deference to the administrative agency was necessary to determine whether the conduct violated the regulatory rules, whereas

The Court distinguished *Thill*[218] on several grounds. First, there was no evidence presented in that case regarding the extent of SEC review of the challenged rule. Second, and more importantly, in that case the challenged practice was not among those items specifically listed in § 19(b) of the Securities Exchange Act,[219] and it did not necessarily apply uniformly. Moreover, Justice Blackmun went on to say that to the extent that the Seventh Circuit in *Thill* viewed the question of implied repeal as a question of fact, "concerning whether the particular rule itself is necessary to make the Act work," the Court declined to follow that rule.[220]

Accordingly, the Court held that to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. Thus, the statutory provision authorizing regulation, the long history of regulatory supervision, and the continued congressional approval signified by the form of the new legislation led inevitably to the conclusion that the Securities Exchange Act and the antitrust laws are fundamentally in conflict as applied to fixed commission rates.

> Interposition of the antitrust laws, which would bar fixed commission rates as *per se* violations of theSherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and, as effectuated through SEC regulatory activity. Implied repeal of the antitrust laws is, in fact, necessary to make the Exchange Act work as it was intended; failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.[221]

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in *Gordon* there was no factual dispute and the conduct was clearly "encompassed by the legislation."

[218] Thill Securities Corp. v. New York Stock Exch., 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

[219] The Court concedes that the practice might reasonably be thought to relate to the fixing of commission rates, which is specifically mentioned in the Act. 422 U.S. at 687.

[220] *Id.* The Court distinguishes between the factual question whether fixed commission rates are necessary to the operation of the exchanges under the Act, and the legal question whether an antitrust suit would conflict with the regulatory scheme. In the Court's view the factual question was not part of the case and would only become relevant upon a determination of no antitrust immunity. 422 U.S. at 688.

[221] 422 U.S. at 691. The concurrence by Justice Douglas emphasized the importance for him of active and aggressive exercise of the power of review and approval by the SEC. In the absence of that supervisory activity, the mere existence of a statutory power of review, unexercised, would not be sufficient to immunize the conduct. The concurrence by Justice Stewart reiterated that the Court was not holding that federal

The Court last Term also decided *United States v. National Association of Securities Dealers, Inc.*[222] another case treating the relationship between the antitrust laws and securities industry regulation. By a 5-4 vote, the Court held that certain activities engaged in by broker-dealers were immunized from antitrust applicability by the existence of regulatory authority.[223]

The United States sued the National Association of Securities Dealers (NASD), certain mutual funds, mutual fund underwriters and securities broker-dealers alleging a combination and conspiracy to restrict the sale and fix the resale prices of mutual fund shares in secondary market transactions in violation of § 1 of the Sherman Act.[224] The first count of the complaint charged a horizontal combination among members of NASD to prevent the growth of a secondary dealer market in the purchase and sale of mutual fund shares. The remaining counts alleged vertical restrictions on secondary market activities.[225] The district court held that the statutory scheme comprised by the Investment Company Act[226] and the Maloney Act[227] conferred antitrust immunity for all the practices challenged.[228] Specifically, the district court concluded that §§ 22(d) and (f) of the Investment Company Act, together with the Maloney Act, provided explicit statutory immunity. Moreover, the court decided that the pervasive regulatory scheme conferred implied antitrust immunity in the "narrow area of distribution and sale of mutual fund shares."[229] On appeal the Supreme Court affirmed.

Mr. Justice Powell began his opinion for the majority with a careful review of the revisions of the Investment Company Act of 1940, which conferred on the SEC regulatory authority over the business practices of investment companies.[230] Prior to the enactment of the

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agency jurisdiction over activities necessarily immunize them from antitrust applicability. Rather "exchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act." 422 U.S. at 692, *citing* Silver v. New York Stock Exch., 373 U.S. 341, 361 (1963).

[222] 422 U.S. 694 (1975).

[223] The majority opinion by Powell, J., was joined by Burger, C.J., and Stewart, Blackmun and Rehnquist, JJ. White, J., wrote the dissenting opinion, in which Douglas, Brennan, and Marshall, JJ., joined.

[224] 422 U.S. at 700-01.

[225] *Id.* at 701-03.

[226] 15 U.S.C. § 80a-1, *et seq.* (1970).

[227] 15 U.S.C. § 780-3 (1970).

[228] *In re* Mutual Fund Sales Antitrust Litigation, 374 F. Supp. 95 (D.D.C. 1973).

[229] *Id.* at 114.

[230] 422 U.S. at 704. Sample provisions of the Act include the requirement for

Investment Company Act, a number of abuses involving the "two price system"[231] and other aspects of the secondary market in mutual fund shares were thoroughly exposed by the SEC's Investment Trust Study,[232] which led to the enactment of the Investment Company Act.

Because the trial court had found the cloak of immunity in the terms of §§ 22(d) and (f) of the Act, the majority opinion then undertook a detailed review of those provisions.[233] With respect to § 22(d), Justice Powell, discovering that the lower court had expanded the price maintenance mandate for sales by "dealers" to transactions in which a broker-dealer acts as a statutory "broker" rather than a statutory "dealer," was unable to agree with that reading of the statute. Moreover, the purpose of § 22(d) was apparently to protect the primary distribution system, and nothing in the legislative history or contemporary comment suggests a congressional concern with anything other than the disruptive effects of secondary dealer sales. Accordingly, the majority viewed reliance on § 22(d) to immunize the challenged activities from antitrust liability as error.[234]

Next, the Court examined § 22(f), which the lower court also found provided a shelter from antitrust liability. Section 22(f) authorizes the imposition of restrictions on the negotiability and transferability of mutual fund shares, provided the restrictions conform with the fund's registration statement and do not violate any rules or regulations prescribed by the SEC.[235]

The government argued that the maintenance of contractual re-

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submission of detailed financial reports and documentation and the issuance of such information to shareholders, 15 U.S.C. § 80a-29 (1970); limits on the permissible methods for selecting directors, 15 U.S.C. § 80a-16 (1970); registration requirements for all securities, *see* Securities Act of 1933, 15 U.S.C. § 77f (1970); Investment Company Act, 15 U.S.C. § 80a-24 (1970); standards governing the internal practices of investment companies, including the requirement of a majority shareholder vote for certain decisions, 15 U.S.C. § 80a-13 (1970); and limits to dividend distributions, 15 U.S.C. § 80a-19 (1970).

[231] The two price system involved the difference between the net asset value of mutual funds for the current day, as computed by the fund's portfolio value at the close of exchange trading the previous day, and the next day's price, based on the net asset value computed at the close of exchange trading on the present day. Anyone aware of both prices, as the average investor was not, could hardly fail to reap a profit by trading in the fund's shares.

[232] Part I of the Investment Trust Study is printed as H.R. Doc. No. 707, 75th Cong., 3d Sess. (1938). Part II of the study is printed as H.R. Doc. No. 70, 76th Cong., 1st Sess. (1939). Part III of the Study is printed as H.R. Doc. No. 279, 76th Cong., 1st Sess. (1940).

[233] 422 U.S. at 711, *et seq.*

[234] 422 U.S.at 720.

[235] *Id.* at 721, 15 U.S.C. § 80a-22(f) (1970).

strictions was not protected by § 22(f) which, in its view, only permits limitations appearing on the face of the share certificate itself. Moreover, the government argued that the SEC's unexercised power to prescribe rules and regulations made impossible the creation of the kind of repugnancy that would serve to immunize the challenged conduct from the antitrust laws.[236]

The majority opinion concluded that the vertical restrictions on the distribution system challenged by the government were among the kinds of restrictions Congress contemplated when it enacted § 22(f). The narrower interpretation of the provision would not serve the functions of the statute to curb abuses connected with the bootleg distribution system and other practices identified in the Investment Trust Study.

The Court then addressed the government's contention that the SEC had been insufficiently active in the exercise of its regulatory authority to permit an implication of immunity from the antitrust laws. Justice Powell pointed out that the statute authorizes properly disclosed restrictions unless they are inconsistent with SEC rules or regulations.[237] Thus any disclosed restrictions are effective, subject to SEC disapproval. Given this mechanism, the fact of SEC inaction, so far from demonstrating inattention, proves that the SEC has approved all properly disclosed restrictions.[238]

> The Commission's acceptance of fund-initiated restrictions for more than three decades hardly represents abdication of its regulatory responsibilities. Rather, we think it manifests an informed administrative judgment that the contractual restrictions employed by the funds to protect their shareholders were appropriate means for combating the problems of the industry. The SEC's election not to initiate restrictive rules or regulations is precisely the kind of administrative oversight of private practices that Congress contemplated when it enacted § 22(f).[239]

The Court thus concluded that the vertical restrictions challenged in

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[236] 422 U.S. at 721.

[237] *Id.* at 727.

[238] As originally introduced, § 22(f) would have authorized SEC promulgation of rules prohibiting restrictions on the redemption or transfer of mutual fund shares. That proposal was not accepted, and instead a compromise provision was offered, which subsequently became law, eliminating the problem and providing for the effectiveness of fund-imposed restrictions unless disapproved by the SEC.

[239] 422 U.S. at 728.

the complaint were among the kinds of agreements permitted under § 22(f) of the Investment Company Act.

While the agreements challenged by the United States would ordinarily constitute per se violations of § 1 of the Sherman Act,[240] here Congress has decided that these restrictions might be necessary in the mutual fund industry, and has endowed the SEC with final authority to determine whether and to what extent such restrictions should be permitted. That congressional intention requires that the antitrust laws give way to the regulatory scheme established by the Investment Company Act, since there can be no reconciliation of the two statutory schemes. The Court concluded, as a result, that the lower court properly dismissed the counts of the complaint that challenged the vertical agreements.[241]

Justice Powell then examined the portion of the complaint that challenged the horizontal agreement between the NASD and its members to prevent the growth of a secondary dealer market and a brokerage market in the purchase and sale of mutual fund shares. The Court stated at the outset that the activities challenged were neither required by § 22(d) nor authorized under § 22(f).[242] If they were to be immunized from antitrust attack, the basis would have to be the pervasive nature of the SEC's exercise of regulatory authority under the Investment Company Act and the Maloney Act.

The Court's opinion characterized the SEC's supervisory authority over the NASD as extensive, and calculated to protect the public interest, which includes concern with the force of effective competition.[243] Justice Powell concluded as a result that the pervasive supervisory authority lodged in the SEC suggests that Congress intended to protect association activities approved by the SEC from Sherman Act application. Thus, the Court held that the challenge of an alleged conspiracy designed to encourage the supression of secondary market activity was an attack on a policy the SEC had consistently approved for nearly 35 years purusant to § 22(f).[244]

The Court thus found in this case the necessity of implied repeal of the antitrust laws in order to make the regulatory scheme work.

> In generally similar situations, we have implied immunity in particular and discrete instances to assure that the federal

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[240] *See, e.g.*, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originator's Guild of American, Inc. v. FTC, 312 U.S. 457 (1941).

[241] 422 U.S. at 729-30.

[242] *Id.* at 730.

[243] *Id.* at 732.

[244] *Id.* at 733.

> agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws. . . . In this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. This is hardly a result that Congress would have mandated.[245]

The Court therefore held that the horizontal activities challenged by the complaint were insulated from antitrust attack because the Sherman Act was displaced by the pervasive regulatory scheme found in the Maloney and Investment Company Acts.[246]

The four-man minority could not agree that antitrust immunity ought to follow whenever a regulatory agency has authority to approve business conduct, whether or not the agency was ordered to consider antitrust factors and whether or not there is any other evidence of a congressional intention to "displace judicial with administrative antitrust enforcement."[247] Mr. Justice White then proceeded to discuss the law of implied repeal and exemption found in the recent Supreme Court cases.[248] Justice White first acknowledged that express permission or requirement of particular private conduct otherwise violative of the antitrust laws results in inapplicability of those laws. In addition, Congress sometimes directs an administrative agency to evaluate practices in the "public interest" and provides that any approved transactions shall be immune.[249] Justice White recognized that such express exemptions have been given effect by the courts, but cautioned that even these exemptions are strictly construed.[250]

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[245] *Id.* at 734-35 (citations omitted).

[246] *Id.* at 735.

[247] *Id.* at 736 (White, J., dissenting, joined by Douglas, Brennan, and Marshall, JJ.).

[248] *See* Gordon v. New York Stock Exch., Inc.; 422 U.S. 659 (1975); Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973); Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Silver v. New York Stock Exch., Inc., 373 U.S. 341 (1963); Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963); California v. Federal Power Comm'n, 369 U.S. 482 (1962); United States v. RCA, 358 U.S. 334 (1959).

[249] 422 U.S. at 736-37, *citing*, § 414, Federal Aviation Act of 1958, 49 U.S.C. § 1384 (1970); § 5(11), Interstate Commerce Act, 49 U.S.C. § 5(11) (1970).

[250] 422 U.S. at 737, *citing* Federal Maritime Comm'n v. Seatrain Lines, Inc.

Beyond this, the mere authority of an agency to review conduct does not immunize that conduct from the antitrust laws. Neither the existence of the power nor, in Justice White's view, agency approval of particular transactions of necessity confers antitrust immunity. The dissent did admit that when Congress has authorized an agency to evaluate conduct under specifically defined standards that take into account competitive criteria, then administrative enforcement displaces judicial enforcement of the antitrust laws.[251]

> The rule of law that should be applied in this case, therefore, as it comes to us from the precedents, is that, absent an express antitrust immunization conferred by Congress in a statute, such an immunity can be implied only if Congress has clearly supplanted the antitrust laws and their model of competition with a differing competitive regime, defined by particularized competitive standards and enforced by an administrative agency, and has thereby purged an otherwise obvious antitrust violation of its illegality.[252]

This rule of law, when applied to the facts in *NASD*, in the view of the dissenters, failed to produce immunity.

Justice White noted that the Investment Company Act contains neither an express exemption nor express authority permitting the allowance of the specific restrictions at issue in this case. In addressing the decision of the majority that immunity is conferred by the SEC's failure to disapprove the practices challenged here, the dissent took the position that any such conclusion flies in the face of the familiar rule in favor of strictly construed exemptions and disapproval of implied exemptions. That the Court has to "labor" to find hidden immunities confirmed to Justice White the inappropriateness of the effort in light of earlier precedents.[253]

The dissent viewed the conferral of antitrust immunity in this case as inappropriate, given the fact that there was neither express immunity, nor direction to consider competitive factors, nor statutory standard to follow with respect to competition, nor any indication that the SEC had in fact considered the competitive impact of the restrictions, nor finally any other basis for concluding that Congress intended to supplant the antitrust laws and institute some other

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411 U.S. at 726, 733 (1973).

[251] 422 U.S. at 740-41.

[252] *Id.* at 742-42.

[253] *Id.* at 744.

form of regulation.[254] The dissent viewed the SEC's activity in connection with restrictions as wholly inadequate to produce antitrust immunity.

Both *Gordon* and *NASD* will lead to an expanded concept of antitrust immunity in the regulated industries.[255] While some might regard that as unpalatable, if it is more nearly consistent with the intention of Congress, it is unobjectionable. The fact that in a larger number of cases antitrust may be deemphasized in favor of regulation cannot be a disappointment to those who, as judges must be, are policy neutralists.

Gordon builds directly on *Silver*. In *Silver*, immunity was not found because the SEC had no jurisdiction to evaluate specific applications of the rule in question, and there was therefore no potential for monitoring its application in particular cases. On the other hand, in *Gordon*, the challenged activity was explicitly anticipated in the statute, so that the SEC, when it was given authority to order fixed commission rates, was necessarily entrusted with the power to immunize conduct from antitrust application. Indeed, quite clearly to the unanimous Court, no other conclusion was possible.

In *NASD*, the argument was less clear.[256] The legislative intention was not as certain, and the supervisory regulation was not as direct and did not take the form of affirmative action. Nevertheless, an assessment of congressional intention leads more logically to the conclusion that immunity was intended.

The dissent in *NASD* strayed on two separate grounds. First, and least important, its tendency was to view the SEC's lack of action as the absence of enforcement. Justice Powell's explanation of that lack of action was somehow not satisfactory to the four dissenting justices.[257] Some have reasoned that the *NASD* form of regulatory action

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[254] *Id.* at 745.

[255] *But cf.* Jacobi v. Bache & Co., 520 F.2d 1231 (2d Cir. 1975).

[256] It is evident that the two concurring opinions in *Gordon* shed light on the composition of the majority and the minority opinions in *NASD*. Justice Stewart in *Gordon* emphasized that the mere existence of oversight power would not necessarily immunize SEC rules from antitrust attack, but that immunity would result to the extent necessary to promote the aims of regulation of the securities industry. His vote with the majority in *NASD* confirms the importance in that case of the majority's finding of congressional intention to permit NASD-imposed restrictions on mutual fund distribution systems. Moreover, the Douglas concurrence in *Gordon*, with its emphasis on active regulation at the expense of other possibly relevant considerations, clearly explains his dissent in *NASD*, where the supervision was of an oversight nature.

[257] This is hardly the same kind of "silence" to which the Fourth Circuit alluded in approving private action that was not objected to by the appropriate regulatory authority, since in that case the submission was informal and no explicit statutory

should be accorded less weight since, unlike the SEC mandate of fixed commission rates in *Gordon*, no private action that might conceivably violate the antitrust laws is compelled.

While that is an accurate description of the legal dilemmas faced by the private individuals in each case, it tells very little about the importance Congress accorded to the procedure or to the role of the antitrust laws in connection with the regulatory scheme. Far from assuming that the oversight nature of regulation in *NASD* demonstrates a lower priority for the regulatory process, it can be argued that the restrictions regulated were in fact viewed as relatively more important, since they were given the force of law, subject only to SEC disapproval.

The second error of the dissenters reflects a basic philosophic difference. If it is congressional intention that is to guide the Court in this area, as properly it ought to be, then the effort ought to be to fathom that intention, not to set up a variety of presumptions that, unless surmounted, will produce a certain interpretation, regardless of what Congress intended. Obviously, explicit legislation involving immunity is easier to construe than general legislation, permitting more precise application of the immunity. Yet, to avoid the most likely interpretation of congressional action only because it does not meet certain judicially imposed standards of precision is hardly a service to the meaning of the legislation. Mr. Justice Powell's painstaking review of the applicable legislation, together with the state of the industry at the time of its enactment, is persuasive of congressional intention to confer immunity. *NASD* quite properly is viewed as a step back from the anti-regulation aggressiveness of cases such as *Seatrain*[258] and *Otter Tail*.[259] In both of those cases the Court labored hard to avoid clear congressional intention and the reader cannot escape the feeling that antitrust was exalted and Congress' intention subordinated.[260]

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authority for review existed during the period under scrutiny. Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 252 (4th Cir. 1971).

258 Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973).

259 Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

260 United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), while showing evidence of anti-regulation attitudes, is not a case that should be analyzed in connection with the immunity question. There Congress through the Bank Merger Act, 12 U.S.C. § 1828(c), and the Bank Holding Company Act, 12 U.S.C. § 1841, *et seq.*, demonstrated a clear intention to set up a duplicate system for review of the antitrust consequences of a bank acquisition. While there may be doubt as to the wisdom of such an effort, there can be little doubt that Congress' intention was clearly understood by the Court.

In short, *Gordon*, a case of "direct repugnancy," and *NASD*, a case involving the subtler interrelationship of a general regulatory scheme and implied repeal of the antitrust laws, were both correctly decided. Together, they constitute a further step in the movement toward neutrality in the application of the antitrust laws to the regulated industries.

IV.

CITIZENS AND SOUTHERN—THE RULE OF REASON REAPPEARS

Another aspect of the interface between antitrust and the regulated industries was explored last Term in *United States v. Citizens & Southern National Bank*.[261] In the context of the banking industry, the Court handed the government its third straight defeat in cases under § 7 of the Clayton Act[262] and introduced the concept of reasonableness to justify practices challenged under § 1 of the Sherman Act.

Georgia bank law for some years made it impossible for banks to branch.[263] In order to follow its customers to the suburbs and beyond the Atlanta city limits, C&S created a bank holding company and established banks in the surrounding counties. Each of these banks was made a "correspondent associate" bank within the C&S system.[264]

The correspondent associate relationship involved a close association between the country banks and C&S. In particular, it was under-

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[261] 422 U.S. 86 (1975).

[262] The two previous defeats came in United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974), and United States v. Marine Bancorporation, 418 U.S. 602 (1974). For a discussion of these cases see Shenefield, *Annual Survey of Antitrust Developments—Class Actions, Mergers, and Market Definition: A New Trend Toward Neutrality*, 32 WASH. & LEE L. REV. 299, 329-345 (1975). The dual antitrust scheme governing the banking industry is discussed in Shenefield, *Annual Survey of Antitrust Developments—The Year of the Regulated Industry*, 31 WASH. & LEE L. REV. 1, 22-39 (1974).

[263] Before 1927, Georgia permitted state-wide branching, but in that year state law was changed to prohibit all branching. As that strict prohibition led to the establishment of bank holding companies, in 1956, Georgia by statute prohibited a bank holding company from acquiring more than 15 percent of a bank's stock. Georgia Bank Holding Company Act, 1 Ga. Laws 1956, pp. 309-12. A further amendment in 1960 reduced the maximum ownership level to 5 percent. GA. CODE ANN. § 13-207(a)(2) (1967 ed. and Supp. 1974).

[264] 422 U.S. at 92. Six banks were involved, of which five were founded directly by C&S. The sixth had been an independent bank but was converted into a C&S correspondent associate bank in 1965. These banks were *de facto* branch banks in the Atlanta suburbs. C&S owned 5 percent of the stock of each of the banks and ownership of much of the remaining stock was held by persons friendly to C&S.

stood at the outset that, when state law permitted, the banks would be acquired outright.[265] Moreover, the county banks functioned as C&S subsidiaries and branches and were supplied with the full line of C&S services. C&S chose the executive officer for each county bank, the county bank employees were treated according to the same standards as existed in the C&S system and C&S undertook to supervise the county bank activities.[266]

C&S supplied data concerning interest rates and service charges in use by the C&S bank system. Each of the county banks, however, was cautioned to use its own judgment in setting interest rates and service charges. It is fair to say that the information was received with the deference predictable for banks that respected the greater expertise of C&S.

In 1970 Georgia amended its banking laws to permit branching within any county in which a bank already had an office.[267] This amendment permitted C&S to convert the county banks into de jure branches.[268] C&S applied to the FDIC for permission to make an assets acquisition of the county banks,[269] and after receiving the views of the Federal Reserve Board, the Comptroller of the Currency and the Justice Department, the FDIC approved the acquisitions of five of the six banks.[270] The FDIC approved the acquisition of the five banks because, inasmuch as they did not compete and never had competed nor was there any reasonable probability that the close relationship with C&S would be altered, their acquisition by C&S would not alter the existing competitive structure in any way.[271]

The Department of Justice sued, alleging violation of § 7 of the Clayton Act and challenging in addition the correspondent associate

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[265] *Id.*

[266] *Id.* at 93.

[267] *Id.* at 94, GA. CODE ANN. § 13.203.1(a) (Supp. 1974).

[268] 422 U.S. at 94. The City of Altanta and its suburbs are located within DeKalb and Fulton Counties.

[269] *Id.* The FDIC was the appropriate federal agency because C&S chose to acquire the county banks by having its own bank subsidiaries formally act as the acquiring banks. The subsidiaries chosen for that role were not members of the Federal Reserve System. 12 U.S.C. § 1828(c)(2)(C) (1970).

[270] 422 U.S. at 94. The FDIC disapproved the acquisition of the formerly independent bank on the ground that the correspondent associate affiliation in that instance had been "anticompetitive in its origins" and should not be "ratified" by approval of outright acquisition. The underlying theory for that view was apparently that it would have been better for competition if C&S had sponsored a new bank in the community rather than taking control of an independent but sound bank. *Id.* at 94-95.

[271] *Id.* at 95.

relationship under § 1 of the Sherman Act.[272] The government sought injunctive relief prohibiting the acquisitions and terminating the relationships. Following trial, the trial court entered judgment for the defendant.[273] The court first held the correspondent associate relationship insulated from attack under the antitrust laws.[274] Furthermore, the court found that the relationships were justified under the rule of reason and therefore not in violation of § 1 of the Sherman Act.[275] Finally, the court declined to find any anticompetitive effect as the result of the acquisitions and accordingly found no violation of § 7 of the Clayton Act.[276]

The Supreme Court affirmed in a 6-3 vote.[277] The Court turned first to the question of immunity. Justice Stewart took the view for the majority that any antitrust immunities applicable to the situation had to come directly from the Bank Holding Conpany Act, and in particular from those provisions dealing with the approval of transactions tending to create or enlarge holding company control of independent banks.[278] Because the "understanding" was between the staff of the Federal Reserve Board and C&S, the immunizing provisions of the Bank Holding Company Act were not applicable, in the majority's view.[279]

The majority, however, referring to the "grandfather" provisions of the Bank Holding Company Act,[280] noted that the correspondent

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[272] *Id.* at 95-96. The government sued under 12 U.S.C. §§ 1828(c)(6) and (7) (1970), which grant the government the right to challenge, within 30 days, FDIC-approved acquisitions.

[273] 372 F. Supp. 616 (N.D. Ga. 1974).

[274] *Id.* at 627. In 1968, the staff of the Federal Reserve Board and C&S entered into an "understanding" that the correspondent associate relationships did not require formal approval. The "understanding" resulted from a special investigation by the Board of the correspondent associate banks to determine whether the degree of control over the banks requires special "approval" of the Federal Reserve Board pursuant to § 3 of the Bank Holding Company Act of 1956 as amended, 12 U.S.C. § 1842 (1970).

[275] 372 F. Supp. at 627-38.

[276] *Id.* at 633-38.

[277] 422 U.S. 86 (1975). The majority opinion was by Stewart, J., and the dissenting opinion was by White, J., joined by Douglas and Brennan, JJ.

[278] *Id.* at 102-03; 12 U.S.C. § 1841 *et seq.* (1970); 12 U.S.C. § 1842(a) (1970).

[279] 422 U.S. at 106-08.

[280] *Id.* at 108, *citing* 12 U.S.C. § 1849(d) (1970):

> Any acquisition, merger, or consolidation of any kind described in § 1842(a) of this title which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to July 1, 1966, shall be conclusively presumed not to have been in violation of any antitrust laws other than § 2 of Title 15 [§ 2 of the Sherman Act].

associate relationships with three of the county banks were consummated prior to July, 1966, and that the Attorney General had taken no action against those transactions by that date. Justice Stewart concluded that the de facto branch relationship might properly be characterized as an "acquisition, merger, or consolidation of the kind described in § 1842(a)," and accordingly held that, at least as to three of the county banks, the "grandfather" clause provided immunity from retroactive challenge under the antitrust laws.[281]

The other three banks, however, were created after July 1, 1966, and were therefore not eligible for the immunizing treatment of the "grandfather" provisions of the Bank Holding Company Act. The majority then undertook to review the relationships between C&S, on the one hand, and the three younger banks, on the other, under the provisions of the Sherman Act.[282]

While admitting that normal branching relationships were beneficial on balance, the government argued that the de facto branching involved in the C&S system violated the Sherman Act because the concerned banks were all distinct corporate entities and were obligated as a result to compete with one another.[283] C&S conceded that it did not compete with the county banks but denied that the correspondent associate programs involved even passive agreements to fix interest rates and service charges. The record did show that C&S sent information concerning its rates and charges to its correspondent associates. The Court, however, reiterated that "dissemination of price information is not itself a per se violation of theSherman Act."[284] Indeed, the memoranda distributed to the correspondent associates were stamped "For Information Only," and the county banks were advised to use their own judgment in setting their own prices. While the trial court found little difference in the prices among the banks, it also found as a fact that there was no "collusive price fixing."[285]

Justice Stewart agreed that the kind of behavior involved in this case, were it to take place among independent competitors, might

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[281] 422 U.S. at 109.

[282] *Id.* at 111. The one independent bank, whose acquisition was not approved by the FDIC, established its correspondent associate relationship with C&S prior to July 1, 1966, and therefore came within the coverage of the grandfather provision of the Bank Holding Company Act. *Id.* n.21.

[283] *Id.* at 112.

[284] *Id.* at 13, *citing* United States v. Container Corp. of America, 393 U.S. 333, 338 (1969) (Fortas, J., concurring); Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925). *See* notes 113-116, *supra*.

[285] 372 F. Supp. at 626.

involve a conspiracy to affect prices.[286] But instead, given the fact that the Court found the correspondent associate program in general to be lawful, that conclusion did not follow:

> In this unusual light, we cannot hold clearly erroneous the District Court's finding that the lack of significant price competition did not flow from a tacit agreement but instead was an indirect, unintentional, and formally discouraged result of the sharing of expertise and information which was at the heart of the correspondent associate program.[287]

The Court then dealt with the government's alternative argument that the correspondent associate program went far beyond the conventional "correspondent" relationship, and accordingly unreasonably restrained trade under the Sherman Act. While agreeing that the C&S program did go beyond the normal correspondent relationship, the Court declined to find a violation. In its view, the crucial point was that the correspondent associate concept was originated as a response to the restrictions imposed by the State of Georgia on de jure branching.[288]

In the context of the restraint of branching imposed by the State of Georgia, the correspondent associate relationships were designed to defeat—not to enhance—the state-imposed restraint of trade. The Court evaluated the purpose and effect of the C&S system and found them "procompetitive." Thus, in the face of the stringent state restrictions on branching, the Court found C&S's program of founding new de facto branches not unlawful under the Sherman Act.[289]

Following from that, the Court was also unable to find defects in the acquisitions under § 7 of the Clayton Act. Justice Stewart agreed that the government may have made out a prima facie case of § 7 violation by showing the increase in market shares in various relevant markets, but decided that C&S was able to show that the

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[286] 422 U.S. at 113-14.

[287] *Id.* at 114.

[288] *Id.* at 115-16. In that context, the question is whether restraints of trade inherent to that unusual function are unreasonable. The Court then recites familiar general principles of Sherman Act jurisprudence. Even commonly owned firms must compete against each other if they hold themselves out as distinct entities. Internal expansion is to be encouraged as a means of finding new customers and higher profits over agreements among competitors. Business entities cannot justify restraints of trade on the ground that their sponsorship led to the establishment and flourishing of their co-conspirators. But the Court does not believe these general principles reach the present case. *Id.* at 116-17.

[289] *Id.* at 118-20.

marketshare statistics gave an inaccurate account of the acquisitions' probable effects on competition. Because there was neither present nor past competition—a fact that in this context does not indicate a violation of the antitrust laws—Justice Stewart found that the proposed acquisitions would not eliminate any present competitive conduct or relationships. Nor, in the view of the majority, was there any prospect that the denial of these acquisitions would lead the various banks to compete with one another. Accordingly, Justice Stewart found no unlawful acquisitions under § 7 of the Clayton Act.[290]

The dissent provided a thorough going counterpoint.[291] With respect to the Sherman Act allegations, Justice Brennan failed to see any effect from the grandfather provision of § 11(d) of the Bank Holding Company Act. Reviewing the legislative history of that provision and its language, Justice Brennan failed to see that price fixing, market division or other cartel activities were covered in any way. In his view, the provision applied only to the classic merger or acquisition, and C&S did not engage in these transactions prior to 1966. The limited character of the transactions "grandfathered" argues against the expansion of that language to cover the correspondent associate relationships.

With respect to the merits of the § 1 claim, Justice Brennan first considered the relationships at their inception. While characterizing the question as a close one, the dissent was willing to allow for the possibility of justification. But in his view:

> The lawfulness of the practices at their inception, even if assumed, could not be controlling, for changes in market conditions can deprive once-reasonable arrangements of their justification.[292]

The dissent argued that the only relevance of the initial justification was in its support of the contention that no bank would engage in "de facto branching" without a guarantee of perpetual immunity from the antitrust laws. Justice Brennan did not find that kind of argument persuasvie, mainly because he was able to conceive of alternative tactical responses to an antibranching policy that would be less restrictive and still serve the C&S interest.

The dissent then examined the C&S affiliations in light of conditions prevailing at the time of suit, when free branching in the At-

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[290] *Id.* at 120-22.

[291] *Id.* at 130-50 (Brennan, J., dissenting, joined by Douglas and White, JJ.).

[292] *Id.* at 143, *citing* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa.), *aff'd*, 365 U.S. 567 (1961).

lanta suburbs was clearly permitted by Georgia law. Likening the C&S system to "common brand" marketing agreements or franchising arrangements, particularly when undertaken by firms that possess large market shares,[293] he saw difficulty for these kinds of arrangements in the context of the commercial banking industry, since regulation already inhibits competition and such marketing arrangements restrict the few modes of competition left to the bank. Any additional impediment to competition thus takes on a larger significance and, as a result, Brennan concluded:

> These considerations suggest that cooperative arrangements in commercial banking should be permitted only where their competitive benefits are clear, and where the combined market shares of the participants dispel the fear that price collusion will accompany them.[294]

The dissent then failed to find that the C&S system satisfied that test. Justice Brennan viewed the situation as combining substantial market shares, agreements not to challenge large rivals, the hegemony of a dominant firm and a concentrated market, all of which impede competition.

The dissent also disagreed that there was no Clayton Act violation.[295] Finding it not improbable that the county banks, denied the protective association with C&S, would seek their independence, Justice Brennan found the acquisition leading to a substantial lessening of competition under future conditions that were clearly discernible. While admitting that there was some speculation involved in assessing future market conditions, the dissent preferred the uncertainty of holding open the possibility of future competition rather than ratifying acquisitions in a market that was highly concentrated and where the acquiring firm was the dominant one.

Citizens and Southern is a case closely tied to its facts, and in the conventional commercial context, those facts are admittedly unusual ones. Accordingly, it may be that the precise holdings will be of little general significance. Within the world of banking, however, a world cross-hatched with state and federal regulatory restrictions, the case is more important. It seems to teach that private activities, normally risking unlawfulness under the antitrust laws, in the context of regulations that are themselves anti-competitive may be justifiable if

[293] 422 U.S. at 144-45.
[294] *Id.* at 146.
[295] *Id.* at 147-50.

their purpose and effect is generally procompetitive. This kind of evaluation is distinct from the normal analysis in which certain conduct is absolutely unlawful per se, regardless of the context. Instead, in *Citizens and Southern*, conduct that might have been regarded as per se unlawful is evaluated against the background of the amount of competition permitted by state law, and in that context found procompetitive and lawful. The concept of relative procompetitiveness is a fertile one. Indeed, the result may be the introduction of market incentives into regulated sectors of the economy where they are sorely needed.

Even beyond the banking world, the reappearance of the rule of reason after many years in which its demise was often rumored is a welcome event.[296] To those judges with a special interest in the use of the antitrust laws in a precise and sensitive way, the rule of reason has always provided the breathing space which the cruder and more absolute per se doctrine denied. In a world of diverse commercial arrangements and varying economic circumstances, some formulation enabling courts to take the diversity into account seems necessary and desirable. The concern of some judges with truncated procedures and easy predictability, even at the expense of flexibility, may now be giving way to a more realistic and more neutral competition policy.

The opinion also confirms the Court's movement away from the use of market share statistics as the ultimate indicium of competitiveness in Clayton Act cases. As was the case in *United States v. General Dynamics Corp.*,[297] the Court in *Citizens and Southern* permits more extended factual proof to show that market share statistics give an inaccurate picture of the realities of the marketplace. That concern for and willingness to be guided by economic realities is a desirable byproduct that could be expected from a less doctrinaire application of the antitrust laws.

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[296] Recent cases employing a rule of reason analysis include United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); White Motor Co. v. United States, 372 U.S. 253 (1963). More recently, the Supreme Court has invoked per se rules in situations where rule of reason analysis might have reached economically more desirable results. *See, e.g.*, United States v. Topco Associates, Inc., 405 U.S. 596 (1972); Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 WASH. & LEE L. REV. 457 (1971). For a scholarly and often cited discussion of the appropriate roles of the rule of reason and the per se rules, see Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division: Part I*, 74 YALE L. J. 775 (1965).

[297] 415 U.S. 486 (1974). The decision is discussed in Shenefield, *Annual Survey of Antitrust Developments—Class Actions, Mergers, and Market Definition: A New Trend Toward Neutrality*, 32 WASH. & LEE L. REV. 299, 321-29 (1975).

V.

Conclusion

The decisions of this past Term reflect the continuation of the trend toward neutrality in the application of the antitrust laws. The appearance of the last antitrust opinion by Justice Douglas is a major landmark in that process. In every case in which there was a dissent this past Term, except *ITT Continental Baking*, Justice Douglas counted himself among the dissenters. In two of those dissents, Justice Douglas was the author. His dissenting opinion in *American Building Maintenance*, issued on June 24, 1975, was his last antitrust opinion.

It is not entirely coincidental that his departure from the Court accompanies the movement away from antitrust activism. His views on the virtues of competition as a fundamental ingredient of American life were sufficiently enthusiastic that his colleagues on the Court were much influenced for some 35 years. Not even the student of antitrust, who was at times frustrated by the sweeping opinions that seemed to decide so much more than the particular case, or who looked in vain for support in the record for positions taken in those opinions, could fail to be moved by Justice Douglas' reverence for the small, family-owned business or his repugnance for the mechanization and industrialization of every sector of American life. For him, "big" business was an epithet, and economies of scale were never a sufficient justification.

This apostle of competition contributed much in the decision-making, even as the Court now moves to a more moderate position in the antitrust spectrum. Whatever one may think of the results of the decisions in the Term to come, one cannot doubt that the fire and spirit and vigor of Justice Douglas will be missed.