U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

May 28, 2020

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Assistant Attorney General Makan Delrahim before the Subcommittee on Antitrust, Competition Policy, and Consumer Rights on September 17, 2019, at a hearing concerning oversight of the enforcement of the antitrust laws.

Please do not hesitate to contact this office if we can be of additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Prim Escalona

Prim F. Escalona
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Dianne Feinstein
Ranking Member

The Honorable Mike Lee
Subcommittee Chairman

The Honorable Amy Klobuchar
Subcommittee Ranking Member

MAKAN DELRAHIM
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE
QUESTIONS FOR THE RECORD
FROM A HEARING ENTITLED
"OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS"
BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS
SEPTEMBER 17, 2019

Questions from Chairman Lee

1. **AAG Delrahim testified that the Antitrust Division could benefit from additional resources to enforce the antitrust laws. As I noted in my opening statement, "there's no analytical basis for splitting a monopolization investigation between the FTC and DOJ. Doing so simply looks like both agencies want to have the same slice of the same pie at the same time." AAG Delrahim, however, testified that it would be possible to divide a monopolization investigation of the same company if each agency investigated different conduct.**

    a. **Explain how taxpayers and consumers will benefit by the Antitrust Division and FTC simultaneously investigating different conduct by the same company under a monopolization or attempted monopolization theory of harm.**

Response:

The Antitrust Division (Division) and the Federal Trade Commission (FTC) share authority for civil antitrust enforcement. Over the years, the two agencies have developed a process for determining which agency will handle a particular matter generally on the basis of which agency has the most relevant experience in the particular market(s) involved. This process for the most part enables both agencies to make the most effective use of enforcement resources and avoids duplicative investigatory requests to private parties.

There can be benefits, however, to taxpayers and consumers from simultaneous monopolization investigations involving the same firm, but different conduct. The benefits from specific parallel investigations would ultimately depend on the specific factual circumstances. They could include, for example, permitting both the FTC and the Division to devote more resources collectively to the overall investigation than each could do individually. Such benefits can be analogous to the routine practice of having different teams within an agency investigating different theories of harm, or relevant product markets, involving the same companies.

b. **Explain how the Antitrust Division and FTC can conduct such a**

simultaneous investigation without duplicating efforts, wasting government resources, and burdening the company under investigation or third parties.

<u>Response:</u>

The goal of the clearance process is to reduce any inefficiencies or burdens while maintaining the ability to carry out our statutory mandate to protect competition. I am aware of the burden associated with complying with antitrust investigations on both target companies and third parties. The Division endeavors to minimize inefficiency, duplication of effort, and burden while upholding the antitrust laws through diligent coordination with other antitrust enforcers, including multiple state attorneys general and foreign enforcement agencies, when seeking related information.

c. **Explain any additional litigation risks the Antitrust Division may face if the Antitrust Division and FTC simultaneously attempt to challenge in court different conduct by the same company under a monopolization or attempted monopolization theory of harm.**

<u>Response:</u>

Both the litigation risks and the benefits of a concomitant enforcement action by another federal agency against the same firm would depend on the specific nature of the case or cases. The Division would work with the FTC in such circumstances to minimize any risks, and maximize any benefits, of enforcement actions against the same or related parties.

d. **Describe any potential opportunity costs involved in splitting what is in essence a single monopolization investigation between the Antitrust Division and the FTC.**

<u>Response:</u>

The opportunity costs, if any, would depend on the specific investigation at issue and other enforcement priorities at the time. Any monopolization investigation requires coordination among a team of attorneys, economists, and other professionals. The opportunity costs of concomitant investigations would include whatever additional coordination efforts would be required over and above the standard efforts of coordination involved in any monopolization investigation. The opportunity costs would also need to be weighed against the potential benefits of concomitant investigations. The potential benefits of concomitant investigations would also be fact specific, but may include efficiencies associated with having the combined expertise of the Division and FTC involved in such an investigation.

2. **Having two antitrust agencies responsible for civil antitrust enforcement requires a process to determine which agency will investigate which matter to avoid duplicative efforts. Both AAG Delrahim and Chairman Simons acknowledged at the hearing that the clearance process, at least in some instances, is not currently working well.**

a. **Besides moving all civil antitrust enforcement to a single agency, what can be done in the short term to improve the clearance process?**

Response:

The Department and the FTC developed the clearance process to minimize, to the extent possible, the inefficiencies caused by their overlapping authority in enforcing the antitrust laws. The Department will continue to work with the FTC to identify areas of friction and devise arrangements that lead to the faster and more efficient resolution of clearance requests.

3. **The Supreme Court hasn't issued a decision on a merger challenge since 1974. It's been more than 50 years since the Court specifically addressed whether efficiencies resulting from a merger can be considered when judging its legality. In the meantime, antitrust analysis has evolved considerably, and now embraces an approach that is grounded in economics. In analyzing non-merger antitrust issues, the Supreme Court has followed this modern economic approach. However, while the trend among lower courts has been to entertain merging parties' efficiency claims, no court has ever held that an otherwise illegal merger could proceed given the likely large efficiencies. Twelve months ago, when asked at the October 2018 oversight hearing whether an efficiencies defense should be codified, AAG Delrahim stated that he would want to think more about that question.**

   a. **Should an efficiencies defense be codified given the apparent confusion in the courts about whether such a defense may be unlawful under Supreme Court precedent?**

Response:

As reflected in the joint DOJ-FTC Horizontal Merger Guidelines, the agencies consider efficiencies when determining whether they will challenge a merger—specifically, those efficiencies that are demonstrated to be merger-specific, not vague or speculative, verifiable by reasonable means, and not the product of an anticompetitive reduction in output or quality. In general, the common law approach of antitrust has benefited from its flexibility to adopting economic developments over time. A congressional statute recognizing an efficiencies defense may provide clarity to the public, but any statutory provision codifying an efficiencies defense would need to be drafted very carefully to avoid unnecessarily shifting courts' focus away from applying advances in economic thinking and judicial experience.

4. **The Antitrust Division's Business Review Letter process permits an entity to request the Division's enforcement intentions regarding proposed conduct and contemplates a letter response from the Division.**

   a. **If the Antitrust Division issued a no-enforcement Business Review Letter but subsequently found that forward-looking predictions in its analysis were not realized such that the proposed conduct could threaten**

anticompetitive effects, what can the Antitrust Division do to address this situation?

<u>Response:</u>

The Business Review process was designed to provide parties confidence to pursue conduct, practices, or agreements they believe to be procompetitive, and to avoid uncertainty that chills business activities that benefit consumers. While the Division may review proposed activities and issue a letter to provide such confidence, the process is not intended to limit in any way the Division's ability to bring an action to prevent conduct, practices, or agreements that in fact pose a threat to competition or consumers. A business review letter states only the present enforcement intention of the Division, with regard to the facts specified, as of the date of the letter. The Division remains free to bring any action it comes to believe is required by the law, as noted in the Division's Business Review Procedures and the Business Review letters themselves. As such, the Division does not believe the Business Review program, as practiced, prevents it from bringing a lawsuit to challenge activities that violate the antitrust laws.

b. If the analysis in a Business Review Letter were regularly misrepresented by private parties, especially in foreign jurisdictions, in a manner that creates confusion as to the state of U.S. antitrust law, what can the Antitrust Division do to address this situation?

<u>Response:</u>

As the Division's Business Review letters note, the Division reserves the right to bring an enforcement action in the future if we determine that conduct or practices violate the law. Depending on the nature of any misrepresentations about a Business Review Letter, the Division could take a range of formal or informal steps to address them short of opening or bringing an enforcement action. Misrepresentations in foreign jurisdictions would require taking steps designed to ensure correcting any misunderstanding thereby developed in the foreign jurisdiction.

<u>Questions from Ranking Member Klobuchar</u>

5. I am concerned that our antitrust laws may not be doing a very good job at deterring monopolistic or exclusionary conduct. It seems that the threat of a potential injunction or the remote possibility of a company break-up may not always be enough to deter companies from crossing the line into anticompetitive conduct—which is why I introduced a bill to allow the antitrust agencies to seek substantial civil penalties when firms violate Section 2 of the Sherman Act.

a. Could giving the antitrust agencies the ability to seek civil penalties enhance their ability to enforce Section 2 of the Sherman Act and deter unlawful behavior?

<u>Response:</u>

The ability to seek civil penalties would give the Division an additional tool with which to combat and deter anticompetitive conduct. It also would provide a means to compensate taxpayers for anticompetitive injuries to American consumers. I believe the antitrust laws, including the private right of action, provide an appropriate framework to address anticompetitive conduct, but the Division would be happy to work with this subcommittee on ideas it may have to enhance the Division's enforcement capabilities. Where penalty authority is desired for FTC matters, providing enforcement authority to the Department is an effective way to increase the available tools while appropriately leaving punitive law enforcement functions under the control of the Executive Branch.

6. **In December 2015, this Subcommittee held a hearing on the proposed Anheuser-Busch InBev/SABMiller merger and its potential effects on competition, prices, and consumer choice in American beer markets. I raised concerns about this transaction at the hearing and in a letter to the Antitrust Division. The merger was later completed subject to a Justice Department consent decree intended to cure the anticompetitive effects of the transaction.**

    a. **What can you report concerning the parties' compliance with the consent decree and the state of competition in U.S. retail and wholesale beer markets?**

Response:

The Modified Final Judgment that the Division obtained in the Anheuser-Busch InBev (ABI)–SABMiller merger provided comprehensive relief to prevent that merger from harming competition. Without the relief the Division obtained, ABI's acquisition of SABMiller would have harmed consumers, in part because ABI would have controlled 72 percent of the U.S. beer market and would have had high market shares in local markets throughout the country. As a result, the merger likely would have resulted in higher beer prices and fewer choices for U.S. beer consumers.

The Judgment directly addressed this harm by requiring ABI to divest SABMiller's entire U.S. beer holdings. ABI made the divestiture required by the Judgment to Molson Coors on October 11, 2016. This $12 billion divestiture included SABMiller's equity and ownership stake in MillerCoors, the worldwide rights to the Miller brands, and perpetual, royalty-free licenses to certain products for which MillerCoors previously had to pay royalties. As a result of the divestiture, ABI did not increase its market share in the United States at all, and the merger did not cause the U.S. beer industry to become more concentrated. The divestiture ensured that MillerCoors (now solely owned by Molson Coors) has remained an independent and economically viable competitor.

The proposed Final Judgment also imposed certain restrictions on ABI's distribution practices and ownership of distributors, which under the current arrangement will remain in force until January 19, 2026. The Division retains the full authority to ask the Court to hold ABI in civil and criminal contempt should ABI fail to comply with any provision of the Judgment. Importantly, in 2018, prior to the entry of the Modified Final Judgment, the Division sought four important changes to aid in the enforcement with this consent decree. These modifications reduced the burden of proof for the Division to prove a consent violation, incorporated a fee-shifting provision so that the parties would pay the Division's attorney's fees and costs in any successful consent decree enforcement effort, and allowed the Division to apply for a one-time extension of the term of the decree or terminate the decree after five years upon notice to the court.

Questions from Senator Grassley

7. I'm increasingly concerned by reports of major players in the pharmaceutical supply chain engaging in practices that seem to prevent competition. For example, some manufacturers have used so-called rebate walls or rebate traps to bundle together rebates and block a competitor's access to a PBM's formulary. This could have the effect of keeping drug prices high, even though competitors are trying to enter the market with lower cost alternatives.

a. Are you familiar with rebate walls or rebate traps? Does the Antitrust Division have any concerns about potential anticompetitive impacts of these practices?

Response:

Pursuant to long-standing procedures to ensure that both the FTC and the Department do not prosecute the same conduct, civil antitrust matters involving pharmaceuticals are routinely handled by the FTC; I refer you to them for further information in that regard. For its part, the Division is committed to thoroughly investigating and, where warranted, criminally prosecuting companies and individuals who conspire to fix drug prices, rig drug bids, or allocate customers between different pharmaceutical companies.

For example, on December 14, 2016, the Division filed charges against the former CEO and the former president of Heritage Pharmaceuticals Inc., a generic pharmaceutical company, for fixing the prices of generic antibiotic and diabetes drugs. Both individuals pleaded guilty in early January 2017. Further, in May 2019, the Division charged Heritage itself with engaging in a criminal antitrust conspiracy with other companies and individuals to fix prices, rig bids, and allocate customers for glyburide, a medicine used to treat diabetes. Heritage entered into a deferred prosecution agreement with the Division, under which Heritage acknowledged its participation in the criminal conspiracy, agreed to pay a monetary penalty, and committed to cooperating in the Division's ongoing investigation. This case is the result of an ongoing federal antitrust investigation being conducted by the Division with the assistance of the United States Postal Service Office of Inspector General, the FBI's Washington Field Office, the FBI's Philadelphia Field Office, and the U.S. Attorney's Office for the Eastern District of Pennsylvania. To date, four executives and two companies have been charged in this investigation. Criminal antitrust violations in the generic pharmaceutical industry exploit Americans who need pharmaceuticals to survive or to achieve a better quality of life, and the

Division will continue to prosecute the companies and executives who commit these offenses. I appreciate Congress's continued support of these ongoing efforts and the resources they require.

8. **I've heard from a number of my constituents regarding the Antitrust Division's review of the ASCAP and BMI consent decrees. Iowa businesses and songwriters alike have come to rely on the efficiencies provided by these two consent decrees. There is significant concern that the processes that they rely on will be changed without enough notice and will result in harmful market disruption. Section 105 of the Music Modernization Act acknowledges this complexity and establishes a clear mandate for the Antitrust Division to consult with Congress as it reviews these consent decrees to minimize market disruption and maximize benefits to songwriters, copyright owners, music licensees and consumers. In August, you indicated that the Antitrust Division could take action on these decrees before the end of the year. If that is the case, it doesn't leave Congress much time to act, and I'm not aware of any consultation with Congress or any specifics about the review.**

    a. **What is your expected timetable with respect to the ASCAP and BMI consent decrees? How do you intend to fulfill the consultation mandate contained in the Music Modernization Act?**

Response:

After the Division announced its intention to review the ASCAP and BMI decrees, it opened up a public comment period. That comment period ended in August 2019. The Division advised Congress when it opened the comment period. The Division received over 800 comments from parties, stakeholders, and citizens, and these comments are publicly posted on the Division's website (found at https://www.justice.gov/atr/antitrust-consent-decree-review-public-comments-ascap-and-bmi-2019). As the Division reviews the comments, it continues to be engaged actively with the parties and industry stakeholders.

    b. **Will you commit to keeping this Committee informed as the Antitrust Division's review progresses and to working with us to have a framework in place prior to taking action?**

Response:

Congress has a very important role with regard to this issue, and the Division intends to continue its engagement with Congress, and will continue to abide by its obligations under the Music Modernization Act. At this time, the Division has not reached any conclusion as to whether to modify, terminate, or take no action with respect to the consent decrees.

9. **Many discussions in Congress about protecting consumers from skyrocketing healthcare costs focus on the manufacturers, intermediaries, insurers, and care providers. It's also important to recognize that patients' own electronic healthcare information and prescription histories are a key part of this complex supply chain. As is often the case, information is power—and an entity's control of information can**

ultimately impact the prices that consumers pay.

a. **Has the Antitrust Division observed any anticompetitive activities in the realm of patient information and data? Do PBMs or other intermediaries play a role in these activities? If so, please explain.**

Response:

I agree that the use of patient information and data is an important dimension of competition in the healthcare industry. As part of the Division's enforcement efforts in the healthcare sector, the Division recently completed a significant investigation of a merger involving electronic health records. When analyzing mergers of companies that sell software for electronic health records, the Division takes a critical look not only at competition for electronic health records software generally, but also for competition to develop specialized software for specific types of medical practices. In addition, the Division is committed to monitoring anticompetitive conduct involving the handling of patient data and information.

b. **Does the DOJ have the tools it needs to investigate and protect consumers against abuses in the patient health and prescription information marketplace?**

Response:

The available legal tools to investigate and enforce antitrust law in the health care marketplace have been sufficient for the Division to effectively to protect consumers, despite limited resources. For example, in the Division's investigation of CVS's acquisition of Aetna, the Division thoroughly investigated the potential for anticompetitive effects arising from that transaction, including the potential for concerns relating to the interaction between PBMs and other components of the healthcare supply chain. The Division's investigation collected information from market participants at all levels of the pharmaceutical supply chain and identified a substantial concern in Medicare prescription drug plans for seniors, which we addressed with a divestiture of the relevant business line.

10. **It's no secret that the healthcare supply chain is growing increasingly concentrated. Last year, for example, mergers were announced between Cigna Corp. and Express Scripts, and CVS Health and Aetna. According to the Kaiser Family Foundation, these two combined entities cover 71% of all Medicare Part D enrollees and 86% of all stand-alone drug plan enrollees. We're also witnessing mergers of pharmaceutical manufacturers, like the recently proposed AbbVie and Allergan deal, and the Bristol-Myers Squibb and Celgene deal. Some of these actors have engaged in anticompetitive practices before, such as Allergan's sham transfer of a patent and Celgene's abuse of the REMS process.**

    a. **Are Americans right to be concerned about increased concentration in the healthcare marketplace?**

Response:

The healthcare industry is a crucial sector of the U.S. economy as well as in individuals' lives. The Division shares concerns about concentration in healthcare markets and will vigorously investigate and enforce any violations of the antitrust laws in the sector. Competition is an important factor in helping control health care costs. Therefore, the Division devotes substantial resources to ensuring it pursues potential anticompetitive mergers and conduct in the industry. When we determine that a merger or consolidation threatens healthcare competition, we will take the actions necessary to preserve that competition and protect against consumer harm.

b. What can you say to the American people to reassure us that your agency is conducting *robust* analyses of these and other mergers in the healthcare marketplace?

Response:

The Division investigates and pursues anticompetitive activities in healthcare through criminal investigations, civil non-merger conduct investigations, and merger investigations. On the criminal side, we have an ongoing investigation into cartel activity among generic drug providers, in which four executives and two companies have been charged so far. In May 2019, one of the generic pharmaceutical companies admitted to price fixing and agreed to pay more than $7 million in criminal penalties and civil damages. In our civil non-merger work, we successfully prevailed in restoring competition by challenging an agreement among Michigan hospitals to limit competition among one another, reaching a final judgment in May 2018. In November 2018, we entered into a consent decree with Atrium Health that prohibits it from using anticompetitive provisions in its contracts with insurers. In the area of merger review, in 2018 we obtained a divestiture in the CVS/Aetna transaction to preserve competition, requiring the sale of Aetna's Medicare Part D prescription drug plan business for individuals to WellCare Health Plans, Inc. In 2017, we successfully prevailed in litigation to stop mergers between some of the largest insurers—Aetna/Humana and Anthem/Cigna—that would have harmed competition. As the above examples illustrate, if any such conduct threatens consumer harm in violation of the antitrust laws, we take appropriate action to protect consumers.

Questions from Senator Hawley

11. The Department of Justice is currently reviewing the separate consent decrees that govern the two largest music performing rights organizations, the American Society of Composers, Authors and Publishers, and Broadcast Music, Inc. Changing or terminating these consent decrees would have dramatic effects on the marketplace for music performance licensing.

a. What is the status of this review, and when might it conclude?

Response:

In June 2019, the Division announced its intention to review the ASCAP and BMI decrees and opened up a public comment period. That comment period ended in August 2019. The Division received over 800 comments from parties, stakeholders, and citizens, and these comments are publicly posted on the Division's website (Found at https://www.justice.gov/atr/antitrust-consent-decree-review-public-comments-ascap-and-bmi-2019). As the Division continues to review the comments, it continues to engage actively with parties and industry stakeholders. The Division intends to reach a conclusion about modifying, sunsetting, terminating, or keeping the decrees in place in the coming months.

b. What potential revisions to the decrees is the Department considering?

Response:

The Division is considering all options, which include modifying, terminating, or keeping the decrees in place without modification.

c. How does the Department intend to respond to and counteract any anticompetitive effects that may result from modifying or terminating the consent decrees?

Response:

The Division appreciates the potential ramifications of an abrupt termination of the ASCAP and BMI decrees without some form of transition. The Division continues to engage with industry stakeholders as it determines appropriate next steps.

12. Critical to how the Department of Justice enforces antitrust laws is how the Department defines the relevant market. During the Competition in Television and Digital Advertising workshop that your Department hosted in May, some broadcasters raised concern that the Department fails to consider competition posed by digital advertising when defining the market for broadcaster advertising. Outdated market definitions could cause the Department to view a single broadcaster in a community as a local monopolist even though residents of that community are viewing digital ads associated with streaming services or video-sharing internet services that are similar to traditional broadcast advertisements.

a. What steps has the Department taken in response to concerns raised at the May workshop?

Response:

The Division has given a great deal of thought to the concerns raised at the Competition in Television and Digital Advertising Workshop that we hosted in May 2019. The purpose of the workshop was to explore industry dynamics in media advertising, including the competitive impact of technological developments such as digital and targeted video advertising, and the implications for antitrust enforcement and policy. We recognize that consideration of evolving industry dynamics is necessary to our analysis and we are constantly refining our thinking to be on pace with technological and other industry developments.

b. Has the Department considered altering its guidelines for defining the product market for broadcast advertisements?

Response:

The Division relies on the 2010 DOJ-FTC Horizontal Merger Guidelines, which apply to all industries. I believe that the Guidelines have proven to be flexible enough to account both for differences across industries and technological developments.

c. Has the Department evaluated whether the availability of digital advertisements in a region makes advertisers less likely to pay for traditional broadcast advertising because of the ability to target consumers through digital streaming services using behavioral advertisements?

Response:

The Division's recent investigation into Nexstar Media Group's proposed acquisition of Tribune Media Company afforded us the opportunity to evaluate the impact of digital advertisements on traditional broadcast advertising prices. The complaint the Division filed against Nexstar/Tribune on July 31, 2019 explained that: "Technological developments may bring various advertising categories into closer competition with each other. For example, broadcasters and cable networks are developing technology to make their spot advertising addressable, meaning that broadcasters could deliver targeted advertising in live broadcast and on-demand formats to smart televisions or streaming devices. For certain advertisers, these technological changes may make other categories of advertising closer substitutes for advertising on broadcast television in the future."

13. Aluminum end-users like those who manufacture canned beverages are concerned that the Midwest Premium paid by American purchasers may be inflated above its appropriate rate. Despite the lifting of the aluminum tariffs imposed on Canadian and Mexican aluminum supply, and despite reductions in transportation and storage costs, the Midwest Premium remains well above its pre-tariff level. Currently, the Midwest Premium is set based on data compiled by a single ratings agency, data that end-users fear may be subject to manipulation that forces these end users to pay monopoly prices for aluminum.

You received a request last Congress from members of the House to examine this market to determine whether anticompetitive conduct has inflated the Midwest Premium. Please provide an update about any preliminary inquiries the Department of Justice has undertaken on this matter, your office's response to any recent submissions of new information by aluminum end-users to your staff, and the basis for any decision not to pursue a formal inquiry.

Response:

The Division is strongly committed to protecting competition in the aluminum industry, and I am aware of the concerns that aluminum end-users, such as manufacturers of canned beverages, have raised regarding the Midwest Premium. Complaints from individuals and companies interested in sound enforcement of the antitrust laws give the Division important leads, with which we develop investigations and, ultimately in some instances, litigate cases. We are continuing to monitor the industry closely and we stand ready to review any new information that industry participants wish to submit. Although Department policy limits my ability to comment on specific investigations, please be assured that should the Division come across any evidence suggesting conduct that may violate the antitrust laws, including any form of unlawful monopolization or collusion, we will not hesitate to investigate it and bring an enforcement action as appropriate to protect competition and consumers.

14. **Are you aware of any claims by large tech companies that section 230 creates an immunity from liability for violations of the Children's Online Privacy Protection Act, rules promulgated under that Act, any other federal privacy regulation, or section 5 of the FTC Act?**

    Has the federal government sought to impose weaker fines or penalties of any kind than it otherwise would have when enforcing competition and consumer protection laws because of a concern that a company might have immunity from liability because of section 230?

Answer:

The Department is not aware of claims as to section 230 immunity in any Antitrust Division matters.

Questions from Senator Leahy

15. **During the oversight hearing, you stated that the White House has never, directly or indirectly, communicated its preferences to you regarding any enforcement matter or investigation. Previous reporting has claimed that the President personally demanded the Justice Department block the merger between AT&T and Time Warner. The same day as the oversight hearing, reports broke that the President intended to revoke California's ability to set its own fuel efficiency standards, further adding to the perception that the President has used antitrust enforcement to target his opponents.**

    a. **Regardless of whether the White House has ever communicated its preferences to you regarding an antitrust enforcement or investigative action, do you believe that a public perception that the President has influenced the Antitrust Division's actions damages the independence of the Department of Justice?**

<u>Response:</u>

The Division is committed to ensuring that the law is administered and applied impartially, that all investigations comply with Department policies, and that political considerations do not influence the handling of investigations or cases. The Department takes very seriously its commitment that all investigations conducted by the Division are initiated and conducted in a fair, professional, and impartial matter without regard to political considerations.

b. What efforts, if any, is the Justice Department taking to combat the appearance that the Antitrust Division has been influenced by the White House?

<u>Response:</u>

The Department has specific policies and guidance, including a memo by then-Attorney General Holder dated May 11, 2009, that limit discussions between the White House and the Department regarding ongoing cases or investigations. The Division remains committed to following and enforcing applicable policies related to such contacts.

The Division took the effort to correct the unfortunate misunderstandings reflected in certain published commentary about the automaker investigation. To that end, I recently wrote an op-ed, published in USA Today and reprinted below, in an effort to correct the public record on well-settled antitrust law principles.

16. The *Noerr-Pennington* doctrine provides immunity under antitrust law when an entity is advocating for legislation or regulation before a government. In response to Senator Whitehouse's questions regarding the Division's investigation into four automakers for their agreement with the state of California – and why the *Noerr-Pennington* doctrine didn't apply to shield the automakers – you alluded to several situations where business entities' interactions with governments were not shielded from liability under the *Noerr-Pennington* doctrine.

a. What specific DOJ investigations or enforcement actions were you alluding to?

<u>Response:</u>

The seminal cartel case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), involved coordination among large oil producers encouraged by then-Secretary of the Interior Harold Ickes, but the Supreme Court rejected the argument that the government involvement provided a defense. Later cases, such as *Allied Tube & Conduit Corp. v. Indian Head, Inc*., 486 U.S. 492 (1988), suggest that exemptions are limited and subject to rigorous antitrust analysis. For example, *Allied Tube* involved a standard adopted by a governmental body, and the *Noerr-Pennington* doctrine did not apply. As the Supreme Court explained, "the scope of [*Noerr-Pennington*] depends…on the source, context, and nature of the anticompetitive restraint at issue." *Id.* at 499. *Noerr-Pennington* doctrine does not protect "private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." *Cont'l Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 707 (1962). Thus, in *FTC v. Superior*

Court Trial Lawyers Association, 493 U.S. 411 (1990), the Supreme Court found that members of an association who agreed not to accept new cases for the purpose of persuading the District of Columbia to increase hourly fees paid to court-appointed criminal defense lawyers were not protected by *Noerr-Pennington* when they stood "to profit financially from a lessening of competition…." *Id.* at 427 (quoting *Allied Tube*, 486 U.S. at 508).

b. How are these investigations or enforcement actions similar to the conduct of these automakers such that the Division determined an investigation was warranted?

<u>Response:</u>

Department policy limits my ability to comment on the details of specific investigations, though in the most general terms, I believe the aforementioned cases establish that the applicability of the *Noerr-Pennington* doctrine is a fact-specific matter and not always apparent without investigation of whether a violation of antitrust law has occurred.

17. Recently, Taiwan Semiconductor Manufacturing Company (TSMC) has been accused of using its dominant position in the electronic chip manufacturing market to hurt competition through unfair usage of loyalty rebates, exclusivity clauses, and penalties designed to discourage customers from switching to competitors. GlobalFoundries, one of TSMC's largest competitors, employs a large number of Vermonters.

a. Is the Antitrust Division of the DOJ aware of these allegations against TSMC? If so, is the Division investigating or considering investigating whether TSMC's practices are harmful to competition?

<u>Response:</u>

The Division is aware of the allegations against the Taiwan Semiconductor Manufacturing Company. Department policy limits my ability to comment, confirm, or deny the existence of an investigation, but please be assured that the Division thoroughly investigates allegations of potential antitrust violations and if such a violation is found, it will take whatever actions are necessary to protect competition and consumers.

<u>Questions from Senator Booker</u>

18. As we navigate the contours of crafting federal privacy legislation, one of the most intense and recurring debates centers around interoperability provisions, i.e., the ability of consumers to control the use of the information they provide on one service within another service.

a. What kinds of data should be portable?

Response:

The Division's mandate is to enforce the antitrust laws by preventing harm to competition. Questions regarding the kinds of data that should be portable would be better addressed by other components of the Department or other federal agencies. Although data portability may in some circumstances promote competition, many issues related to data portability may fall outside the scope of competition policy. The Division will work with other components within the Department and across the executive branch to ensure that the antitrust agencies' capacity to investigate and enforce against threats to competition are not adversely affected by policies designed to address other issues involving data.

b. Who should bear the burden of protecting information as it moves from one service to another?

Response:

Given its statutory mandate, I do not believe the Division is the appropriate agency to determine who should bear the burden of protecting information as it moves from one service to another.

c. Is there a downside to interoperability provisions? For example, Facebook is reportedly rushing to integrate all of its services (Facebook, WhatsApp, Instagram, and Messenger) in order to make a potential break-up impractical and inordinately expensive.[1]

Response:

Although interoperability provisions may be well-intentioned, if not properly structured or applied, poorly-written regulations can sometimes favor entrenched, better-resourced incumbents. The Division looks forward to working across agencies to ensure that any proposed legislation does not have unintended anticompetitive consequences.

d. Are you at all concerned about this reported behavior by Facebook? Would a more tightly integrated Facebook present additional challenges for remedying anticompetitive conduct?

Response:

Any company behaving anticompetitively must bear the burden of the remedy imposed upon it. For example, when the Division has required a monitor as a settlement condition with a company that has engaged in anticompetitive conduct, the company generally must pay the monitor's fees. After concluding that Bazaarvoice Inc.'s acquisition of PowerReviews Inc. was a violation of the antitrust laws, the Department required Bazaarvoice to divest the assets it acquired from PowerReviews despite the fact that

[1] *E.g.*, Mike Isaac, Zuckerberg Plans To Integrate WhatsApp, Instagram and Facebook Messenger, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html.

Bazaarvoice had already integrated the assets into its business. Facebook's use of its integration as a defense in a potential equitable proceeding about breaking the company apart likely would be balanced against the fact that the integration occurred while antitrust investigations were ongoing.

19. The Federal Trade Commission's (FTC) $5 billion fine for Facebook's consent decree violations was record breaking. However, Facebook has roughly $45.2 billion in cash and securities on hand.[2] Meanwhile, Apple and Alphabet (Google) each reportedly have well over $100 billion in cash on hand.[3]

As massive as the Facebook fine was, the company had the resources to pay it and then some. What do you make of the argument that fines in the billions or even tens of billions of dollars actually entrench the dominance of incumbent platforms while doing little to deter illegal activity?

Response:

The relevant inquiry for determining appropriate remedies includes the benefit to the firm associated with the remedy and the prospective costs created by the likelihood that the agencies detect and punish the conduct. It is important that antitrust remedies be sufficiently large to disincentivize unlawful conduct. While a company's total revenue may be relevant to the remedy analysis, it is not determinative. Ultimately, an appropriate remedy will consider what best serves competition and consumers.

20. My home state of New Jersey has led the way on consumer protection issues when it comes to online event ticketing. My New Jersey colleagues in the House have been outspoken and written to your agencies several times about our shared concerns with the Live Nation Entertainment monopoly (from the 2010 merger of Live Nation and Ticketmaster) and the anticompetitive practices the company continues to utilize to stifle competition and harm consumers.[4]

a. Why has Live Nation Entertainment's dominance grown so much?

Response:

I share your concerns regarding the continued market power that Live Nation Entertainment appears to possess in ticketing and concert promotion. When the Department reached a settlement with Live Nation regarding its Ticketmaster acquisition in 2010, Ticketmaster provided primary ticketing services to venues representing more than 80% of major

[2] *E.g.*, Josh Constine, Facebook Reserves $3B for FTC Fine, but Keeps Growing with 2.38B Users in Q1, TECHCRUNCH (Apr. 24, 2019), https://techcrunch.com/2019/04/24/facebook-earnings-q1-2019.

[3] Jon Porter, Alphabet Overtakes Apple To Become Most Cash-Rich Company, VERGE (Aug. 1, 2019), https://www.theverge.com/2019/8/1/20749831/alphabet-google-apple-cash-reserves-richest-company.

[4] *E.g.*, Letter from Rep. Bill Pascrell, Jr., to Att'y Gen. Jeff Sessions (Oct. 5, 2018), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=2429; Letter from Reps. Frank Pallone, Jr. & Bill Pascrell, Jr., to Joseph J. Simons, Chairman, Fed. Trade Comm'n (July 20, 2018), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=2355.

concert venues. According to a 2018 GAO study of the primary and secondary ticketing markets, Live Nation's Ticketmaster remains the industry's market leader.

b. What remedies do you propose would bring back competition to the industry?

Response:

In January, the Division filed a petition asking the court to clarify and extend by five and a half years the Final Judgment entered by the court in *United States v. Ticketmaster Entertainment, Inc., et al.*, Case No. 1:10-cv-00139-RMC (July 30, 2010).

The 2010 Final Judgment permitted Live Nation to merge with Ticketmaster but prohibited the company from retaliating against concert venues for using another ticketing company, threatening concert venues, or undertaking other specified actions against concert venues for ten years. Despite the prohibitions in the Final Judgment, Live Nation repeatedly and over the course of several years engaged in conduct that, in the Department's view, violated the Final Judgment. To put a stop to this conduct and to remove any doubt about defendants' obligations under the Final Judgment going forward, the Department and Live Nation have agreed to modify the Final Judgment to make clear that such conduct is prohibited. In addition, Live Nation has agreed to extend the term of the Final Judgment by five and a half years, which will allow concert venues and American consumers to get the benefit of the relief the Department bargained for in the original settlement. The modifications to the Final Judgment will also help deter additional violations and allow for easier detection and enforcement if future violations occur.

The clarifications to the Final Judgment includes provisions that:

- Live Nation may not threaten to withhold concerts from a venue if the venue chooses a ticketer other than Ticketmaster;
- A threat by Live Nation to withhold any concerts because a venue chooses another ticketer is a violation of the Final Judgment;
- Withholding any concerts in response to a venue choosing a ticketer other than Ticketmaster is a violation by Live Nation of the Final Judgment;
- The Antitrust Division will appoint an independent monitor to investigate and report on Live Nation's compliance with the Final Judgment;
- Live Nation will appoint an internal antitrust compliance officer and conduct regular internal training to ensure its employees fully comply with the Final Judgment;
- Live Nation will provide notice to current or potential venue customers of its ticketing services of the clarified and extended Final Judgment;

- Live Nation is subject to an automatic penalty of $1,000,000 for each violation of the Final Judgment; and

- Live Nation will pay costs and fees for the Department's investigation and enforcement.

Along with the provisions described above, the modifications to the Final Judgment include additional safeguards to ensure Live Nation does not punish venues that want to work with competing ticketers, and importantly, extends the term of the Final Judgment for five and half years.

21. **Today we received reports that Mark Zuckerberg said his company's approach to antitrust litigation would be to "go the mat and fight."[5] This has not been the modern FTC or Department of Justice (DOJ) approach, primarily because of the history of such litigation. Specifically, the Microsoft, IBM, and AT&T antitrust cases each took the better part of a decade and were prohibitively expensive. However, Professor Tim Wu of Columbia Law School has argued that the IBM case was worth bringing because—despite the costs and delays—the litigation immediately caused IBM to change some of its anticompetitive conduct.[6] Others have made similar claims about Microsoft.[7] Indeed, late last year, Facebook reportedly ended its acquisition talks with Houseparty, a video-centered social network popular with consumers under 25, fearing the acquisition would invite too much additional antitrust scrutiny.[8] This suggests that the very specter of antitrust probes, investigations, and litigation can cause powerful corporations to think twice before abusing their market power.**

    a. **Do you have any data establishing that the scrutiny being brought to bear on social media platforms has created a deterrent effect as far as acquisitions?**

<u>Response:</u>

The Division's history of vigorous investigation and enforcement against unlawful threats to competition appears to have a deterrent effect on unlawful, anticompetitive conduct. However, the Division does not collect data on what acquisitions or conduct companies decline to pursue because of potential antitrust scrutiny, so is unable to report any such data.

    b. **The risks of failed enforcement actions are well known. However, do you feel your agency has appropriately considered the costs of failing to even**

[5] Casey Newton, *All Hands on Deck*, VERGE (Oct. 1, 2019), https://www.theverge.com/2019/10/1/20756701/mark-zuckerberg-facebook-leak-audio-ftc-antitrust-elizabeth-warren-tiktok-comments.
[6] Tim Wu, *Tech Dominance and the Policeman at the Elbow* (Columbia Pub. Law Research Paper No. 14- 623, 2019), https://scholarship.law.columbia.edu/faculty_scholarship/2289.
[7] Matthew Yglesias, *The Justice Department Was Absolutely Right To Go After Microsoft in the 1990s*, SLATE (Aug. 26, 2013), https://slate.com/business/2013/08/microsoft-antitrust-suit-the-vindication-of-the-justice-department.html.
[8] Mike Isaac, *How Facebook Is Changing To Deal With Scrutiny of Its Power*, N.Y. TIMES (Aug. 12, 2019), https://www.nytimes.com/2019/08/12/technology/facebook-antitrust.html.

commence antitrust litigation?

Response:

The Division's mandate is to enforce the antitrust laws by preventing harm to competition. The Division, though, does not have unlimited resources. As with many of the Division's activities, litigation can be resource intensive. Nevertheless, we achieve successful results with appropriations that are a tiny fraction of the fines we obtain. In all the elements of the Division's mission, we deploy our resources flexibly to address the most pressing needs most effectively and would do so with any additional resources. The Division considers the litigation risks in each case, including the risks to the case law if the court reaches the wrong conclusion.

22. **Mr. Delrahim, it's very important to me that antitrust laws are used solely for protecting competition and benefiting consumers—and that these laws are not being used by you or by President Trump for political purposes. Antitrust law is not designed to be wielded as a cudgel against state regulations that you don't favor.**

    The state of California worked out a plan with automakers to lower their emissions. Professor Herbert Hovenkamp, a venerated professor of antitrust law and coauthor of a leading antitrust treatise, has said that the plan is "almost certainly" legal.[9] And yet DOJ has opened an investigation into whether the automakers who struck this deal with California on emissions standards violated antitrust laws.[10] Was the investigation into those emissions standards motivated by the political preferences of you, President Trump, or other Administration officials for high-emissions vehicles?

Response:

The Division's decision to open an investigation into the emissions agreement was not motivated by political considerations. Reprinted below is the op-ed that I wrote in September, published in *USA Today*, in an effort to correct the public record on well-settled antitrust law principles:

> The loftiest of purported motivations do not excuse anti-competitive collusion among rivals. That's long-standing antitrust law.
>
> The law recognizes that when companies compete, consumers win. It deems competition to be intrinsically good, because rivalry, particularly in the form of free

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[9] Herbert Hovenkamp, *Are Regulatory Agreements To Address Climate Change Anticompetitive?*, REG. REV. (Sept. 11, 2019), https://www.theregreview.org/2019/09/11/hovenkamp-are-regulatory-agreements-to-address-climate-change-anticompetitive/.

[10] Hiroko Tabuchi & Coral Davenport, Justice Dept. Investigates California Emissions Pact That Embarrassed Trump, N.Y. TIMES (Sept. 6, 2019), https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html.

markets, benefits consumers by offering them both better prices and products. In turn, antitrust law negatively views conduct that harms competition.

Indeed, the Supreme Court has made it clear that in seeking to cultivate competition, antitrust laws should not render judgment on the "moral" aspirations behind the conduct.

While companies are free to make any individual public commitments or set any sales or technical limits for themselves, when competitors agree with each other on how they should act in the marketplace, antitrust law enforcers have stepped in and taken a good, hard look. Anti-competitive agreements among competitors — regardless of the purported beneficial goal — are outlawed because they reduce the incentives for companies to compete vigorously, which in turn can raise prices, reduce innovation and ultimately harm consumers.

Indeed, in multiple instances, the Supreme Court has struck down collective efforts by engineers to enhance "public safety" as well as a collective effort by criminal defense lawyers with the goal of improving quality of representation for "indigent criminal defendants." Even laudable ends do not justify collusive means in our chosen system of laws.

This is why the nonpartisan nature of antitrust enforcement remains of utmost importance. Antitrust enforcement must prioritize protecting competition. And we do so.

The Antitrust Division's decisions to look into an industry are based on whether the underlying conduct has the potential to harm competition. It does not look into industries because of political objectives, nor can it refrain from examining possible anti-competitive conduct because it would be politically unpopular.

Nevertheless, media personalities and politicians recently have levied the charge of "politicization" of antitrust in light of enforcement scrutiny that may not align with their political objectives. Fortunately for all Americans, the Department of Justice's sole consideration is the law.

No goal, well-intentioned or otherwise, is an excuse for collusion or other anti-competitive behavior that runs afoul of the antitrust laws. Those who criticize even the prospect of an antitrust investigation should know that, when it comes to antitrust, politically popular ends should not justify turning a blind eye to the competition laws.[11]

The Division is committed to ensuring that the law is administered and applied impartially, that all investigations comply with Department policies, and that political considerations do not influence the handling of particular investigations or cases. As I noted

[11] Makan Delrahim, *DOJ Antitrust Division: Popular ends should not justify anti-competitive collusion*, USA Today (Sept. 12, 2019).

at my confirmation hearing and in written responses thereafter, it is my strongly held belief that there should be no political influence in antitrust decisions. I agree with Attorney General Barr, who testified at his confirmation hearing that "nothing could be more destructive to our system of government, of the rule of law, or the Department of Justice as an institution, than any toleration of political influence with the enforcement of the law."

23. Cengage is a college textbook publisher that has engaged in a number of anticompetitive strategies aimed at making it harder for students to save money by selling their textbooks at the end of the semester or buying used textbooks. It appears that the company is trying to make it so that students can only purchase a license to their books or rent their books instead of actually owning their books. This can cost students a lot of money, and put poor and middle-class students at a disadvantage. Now Cengage wants to merge with another textbook publisher, McGraw Hill. Such a merger would reduce the number of major college textbook publishers from three to two.[12] Your division is reviewing the merger. I'm very concerned that this merger will allow textbook publishers to make things even harder on those students.

a. How are you thinking about DOJ's review of this proposed merger?

b. Can you assure me that the interests of college students trying to save money by buying used textbooks will be considered?

<u>Response:</u>

Without commenting specifically on any ongoing investigations, the Division is committed to evaluating all aspects of a merger to determine whether it risks reducing competition. We consider all facts relevant to the proposed transaction's effects on competition, including the incentive and ability of the combined firm to raise prices or otherwise harm consumers or competition. I can assure you that we will investigate any allegations of potential violations of the antitrust laws thoroughly and take whatever action is appropriate to preserve and protect competition.

Questions from Senator Cruz

24. I understand that manufacturers purchasing aluminum wholesale for manufacture into aluminum products—particularly those purchasing aluminum for manufacture into cans—are currently experiencing significant cost increases due to an increase in one particular index of shipping costs. The "Midwest Premium," an industry-wide index for the cost of storage and transportation of aluminum, has increased

[12] *E.g.*, Timothy Z. LaComb, Co*lleges, Students Tell DOJ McGraw-Hill/Cengage Merger Would Create a Textbook Duopoly*, NAT'L L. REV. (Sept. 30, 2019), https://www.natlawreview.com/article/colleges-students-tell-doj-mcgraw-hillcengage-merger-would-create-textbook-duopoly; Lindsay McKenzie, *Publishers' Pending Merger Faces Growing Opposition* (July 30, 2019), https://www.insidehighered.com/digital-learning/article/2019/07/30/cengage-and-mcgraw-hill-merger-faces-growing-opposition.

significantly since January 2018, despite no significant underlying cost increases in the actual costs for either storing or shipping aluminum. These increases cannot be wholly explained by tariffs, given that they began before the most recent aluminum tariffs were implemented. Some industry watchers believe that upstream market participants, including aluminum rolling mills, have conspired in violation of Section 1 of the Sherman Act to require downstream manufacturers to adhere to one particular Midwest Premium index, the Platts index, because it is reliably substantially higher than other indices, and because it is subject to manipulation by unverified claims related to storage and transportation costs.

Is either the Department of Justice or Federal Trade Commission investigating these concerns? If so, what have you determined so far, and when do you expect to be able to report your findings? If not, will you commit to investigating them?

<u>Response:</u>

The Division is strongly committed to protecting competition in the aluminum industry, and I am aware of the concerns that aluminum end-users, such as manufacturers of canned beverages, have raised regarding the Midwest Premium. Complaints from individuals and companies interested in sound enforcement of the antitrust laws give the Division important leads, with which we develop investigations and, ultimately in some instances, litigate cases. We are continuing to monitor the industry closely and we stand ready to review any new information that industry participants wish to submit. Although Department policy limits my ability to comment on specific investigations, please be assured that should the Division come across any evidence suggesting conduct that may violate the antitrust laws, including any form of unlawful monopolization or collusion, we will not hesitate to investigate it and bring an enforcement action as appropriate to protect competition and consumers.

<u>Questions From Senator Durbin</u>

25. Earlier this year, two of the largest textbook companies in the country—Cengage and McGraw-Hill—announced a merger reportedly worth $5 billion.

For years, textbook publishers have enjoyed little competition, allowing them to charge students exorbitant prices and adding to the national student debt crisis. According to the Bureau of Labor Statistics Consumer Price Index, textbook prices increased by nearly 90 percent between 2006 and 2016. I am skeptical that further consolidation in the marketplace will be good for students.

But I'm not the only one. In July, the U.S. Public Interest Research Group and a coalition of student and consumer advocates sent you a letter opposing the merger, saying, "this merger will allow skyrocketing prices to continue unchecked."

And earlier this month, the Association of Public Land-grant Universities wrote you to add their opposition to the merger. In his letter, APLU President Peter McPherson

warned that, "increased consolidation [in the textbook market] will further reduce competition, disincentive innovation, and raise prices for students" which will "create new headwinds" for students—especially those from low-income backgrounds—trying to gain access and complete college.

Do you share the concerns of these higher education and consumer experts about the proposed Cengage/McGraw-Hill merger?

<u>Response:</u>

Without commenting specifically on any ongoing investigations, the Division is committed to evaluating all aspects of a merger to determine whether it risks reducing competition. We consider all facts relevant to the proposed transaction's effects on competition, including the incentive and ability of the combined firm to raise prices or otherwise harm consumers or competition. I can assure you that we will investigate any allegations of potential violations of the antitrust laws thoroughly and take whatever action is appropriate to preserve and protect competition.

26. **Many agribusinesses over the years have developed key breakthroughs in hybrid seed and other technologies that have made American agriculture the strongest in the world. For corn and soybeans, for example, these types of innovations have created improvements like better resistance to drought and pests and better yields. Since 2013, however, there has been a 50 percent drop in farm income, and farm loan delinquency rates are climbing each quarter. Farm bankruptcies have increased 13% compared to last year, and are at historic levels in some parts of the country.**

    Meanwhile, with numerous mergers among seed companies, meat processors, and equipment manufacturers in recent years, farmers are increasingly feeling the squeeze that while their incomes drop, the price of farming inputs of seed, fertilizer, herbicides, and equipment remain high and are growing.

    a. **Do you believe farmers are facing increasing cost pressures and harmful economic impacts because of these consolidations and mergers in the agribusiness industry?**

<u>Response:</u>

The Division has long considered agriculture an essential part of the American economy. Well-functioning agricultural markets are a matter of national security and public health. The Division recognizes that farmers face increasing cost pressures. That is why, in 2018, as a condition for completing its acquisition of Monsanto, the Division required Bayer to divest its businesses that competed with Monsanto, which included Bayer's cotton, canola, soybean, and vegetable seed businesses, as well as Bayer's Liberty herbicide business, a key competitor of Monsanto's well-known Roundup herbicide. This solution, the largest negotiated merger divestiture in the Division's history, preserves competition for the sale of these critical agricultural products and enables farmers to benefit from competition.

b. **Are you concerned with the decrease of competition in the agriculture sector among major seed companies, equipment manufacturers, and agrochemical suppliers?**

Response:

The Division has been vigilant in protecting competition in the agricultural sector. In 2018, the Division secured divestitures of approximately $9 billion of businesses and assets in the Bayer/Monsanto merger, designed to preserve competition, promote innovation, and protect consumers. Shortly before I became the Assistant Attorney General, the Division secured an important settlement in the Dow/DuPont merger that protected competition in agriculture markets. The Division also sued to block John Deere's acquisition of Precision Planting in order to preserve competition in the market for high-speed precision planting systems.

Questions from Senator Kennedy

27. **There is a proposed termination of the 1963 Consent Decree in *U.S. v. Association of Casualty and Surety Companies, et al.* How can the Department of Justice be confident that the threats to consumers which led to the establishment of the of the 1963 Consent Decree really have changed to no longer need the protective agreement?**

Response:

From 1890, when the antitrust laws were first enacted, until the late 1970s, the United States frequently sought entry of antitrust judgments whose terms never expired. Recognizing that perpetual antitrust judgments rarely serve to protect competition, in 1979, the Division adopted the practice of including a ten-year sunset provision in nearly all of its antitrust judgments. Perpetual judgments entered before the policy change, however, remain in effect indefinitely unless a court terminates them.

In 2018, the Division embarked on a review of its more than a thousand outstanding perpetual antitrust judgments and, when appropriate, sought termination of them.

To date, seventy-six of seventy-eight jurisdictions have terminated legacy judgments. As part of the review of legacy antitrust judgments, the Division sought public comment on the *Association of Casualty and Surety Companies* judgment. For all judgments, the Division reviews the comments, the underlying facts of the judgment, and the status of the named defendants before determining whether termination would be appropriate for the judgment.

Questions from Senator Whitehouse

28. **When and how did the Department make the decision to investigate the agreement between the California Air Resources Board (CARB) and the four automakers in**

question?

<u>Response:</u>

The Division monitors markets and receives information from news reports, market participants, and third parties to learn of potential threats to competition. In appropriate cases, the Division opens investigations to determine the precise nature of the reported conduct, whether the conduct has harmed or would harm consumers, and whether enforcement would be appropriate.

29. At whose direction did the Antitrust Division make the decision to investigate the agreement between CARB and the four automakers in question? If the decision was first broached internally, which office or component of the Antitrust Division first raised the idea?

<u>Response:</u>

In this matter, as in any other, when allegations of a potential antitrust violation come to the Division's attention, career staff is asked to evaluate and draft a recommendation to open an investigation, and the request is reviewed and approved consistent with appropriate procedures.

30. To what extent does the Department consider White House preferences and/or policy priorities when making the decision to investigate a potential antitrust violation?

a. Does the Department consider President Trump's tweets when deciding whether to launch an antitrust investigation?

b. How does the Department distinguish a tweet from a directive?

<u>Response:</u>

The Division's decisions are based on the facts and the law without improper political considerations or interference.

31. You testified that you have not "had a communication with anybody outside of our building," including the White House, EPA, or DOT, about the Department's antitrust probe into Ford, Volkswagen, Honda, and BMW?

a. What communications, if any, has the Department of Justice had with the White House about this investigation? Please describe all such communications, identifying any individuals who participated.

b. What communications, if any, has the Department of Justice with EPA about this investigation? Please describe all such communications, identifying any individuals who participated.

c. **What communications, if any, has the Department of Justice with DOT about this investigation? Please describe all such communications, identifying any individuals who participated.**

<u>Response:</u>

The Department has specific policies and guidance, including a memo by then-Attorney General Holder dated May 11, 2009, that limit discussions between the White House and the Department regarding ongoing or contemplated cases or investigations. The Division has been and remains committed to following and enforcing applicable policies and procedures related to such contacts. I am not aware of any communications between the Department and the White House regarding the opening of any antitrust investigation regarding the reported emissions agreements.

32. **On August 21, 2019, President Trump sent a series of tweets criticizing the July 2019 agreement between CARB and the four automakers. Just one week later, on August 28, 2019, you sent letters to the four automakers initiating the probe. Between August 21, 2019 and August 28, 2019, what materials did the Department consult in deciding to investigate the automakers?**

    a. **Between August 21 and August 28, what communications, if any, did the Department have with the White House concerning the agreement between CARB and the four automakers?**

    b. **Prior to August 21, had the Department decided to open an investigation into the agreement in question? If not, had the Department considered opening an investigation into the agreement in question prior to August 21, 2019? When was this idea first raised?**

<u>Response:</u>

The policy of the Department limits my ability to comment on the status of an ongoing law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement. The Department has specific policies and guidance, including a memo by then-Attorney General Holder dated May 11, 2009, that limit discussions between the White House and the Department regarding ongoing or contemplated cases or investigations. The Division has been and remains committed to following and enforcing applicable policies and procedures related to such contacts.

33. **What communications, if any, has the Department had with the White House concerning the President's opinion on the July 2019 agreement between CARB and the four automakers?**

    a. **Following the July 2019 agreement, a senior Trump advisor reportedly "summoned" Toyota, Fiat Chrysler, and General Motors to the White House,**

and pressured them to abide by the Trump Administration's proposed lower standards rather than the CARB standards. To what extent does the Department consider such meetings when deciding whether to open an investigation?

Response:

The Division's decisions are based on the facts and the law without improper political considerations or interference.

b. **Given the President's public opposition to the agreement between CARB and the four automakers, what steps has the Department taken to maintain independence from the White House in this particular investigation?**

Response:

The Department has specific policies and guidance, including a memo by then-Attorney General Holder dated May 11, 2009, that limit discussions between the White House and the Department regarding ongoing or contemplated cases or investigations. The Division has been and remains committed to following and enforcing applicable policies and procedures related to such contacts.

The Division is working to correct the unfortunate misunderstandings reflected in the public discourse about the reported investigation. To that end, I recently wrote an op-ed, published in USA Today and reprinted above, in an effort to correct the public record on well-settled antitrust law principles.

34. **What communications, if any, has the Department had with the White House regarding the President's decision to revoke California's ability to set more stringent emissions standards than those set by the federal government?**

  a. **What communications, if any, has the Department had with the White House regarding the President's contentious relationship with the state of California?**

  b. **What communications, if any, has the Department had with the White House regarding ongoing litigation between the White House and the state of California?**

Response:

I am unaware of any communications between the Department and the White House regarding the President's decision to revoke California's ability to set more stringent emissions standards than those set by the federal government, or regarding the President's relationship with California or the ongoing litigation between the White House and the state of California.

The Department has specific policies and guidance, including a memo by then-Attorney General Holder dated May 11, 2009, that limit discussions between the White House and the Department regarding ongoing or contemplated cases or investigations. The Division has been and remains committed to following and enforcing applicable policies and procedures related to such contacts.

35. The Antitrust Division Manual sets forth standards for approving a preliminary investigation. The manual provides that although an investigation does not formally become "civil" or "criminal" until compulsory process is issued, "a preliminary judgment is usually made when the preliminary investigation memo is submitted as to whether the investigation will be pursued as a civil or criminal matter."

a. Has that preliminary judgment been made?

b. If so, is the Division's investigation into the California automakers' agreement being considered a civil or criminal investigation, and why?

<u>Response:</u>

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement.

36. If the Division's investigation into the California automakers' agreement is considered a criminal investigation:

a. Was a decision made, pursuant to the Antitrust Division Manual, that the allegations or suspicions were "sufficiently credible or plausible to call for a criminal investigation"? If so, who made that determination, and when?

b. Was a decision made, pursuant to the Antitrust Division Manual, that the matter was "significant"? If so, who made that determination, and when?

<u>Response:</u>

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement.

37. Pursuant to the Antitrust Division Manual, in opening an investigation into the California automakers' agreement, did a Division attorney prepare a preliminary investigation memo describing the nature and scope of the activity? Please produce it.

a. **If this is a civil matter, did the Division attorney consult with an economist in the Economic Analysis Group (EAG)? If so, did EAG provide an opinion that the agreement presents any anticompetitive harm?**

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement.

38. **In your hearing testimony, when I asked why you were pursuing the California automakers' investigation in light of likely defenses, such as the state action doctrine or the *Noerr-Pennington* doctrine, you replied that "the conduct needs to be examined first. Then the immunity to that type of conduct." But that statement – about the order in which likely defenses are to be considered – appears at odds with the Antitrust Division Manual, which provides that in considering a preliminary investigation, "attention should be given to the legal theory, relevant economic learning, the strength of likely defenses, any policy implications, the potential significance of the matter, and the availability of an effective and administrable remedy" (emphasis added).**

    a. **How do you reconcile your statement with this guidance?**

    b. **In considering whether to open an investigation, did the Division give attention to the strength of likely defenses? Specifically, did it assess the state action doctrine and *Noerr-Pennington*? What was its assessment of those defenses?**

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement. The Division considers the strength of likely defenses at every stage as appropriate in light of the facts then available.

I attach several cases relevant to that assessment. *See, e.g., N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494 (2015)*; FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332 (1982); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457 (6th Cir. 1992); *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965); *Manaka v. Monterey Sardine Indus.*, 41 F. Supp. 531 (N. D. Cal. 1941); Bennett H. Goldstein & Howell H. Howard, *Antitrust Law and the Control of Auto Pollution: Rethinking the Alliance Between Competition and Technical Progress*, 10 Environ. L. 517 (1980).

39. **Pursuant to the Antitrust Division Manual, was a completed preliminary investigation memo forwarded to a section or field office chief for review? Which section or field office chief completed this review?**

    a. **Did the section or field office chief approve the memo?**

    b. **Was the memo emailed to the ATR-Premerger-PI Requests mailbox and the appropriate special assistant?**

    c. **Did the Premerger and Division Statistics Unit request clearance from the FTC and email a copy of the memo to all chiefs and assistant chiefs? When did that clearance request take place?**

    d. **Did FTC provide the requested clearance? When?**

<u>Response:</u>

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement.

40. **"When final preliminary investigation authority has been granted on any investigation," the Antitrust Division Manual requires the internal circulation of the preliminary investigation memo, "marked with the clearance result, date of resolution, the name of the individual authorizing the preliminary investigation, the date of the authorization, and the file number for the investigation." Please provide that document.**

<u>Response:</u>

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automakers' agreement.

41. **In your hearing testimony, you rejected the assertion that the California automakers' agreement was one that you had singled out. You stated that "it is not the one I have picked out," and pointed to other cases – "the college admissions counselors," and "APs in elite high schools" – that your division had "looked at."**

    a. **During your tenure, how many investigations has the Antitrust Division launched involving agreements between companies that directly involve the participation and consent of a sovereign government? Please list them.**

b. **How many letters has the Antitrust Division sent to other industries regarding agreements that involve the participation and consent of a government? Please list them**.

Response:

During my testimony before this subcommittee, I referred to other investigations into potential violations of Section 1 of the Sherman Act. If cases with fact patterns similar to the automakers' agreement emerge, the Division will devote resources as appropriate to such matters in a manner consistent with those we devote to the automakers investigation.

Although Department policy prevents me from disclosing the names of nonpublic investigations, I can disclose that the Division has launched eight civil Section 1 investigations during fiscal years 2018 and 2019, and we have filed lawsuits in five instances during those fiscal years.

42. How many attorneys and attorney hours have been devoted to the investigation into the California automakers' agreement?

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automakers' agreement.

43. The Antitrust Division Manual states that one factor for determining whether to initiate an investigation is "whether allocating resources fits within the needs and priorities of the Division." In EPA and NHTSA's August 24, 2018, Notice of Proposed Rulemaking for the "Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks" (83 FR 42986), those agencies concluded: (1) "Consumer preferences have shifted markedly away from higher-fuel-economy smaller and midsize passenger vehicles toward crossovers and truck-based utility vehicles." (Id. at 42993); and "Consumers tend to avoid purchasing things that they neither want or need" (Id.).

a. **Before opening its investigation into the California automakers' agreement, did the Division consider the Administration's position that '[c]onsumer preferences have shifted markedly away from higher-fuel-economy smaller and midsize passenger vehicles"?**

b. **If not, did the Division conduct its own analysis into consumer preferences for higher-fuel-economy smaller and midsize passenger vehicles?**

c. **Under what circumstances would it be an appropriate allocation of the Division's scarce resources to open an investigation into a product that the federal government has concluded increasingly "neither want or need"?**

Response:

Consistent with Chapter 3 of the Antitrust Division Manual, the Division considers appropriate available information, including from public sources and other investigations, to determine whether the particular conduct poses a threat to competition.

44. **At your hearing, you referenced the letter that you sent to the automakers regarding the Antitrust Division's investigation into their agreement with California. Please produce a copy of that letter.**

Response:

The letter is attached to these responses.

45. **It was reported that the Justice Department is set to meet this week with representatives of the automakers that are the subject of your antitrust investigation. Who attended that meeting, and what transpired?**

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation.

46. **When will the Antitrust Division make a decision about whether to pursue a challenge to the automakers' agreement with California?**

Response:

The Division's decision-making about whether to pursue a challenge to the automakers' agreement among each other, whether to close its investigation, or whether other action is appropriate as it "develops evidence" adheres to Chapter 3, section G, of the Antitrust Division Manual.

Questions from Senator Blumenthal

47. **The Federal Trade Commission and Department of Justice are both investigating Amazon, Facebook, Google and Apple (sometimes referred to as the "Big Tech" companies). The *Wall Street Journal* reported earlier this year that the FTC has jurisdiction over Facebook and Amazon while DOJ is investigating Google and Amazon. However, recent reports suggest that this agreement has frayed, if not disintegrated entirely. In July, despite the negotiated agreement, the Department**

announced a broad investigation into the digital platforms. Just a few weeks ago, the FTC reportedly sent a letter to DOJ raising concerns about the Department's behavior with respect to these cases.

a. Is DOJ operating under a negotiated clearance agreement with the FTC in regard to its investigations of the digital technology companies?

Response:

The Division and FTC share authority for civil antitrust enforcement. Over the years, the two agencies have developed a process for determining which agency will handle a particular matter generally on the basis of which agency has the most relevant experience in the particular markets involved.

b. What is the timeline for the investigation into the digital technology companies?

Response:

Department policy limits my ability to comment on specific investigations; however, the Division endeavors to conduct thorough investigations as efficiently as possible.

c. How many full-time DOJ employees are working on the investigation?

Response:

Department policy limits my ability to comment on specific investigations; however, in general, staffing on particular investigations can vary significantly based on, among other factors, the stage of the investigation, the scope of the investigation, and the complexity of the investigation.

d. How many of those employees are technologists or have a background in technology?

Response:

Department policy limits my ability to comment on specific investigations; however, the Division has an entire section devoted to the Technology and Financial Services industries, and this section has been at the cutting edge of enforcing the antitrust laws in high-tech and digital markets for decades.

e. Were any of the employees working on the investigation previously employed by Apple, Amazon, Google, or Facebook? If so, how many?

Response:

Department policy limits my ability to comment on specific investigations; however, in general, the Division employs attorneys, economists, and other staff from a diverse array of backgrounds.

f. Without identifying any of the companies under investigation, have those companies been fully cooperative in your investigate efforts so far?

Response:

Department policy limits my ability to comment on specific investigations; however, the Division possesses a variety of tools to ensure that we can conduct thorough investigations. The Division stands ready to use all of its tools to obtain the information necessary to enforce the antitrust laws and protect consumers.

g. Will you commit to informing Congress if, at any point, they are not cooperative?

Response:

Department policy and confidentiality protections prevent me from commenting or committing to comment on specific investigations, but please be assured that the Division stands ready to use all of its available tools to obtain the information necessary to enforce the antitrust laws and protect consumers.

h. If you find anticompetitive conduct in your investigation, are you prepared to engage in litigation and take these companies to court?

Response:

Although Department policy limits my ability to comment on specific investigations, please be assured that should the Division come across any evidence suggesting conduct that may violate the antitrust laws, including any form of unlawful monopolization, we will not hesitate to investigate it and bring an enforcement action as appropriate to protect competition and consumers.

48. Under the Hart-Scott-Rodino Act (HSR Act), merging companies are only required to report their merger to the FTC and DOJ if they reach certain thresholds. Currently, if the size of the transaction is below $90 million, they do not need to report the merger to the agencies.

a. Is DOJ missing any anticompetitive mergers due to the current HSR thresholds?

Response:

The HSR Act plays a critical role in federal merger enforcement. The HSR Act sets out the procedure for the Division to review transactions meeting certain financial thresholds before these transactions are consummated. These procedures reduce uncertainty and enable more effective remedies by preventing the commingling and scrambling of assets. While the HSR Act provides a procedural framework, its notification requirements do not limit the Division's ability to enforce the Clayton Act on transactions that do not meet the notification requirements. Under Section 7, which was enacted decades before the HSR Act, the antitrust agencies can challenge transactions, before or after consummation, regardless of whether the transaction is subject to HSR notification. So-called non-reportable transactions are subject to the same standard under Section 7 as those that require notification, specifically whether the effect of a transaction "may be substantially to lessen competition, or to tend to create a monopoly" in any line of commerce. The Division has a long history of reviewing non-reportable transactions and continues to do so.

b. How does DOJ learn of potentially anticompetitive mergers that fall beneath the reporting thresholds?

Response:

The Division has a number of ways in which it may learn of non-reportable transactions that may raise anticompetitive issues, of which I will highlight three. First, each of the Division's civil litigation sections has responsibility for enforcement and policy with respect to a set of industries or commodities. Staff in these sections actively monitor developments in their assigned industries. Second, staff have developed numerous contacts in the industries they monitor, and often learn about non-reportable transactions from market participants. Third, merging parties themselves, who seek certainty in pursuing their transactions, will sometimes notify the Division even if formal notification under the HSR Act is not required.

c. Does DOJ support any changes that could enable the agency to discover mergers that are currently falling beneath the reporting thresholds?

Response:

The Administration has not taken a position on any potential reforms to the HSR Act, but the Division stands willing to work with Congress and provide technical assistance on any potential reforms. It is always a good policy to periodically review and evaluate the federal antitrust laws, including the HSR Act.

d. Apple CEO Tim Cook said earlier this year that Apple purchases a company every two-to-three weeks and had purchased 20-25 companies in the previous six months.[13] Furthermore, Cook said that Apple often does not announce these deals because they are small and Apple is "primarily looking for talent and intellectual property."

i. Was DOJ aware of more than 20 acquisitions by Apple between

[13] https://www.cnbc.com/2019/05/06/apple-buys-a-company-every-few-weeks-says-ceo-tim-cook.html.

October 1, 2018 and May 1, 2019?

ii. **If so, how did DOJ become aware of the 20-plus acquisitions? Please break down this number into categories by source (HSR filing, media, public notice, etc.)**

iii. **If not, how many acquisitions by Apple was DOJ aware occurred since October 1, 2018 and May 1, 2019?**

iv. **Outside of any ongoing investigation(s), did DOJ investigate any of these acquisitions for potential competition issues?**

v. **If so, how many acquisitions by Apple during that period did DOJ investigate?**

Response:

Department policy limits my ability to comment on specific investigations and, furthermore, the HSR Act itself provides strict confidentiality provisions that prevent me from disclosing any information obtained pursuant thereto or even the fact of a filing itself. As stated above, the Division has numerous methods to learn about transactions that raise competitive concerns even if such transactions are not subject to the HSR Act's notification requirements.

e. **I am also concerned about killer acquisitions in the pharmaceutical industry where pharma companies purchase a company that is developing a competing drug and then kills that development. This robs the market of competition, hurting consumers. Furthermore, these acquisitions can go undetected by DOJ if they fall below the HSR thresholds.**

i. **Is DOJ concerned that it is missing "killer acquisitions" due to the current HSR thresholds?**

Response:

Where a company seeks to buy out early-stage competition, the acquisition, whether or not reportable under the HSR laws, may be reviewed by the Division and subject to a merger investigation. The Division would consider any reasonably available and reliable evidence to address the central question of whether the acquisition may substantially lessen competition. In this particular type of acquisition, the Division would be particularly attentive to whether the acquired firm is likely to play a uniquely disruptive role in the market to the benefit of customers that is not easily replicated.

ii. **Does DOJ support any changes that could enable the agency to discover potential "killer acquisitions"?**

Response:

Section 7 of the Clayton Act prohibits mergers and acquisitions "where the effect . . . may be substantially to lessen competition, or to tend to create a monopoly." Acquisitions of nascent competitors can be procompetitive in certain instances and anticompetitive in others. They can be beneficial to the extent they combine complementary technologies or bring products and services to market that would not have been made available to consumers otherwise. There is a myriad of ways in which such a transaction may harm competition in a digital market, but I will note the potential for mischief if the purpose and effect of an acquisition is to block potential competitors, protect a monopoly, or otherwise harm competition by reducing consumer choice, increasing prices, diminishing or slowing innovation, or reducing quality. Such circumstances may raise the Division's suspicions. The Division will not shrink from the critical work of investigating and challenging anticompetitive conduct and transactions where justified. That is because where competition is harmed, consumers and markets lose with higher prices, lower quality (which can come in many forms, including decreased free speech and lower privacy protections), and lower rate of innovation. Protecting competition means protecting all of those dimensions of competition.

49. The Department of Justice is currently reviewing the ASCAP/BMI consent decrees. The agency finished collecting comments on the consent decrees on August 9. Under the Music Modernization Act, DOJ is required to notify Congress before it seeks to terminate or sunset the consent decrees.

a. What is the Department's timeline for announcing changes, if any, to the ASCAP/BMI consent decrees?

<u>Response:</u>

After the Division announced its intention to review the ASCAP and BMI decrees, it opened up a public comment period. That comment period ended in August 2019. The Division advised Congress when it opened the comment period. The Division received over 800 comments from parties, stakeholders, and citizens, and these comments are publicly posted on the Division's website (found at https://www.justice.gov/atr/antitrust-consent-decree-review-public-comments-ascap-and-bmi-2019). As the Division reviews the comments, it continues to be engaged actively with the parties and industry stakeholders. The Division intends to reach a conclusion about modifying, sunsetting, terminating, or keeping the decrees in place in the coming months.

b. Will you commit to abiding by the law and providing such notice to Congress?

<u>Response:</u>

Congress has a very important role with regard to this issue, and the Division intends to continue its engagement with Congress, and will continue to abide by its obligations under the Music Modernization Act.

c. Can you commit to providing that notice at least one week before the

Department intends to file a motion to terminate the consent decrees?

Response:

Congress has a very important role with regard to this issue, and the Division intends to continue its engagement with Congress, and of course, will continue to abide by its obligations under the Music Modernization Act. Furthermore, we would welcome any views you have on these decrees.

50. **The Department of Justice has proposed terminating the 1963 consent decree with the Association of Casualty and Surety Companies, commonly known as the Auto Repair Consent Decree. I was pleased that the agency extended the comment period to October 2 but I remain strongly opposed to DOJ's proposal. The Department entered into the consent decree after insurers told auto repair shops to fix consumers' cars with cheap replacement parts. If the shop refused, the insurer would direct consumers to an alternative establishment that was willing to use the cheap parts. Although the consent decree has helped remedy this anticompetitive conduct, there is still evidence that consumers are being hurt by this behavior.**

    a. **What has changed in the auto insurance and auto repair markets over the last decade to support terminating the Auto Repair Consent Decree?**

    b. **Is the Department concerned that, absent the Consent Decree, consumers will be direct to auto repair shops using shoddy materials and replacement parts?**

    c. **What is the timeline for the Department to make a final decision on the Auto Repair Consent Decree?**

Response:

From 1890, when the antitrust laws were first enacted, until the late 1970s, the United States frequently sought entry of antitrust judgments whose terms never expired. Recognizing that perpetual antitrust judgments rarely serve to protect competition, in 1979, the Division adopted the practice of including a ten-year sunset provision in nearly all of its antitrust judgments. Perpetual judgments entered before the policy change, however, remain in effect indefinitely unless a court terminates them.

In 2018, the Antitrust Division embarked on a review of its more than a thousand outstanding perpetual antitrust judgments and, when appropriate, sought termination of them. To date, seventy-six of seventy-eight jurisdictions have terminated legacy judgments. As part of the review of legacy antitrust judgments, the Division sought public comment on the *Association of Casualty and Surety Companies* judgment. The Division will review the comments, the underlying facts of the judgment, and the status of the named defendants before determining whether termination would be appropriate for the judgment. We have appreciated your input and considered comments on this decree.

51. The Department of Justice's 2010 consent decree with Live Nation Entertainment over its merger with Ticketmaster expires at the end of July next year. Senator Klobuchar and I sent a letter to you in August requesting that the Department take any action necessary to restore competition in the primary ticket market. I am pleased that the Department is "examining allegations of violations." I understand that you are unable to comment on that ongoing examination but I would like to hear your general thoughts on the state of the ticketing market.

a. How would you describe the competitiveness of the primary ticket market?

<u>Response:</u>

I share your concerns regarding the continued market power that Live Nation Entertainment appears to possess in ticketing and concert promotion. When the Department of Justice reached a settlement with Live Nation regarding its Ticketmaster acquisition in 2010, Ticketmaster provided primary ticketing services to venues representing more than 80% of major concert venues. According to a 2018 GAO study of the primary and secondary ticketing markets, Live Nation's Ticketmaster remains the industry's market leader. Because Department policy limits my ability to comment on specific investigations, I cannot comment further, but you can be assured that the Division will take whatever actions are available to us to protect and promote competition in this industry.

b. Is the agency also considering potential anticompetitive conduct in the secondary ticket market?

<u>Response:</u>

Department policy limits my ability to comment on specific investigations, but please be assured that the Division will take whatever actions are available to us to protect and promote competition in this industry.

c. What is the timeline for the Department's examination of its agreement with Live Nation Entertainment?

<u>Response:</u>

In December, the Division announced it will file a petition asking the court to clarify and extend by five and a half years the Final Judgment entered by the court in *United States v. Ticketmaster Entertainment, Inc., et al.,* Case No. 1:10-cv-00139-RMC (July 30, 2010). The Department filed a motion in the U.S. District Court for the District of Columbia to reopen the docket in the underlying action, a necessary step towards filing the petition to clarify and extend the Final Judgment. The Department will file that petition once leave is granted by the court.

52. You stated during the hearing that the exemption for hospital group purchasing organizations (GPOs) in the Medicare anti-kickback statute is a "mile long" and

"has created a situation where some of these PPOs are buying exclusivity at the risk of innovation, at the risk of cost and the risk of lives of patients."

a. **Does DOJ support restricting payments between middlemen (GPOs and PMBs) and suppliers?**

b. **Does DOJ support replacing the "cost plus" fee structure with a "flat fee"?**

Response:

The healthcare industry is a crucial sector of the U.S. economy and is important to the lives of all Americans. The Division shares concerns about potential anticompetitive conduct in healthcare markets and will vigorously investigate and enforce any violations of the antitrust laws in the sector. The Division has an entire section devoted to the Healthcare and Consumer Products sectors of the economy, and this Section has extensive experience pursuing potential anticompetitive mergers and conduct in the industry. Although the Administration has not taken a position on the possible reforms you mention, the Division stands willing to provide technical assistance on this and any other proposals.

53. **As you know, the Federal Communications Commission approved the T-Mobile-Sprint merger before the Department of Justice had reached its own conclusions. I understand that the FCC operates under a "public interest" standard but competition is a critical factor in that analysis. In fact, in the past, the FCC stated, "A transaction that violates the Clayton Act would not be in the public interest." As a result, I am concerned that the FCC waived through the merger without considering the Department's position. This is especially worrisome here where DOJ opposed the merger as initially filed and only approved it with merger conditions.**

a. **Did the FCC and DOJ attempt to coordinate their reviews of the T-Mobile-Sprint merger?**

b. **Did Chairman Pai or anyone else at the FCC give you or anyone else at the Department of Justice advance notice of his intention to approve the merger before the Department of Justice had reached its own conclusion on the merger?**

c. **If so, did you or anyone else at DOJ ask the FCC to delay its decision until DOJ had finished its own review?**

d. **Did the FCC's approval of the merger place the Department under any pressure to also approve the merger (with or without merger conditions)?**

Response:

On overlapping merger reviews, the Division works closely with the Federal Communications Commission (FCC), coordinating as appropriate for our respective proceedings. While the FCC reviews mergers under its own "public interest" standard, that standard includes looking at competition issues. In the T-Mobile-Sprint matter, the Division coordinated its efforts with the FCC in an endeavor to examine and resolve the potential competitive effects of the transaction in the most efficient manner. Although I am limited in my ability to disclose specific details of our interagency deliberations, coordination between the Division and the FCC was effective and productive in the T-Mobile-Sprint review.

54. The Federal Communications Commission is soon going to be auctioning C-Band spectrum. In advance of this auctioning process, the FCC has publicly stated, alarmingly, that there will be no limits on how much one entity can own of the spectrum. There is a finite amount of spectrum available for purchase, and tremendous foreclosure value in overpaying for as much spectrum as possible, hoarding it at the expense of competitors. In the past, DOJ has urged the FCC to ensure that spectrum auctions maintain competition. In 2015, for example, DOJ stated that the Federal Communications Commission (FCC) should give "considerable weight" to competition concerns when deciding whether to expand the block of wireless spectrum reserved for smaller carriers in a coming auction.

  a. Do you agree that the FCC's position on this matter, that there will be no limits on how much one entity may own of this new spectrum, is problematic?

  b. In the past, DOJ has submitted comments to the FCC to urge that competitive concerns are prioritized in upcoming spectrum auctions. In an auction in 2013, for example, DOJ urged the FCC to "maintain vigilance" against any efforts to further concentrate market power, warning that carriers may have incentives to buy spectrum not for better services or efficient expansion but just to deprive competitors of access to the valuable airwaves and to keep costs high.

    i. Like the Antitrust Division did in 2013, will you commit to submitting comments to the FCC opposing this position?

    ii. If not, has the DOJ's stance on this issue changed since 2013?

Response:

The Division shares your concerns that competition is vital in the telecommunications industry. Competition brings lower prices and more innovation to consumers. Regarding FCC proceedings, the Division does comment from time to time. For example, the Division submitted a filing in response to an FCC Notice of Proposed Rulemaking in April 2013. The auction at issue in that proceeding, however, involved different issues and different circumstances than those presented by the C-Band proceeding. The Division has monitored the ongoing C-Band proceeding, and while it has not filed comments, it will continue to monitor developments and will decide to comment if appropriate under the circumstances.

COMMENTS

ANTITRUST LAW AND THE CONTROL OF AUTO POLLUTION: RETHINKING THE ALLIANCE BETWEEN COMPETITION AND TECHNICAL PROGRESS

BY

BENNETT H. GOLDSTEIN* AND HOWELL H. HOWARD**

INTRODUCTION

In the 1950s, the automobile was first recognized as a major source of air pollution.[1] Since that time, the domestic automobile manufacturers have pursued technological solutions to the problem of auto emissions by two methods: (1) cooperative research programs, and (2) free market competition. While not necessarily mutually exclusive, the two methods historically have been used as alternatives.

During the 1950s and 1960s, when concern over automobile pollution spread from California to the rest of the nation,[2] the auto manufacturers pooled their pollution control research and development efforts in an industry-wide cooperative program.[3] By the end of the 1960s, however, government officials were dissatisfied with the results achieved by this joint research and through an antitrust suit forced the auto makers to compete with one an-

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1. Scientific research first linked automobile exhaust and air pollution in 1950. Haagen-Smit, *The Air-Pollution Problem in Los Angeles*, 14 ENGINEERING & SCI. 7 (1950). *See* note 12 *infra* and accompanying text.

2. California passed automobile pollution control legislation in 1960. Motor Vehicle Pollution Control Act of 1960, CAL. HEALTH & SAFETY CODE §§ 24378-24399 (West 1967). Congress first addressed the matter in the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (current version at 42 U.S.C. §§ 7401-7626 (Supp. I 1977)).

3. *See* notes 15-19 *infra* and accompanying text.

other in developing pollution control technology.[4] In *United States v. Automobile Manufacturers Association,*[5] the United States District Court for the Central District of California never reached the question of whether cooperative research violated the antitrust laws, but its consent decree terminating the action in 1969 prohibited the auto makers from exchanging technical information.[6] Thereafter, free market competition was the rule of the day, and gained importance with the advent of mandatory emission standards under the Clean Air Act Amendments of 1970.[7]

The auto industry is presently calling for a return to cooperative research. In *United States v. Motor Vehicle Manufacturers Association*[8] the industry recently prevented an extension of two parts of the 1969 consent decree which were to expire in 1979. Citing the energy crisis and the apparent incompatibility of pollution control and fuel economy, the auto manufacturers argued that cooperative programs should be permitted once again. The court accepted the industry's argument and concluded that extending the decree would be "inappropriate, counterproductive, and unjust both in terms of the decree itself and the broader national interest."[9]

In the face of this impending return to cooperative research, it is appropriate to reassess the alliance between pollution control and antitrust law. Antitrust law is linked to pollution control technology in two ways. First, antitrust law provided the basis for the lawsuit which ended the era of cooperative research. Second, the free market principles underlying antitrust law encompass considerations which must be weighed in determining the relative merits of cooperative and competitive methods of technology development. This Comment examines the interplay between antitrust law and the control of auto pollution.

The Comment is divided into three sections. The first section is a brief historical sketch which describes the cooperative research era and the competitive regime that displaced it. The sec-

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4. *See* notes 36-42 *infra* and accompanying text.

5. 1969 Trade Cas. ¶ 72,907 (C.D. Cal. 1969).

6. *Id.* at 87,457.

7. Pub. L. No. 91-604, 84 Stat. 1676 (current version at 42 U.S.C. §§ 7401-7626 (Supp. I 1977)).

8. 1979-2 Trade Cas. ¶ 62,759 (C.D. Cal. 1979).

9. *Id.* at 78,381.

ond section discusses the auto industry's recent victory in *United States v. Motor Vehicle Manufacturers Association*, the district court decision which sanctioned a return to cooperative research. The final section uses antitrust principles to analyze the relative merits of competition and cooperation in the context of auto pollution control.

I. COMPETITION AND POLLUTION CONTROL: THE ALLIANCE EMERGES

A. *The Rise and Fall of Cooperative Research*

Air pollution had been recognized as a public health problem in Los Angeles at least since the early 1940s,[10] but it was not until 1950 that a conclusive link was established between photochemical smog[11] and automobile emissions.[12] Following this discovery,

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10. J. KRIER & E. URSIN, POLLUTION & POLICY 52-54 (1977). The authors cite various newspaper accounts of heavy smog occurring as early as 1940. Visibility was impaired during these smog incidents and people experienced irritation of eyes and lungs. Although the mayor of Los Angeles predicted in 1943 that the smog problem would be eliminated within four months, the sources of the problem were inadequately understood at that time. Apparently neither researchers nor government officials suspected the role of the motor vehicle in air pollution. Smoke emitting factories were regulated with little improvement in air quality. *Id.* at 53-59, 73-75.

The physical susceptibility of the Los Angeles basin to smog is demonstrated by a report of the Spanish explorer Juan Rodriguez Cabrillo, who discovered San Pedro Bay in 1653. He reported a smoky haze hanging low over the valley and attributed the haze to Indian fires. *Id.* at 45. Some writers have contended that Los Angeles has a natural tropical haze which would often be present regardless of man-made pollutants. *Id.*

11. The word "smog" is derived from a combination of the words "smoke" and "fog." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2152 (1971). In Los Angeles the term is a misnomer because the haze has little to do with either smoke or fog; instead, it is "photochemical." The cloudy, irritating matter in the air is caused by a reaction between sunlight and the hydrocarbons, carbon monoxide and nitrous oxides emitted by motor vehicles, industrial processes and waste disposal. J. KRIER & E. URSIN, *supra* note 10, at 18. D. DEWEES, ECONOMICS AND PUBLIC POLICY: THE AUTOMOBILE POLLUTION CASE 29-31 (1974) provides a description of the process. Basically, nitrogen dioxide (NO_2), a common constituent of vehicle exhaust, combines with oxygen in the presence of certain hydrocarbons (also emitted by automobile engines) and sunlight to form ozone (O_3) and nitric oxide (NO). Ozone is considered by many to have unhealthy effects on humans. Carbon monoxide, also emitted directly by automobiles, has a direct adverse effect on the health of humans. *Id.*

12. Haagen-Smit, *supra* note 1. Dr. Arie J. Haagen-Smit also identified refin-

Los Angeles County officials began pressuring the auto industry to reduce emissions.[13] Initially the industry was slow to admit that auto emissions contributed significantly to smog;[14] but, in 1954, the Automobile Manufacturers Association (AMA), an in-

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eries and refuse burning as contributors to photochemical smog. *Id.* Haagen-Smit's research is generally considered to have been the first conclusive proof that auto exhaust was a major cause of smog. Letter from Louis V. Lombardo, Technical Assistant, Mobile Source Pollution Control Program of Environmental Protection Agency, to Dr. Hyman Ritchin of the United States Department of Justice 1 (Febuary 18, 1971) [hereinafter cited as Letter of Lombardo]; Department of Justice Internal Memorandum, *reprinted in* 117 CONG. REC. 15626 (May 18, 1971) (introduced by Rep. Burton) [hereinafter cited as Internal Memorandum]. Haagen-Smit was originally a member of the Los Angeles Chamber of Commerce Scientific Committee; later the Board of the Los Angeles Air Pollution Control District hired him as an advisor. A controversy raged between Haagen-Smit and the Stanford Research Institute during 1950-55 regarding the degree to which each type of polluting process contributed to the smog problem. However, both thought that the motor vehicle was a significant polluter. J. KRIER & E. URSIN, *supra* note 10, at 80-86. In 1957 the Los Angleles Daily News reported that it was unanimously accepted by experts that motor vehicles were a significant cause of smog. *Id.* at 86. The Air Pollution Foundation, a nonprofit research group, concluded during the same year that vehicle exhaust was the major smog constituent. *Id.* at 86.

13. J. KRIER & E. URSIN, *supra* note 10, at 98-99. The Los Angeles County Air Pollution Control Board considered requiring pollution control devices (PCDs) on all vehicles sold in the county but refrained on the advice of counsel. Counsel stated that a rule of mandatory installation would be arbitrary, capricious, and an abuse of discretion when the problem was not critical and no effective PCDs were on the market. Kenneth Hahn, Los Angeles County Supervisor, communicated extensively with auto industry representatives in an effort to persuade them to develop and install PCDs. These efforts met with little success. Letter of Lombardo, *supra* note 12. The county attempted to stimulate firms in the chemical and automotive accessory fields to research the problem. Hahn later threatened to have an ordinance passed requiring emission abatement despite the lack of a good PCD. J. KRIER & E. URSIN, *supra* note 10, at 99-100.

14. The industry, beginning in 1953 and continuing as late as 1960, maintained that Los Angeles smog was caused mainly by environmental factors peculiar to that city (such as topography, *see* note 10 *supra*) and not significantly by vehicles. J. ESPOSITO, VANISHING AIR 38 (1970); J. KRIER & E. URSIN, *supra* note 10, at 88-89; Internal Memorandum, *supra* note 12, at 15626. *See also* L. JAFFE & L. TRIBE, ENVIRONMENTAL PROTECTION 141-52 (1972). However, a Ford Motor Company (Ford) employee stated in a letter that "the automobile industry has accepted the responsibility for reducing hydrocarbon emission from automobile exhaust to the best of its ability. It is, however, up to your local authorities [of the city of Los Angeles] to determine whether or not such a reduction will result in any reduction in the smog problem." Letter from Mr. Chandler of Ford to Kenneth Hahn, Los Angeles County Supervisor (July 24, 1957) *reprinted in* Letter of Lombardo, *supra* note 12.

dustry trade group, began a cooperative research program on air pollution.[15]

In 1955, the domestic automobile companies signed an agreement designed to promote the exchange of information on pollution control device (PCD) development.[16] The agreement obligated the parties to disclose technical information pertaining to certain enumerated categories of promising PCDs,[17] and provided that any of the parties to the agreement had the right to use the disclosed information without paying royalties to the originator.[18] According to industry spokesmen, the purpose of the agreement was to remove the incentive for withholding information from competitors on pollution control progress. Unrestrained sharing

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15. Internal Memorandum, *supra* note 12, at 15626; J. KRIER & E. URSIN, *supra* note 10, at 86-87. In 1953 the AMA established a vehicle emission program. *Id.* at 86. The cooperative effort was named "Operation Teamwork." Internal Memorandum, *supra* note 12, at 15627.

16. J. ESPOSITO, *supra* note 14, at 41; J. KRIER & E. URSIN, *supra* note 10, at 87; Internal Memorandum, *supra* note 12, at 15628. The agreement was amended in 1957 and 1960. The parties signed five-year extensions of the agreement in 1960 and 1965. Internal Memorandum, *supra* note 12, at 15628.

17. Willens, *The Regulation of Motor Vehicle Emissions*, 3 NAT. RESOURCES LAW 120, 122 (1970). The author described this aspect of the agreement as follows: "The agreement is limited in subject matter to specific categories of 'licensed devices' concerning which the parties have an obligation to disclose technical information. These categories have been confined to those areas which show the greatest promise for reducing vehicle emissions." *Id.*

18. Article III of the cross-licensing agreement provided:

> (a) Each party to this Agreement grants to each of the other parties and to their respective subsidiaries, a royalty-free nonexclusive license to make, use and sell and to have others make for it or them Licensed Devices and parts thereof coming under any patents, domestic or foreign (subject to the conditions set forth in paragraph (b) and (c) of the Article), owned or controlled, either directly or indirectly, by said grantor on July 1, 1955, or at any time hereafter prior to June 30, 1980, or granted at any time hereafter on inventions owned or controlled, either directly or indirectly by said grantor on July 1, 1955, or at any time thereafter prior to June 30, 1960.
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> . . . .
>
> (c) If any of the parties hereto acquires directly or indirectly a patent otherwise coming within the scope of this Agreement at a cost, exclusive of the expense incurred in prosecuting the patent application or negotiating the purchase, in excess of three hundred dollars ($300), no license thereunder shall be acquired by any other party by operation of this Agreement except upon such party sharing the cost of the patent equitably with the first party and with any other parties electing to take a license thereunder.

Internal Memorandum, *supra* note 12, at 15628.

of information, it was said, would result in faster progress.[19]

However, progress under the cooperative agreement was slow. Initial research focused on deceleration devices, catalytic converters, and direct flame afterburners.[20] Deceleration devices received substantial attention until 1957, when it was discovered that deceleration emissions contributed little to the overall pollution problem.[21] In 1959, the industry presented to California officials a "progress report" which recommended auto inspections, tune-ups, and the "eventual use of a recently developed smog control muffler."[22] The latter device proved to be unworkable, and the industry shifted its attention to controlling hydrocarbon pollutants emitted from the engine crankcase. Positive crankcase ventilation, or "blow-by," devices were developed which could reduce crankcase emissions,[23] but this was hardly a major breakthrough. The technology necessary for developing blow-by devices had been available and in use at least since World War II.[24]

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19. John Campbell, General Motor's (GM) engineering administrative director, explained that the smog problem was such a grave matter of public concern that no company should reap a "competitive advantage" from the situation. J. KRIER & E. URSIN, *supra* note 10, at 87-88. J. C. Zeder of Chrysler Corporation (Chrysler) and C. A. Chayne of GM took the position that a solution to the problem would occur more quickly through cooperation. Internal Memorandum, *supra* note 12, at 15627. Chayne characterized cooperative research as one example of

> [t]he kind of teamwork which we have adopted in the automotive industry on a number of historic occasions when it was obviously more beneficial to the American people generally for us to set aside for a time our concern about the immediate advantages of competitive action and apply the combined talents and facilities of the whole industry to the solution of some problem that affected the public interest adversely.

Id.

20. Willens, *supra* note 17, at 122; *cf.* Letter of Lombardo, *supra* note 12.

21. Willens, *supra* note 17, at 122.

22. J. KRIER & E. URSIN, *supra* note 10, at 101.

23. *Id.*; L. JAFFE & L. TRIBE, *supra* note 14, at 146.

24. Letter of Lombardo, *supra* note 12; Lanzillotti & Blair, *Automobile Pollution, Externalities and Public Policy,* 18 ANTITRUST BULL. 431, 443 (1973). General Motors had developed the positive crankcase ventilation valve in the late 1930s for the purpose of keeping the crankcase free of mud and dust. Although it appears that GM did not realize that the blow-by device was effective in reducing crankcase emissions until 1959, it would seem that, because the technology was already proven, if GM had been doing serious research in the PCD field it would have realized the value of the blow-by PCD sooner. Blow-by valves were installed on all 1961 models that were shipped to California, but it was not until 1963 that the valves were installed on cars nationwide. *Id.* at 443.

Frustration with the industry's inability to make speedy progress led to legislative action. In 1960, the state of California passed the California Motor Vehicle Pollution Control Act.[25] The Act created a Pollution Control Board which was authorized to seek out effective PCDs, certify them, and require their installation in cars sold in California.[26] The Board first certified a crankcase PCD in 1961, and several other crankcase PCDs were approved shortly thereafter.[27] With the problem of crankcase emissions well in hand, attention then shifted to the control of tailpipe exhaust emissions.

The California Department of Public Health had established exhaust emission standards in 1959. During the early sixties the Pollution Control Board was under pressure, particularly from Los Angeles and Los Angeles County, to approve exhaust emission PCDs that would meet the 1959 standards.[28] The Board, however, was forced to rely on the industry's own account of what was technologically feasible.[29] In March 1964, even after the Board had effectively lowered emission standards to facilitate certification, the major auto companies insisted that the requisite

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25. CAL. HEALTH & SAFETY CODE §§ 24378-24398 (West 1967). *See generally* Kennedy and Weekes, *Control of Automobile Emissions—California Experience and the Federal Legislation,* 33 LAW & CONTEMP. PROB. 297 (1968); Comment, *The California Motor Vehicle Control Law,* 50 CAL. L. REV. 121 (1962).

26. CAL. HEALTH & SAFETY CODE §§ 24386(3)-24386(4), 24397-24398 (West 1967) (criteria for PCD approval, testing of PCDs and certification of approved devices). Section 24388 required that when two PCDs were certified by the Pollution Control Board all vehicles, new and used, must be equipped with a certified device. Enforcement was through vehicle registration; purchasers of new or used vehicles could not register the car unless the vehicle was certified. *See* J. KRIER & E. URSIN, *supra* note 10, at 139.

27. J. KRIER & E. URSIN, *supra* note 10, at 147. Emission standards for crankcase emissions were set in 1960. *Id.* According to an AMA letter to the Department of Justice, each 1960 car sold in California was equipped with a blow-by system. Letter of Lombardo, *supra* note 12. According to the United States Department of Commerce, GM voluntarily installed its blow-by valve beginning in the 1961 model year for all California vehicles. J. KRIER & E. URSIN, *supra* note 10, at 147. Blow-by controls were installed industry-wide on all cars sold in the United States beginning with the 1963 model year. *Id.* These measures were voluntary on the part of the auto manufacturers. Letter of Lombardo, *supra* note 12.

28. J. KRIER & E. URSIN, *supra* note 10, at 119-24, 128.

29. Letter of Lombardo, *supra* note 12. The Board's technical staff was too small to effectively do its own testing; it provided only an evaluation of the systems supplied by the auto makers. In fact, the Board itself engaged in no efforts to develop PCDs. J. KRIER & E. URSIN, *supra* note 10, at 99.

technology would not be available for installation until the 1967 car model year.[30] These claims were made despite a previous Chrysler Corporation (Chrysler) announcement, made in 1962, that it had developed a "Clean Air Package" capable of meeting the 1959 standards.[31]

In June 1964, the Pollution Control Board certified four exhaust control devices which had been developed by independent manufacturers.[32] The industry responded swiftly. In August, the major auto companies announced that pollution control systems developed by the companies themselves would be available for installation in 1966 model cars.[33] The industry's systems were soon certified by the Board. As it turned out, the control package offered by Ford Motor Company (Ford) and General Motors Cor-

30. J. KRIER & E. URSIN, *supra* note 10, at 155-58; Letter of Lombardo, *supra* note 12. The Board lowered emission standards by retreating from its earlier position that emissions could not exceed the standard at any point during a 12,000 mile test. In 1964 the Board decided that as long as the average emissions for the 12,000 mile test did not exceed the standard, the car passed. The Board's earlier belief that the auto industry was cooperating in the attempt to cleanse automotive emissions had changed to a growing conviction that the industry was stalling. J. KRIER & E. URSIN, *supra* note 10, at 156. The avowed purpose for adopting the "averaging" test was to facilitate compliance with the standards. *Id.* at 156-57.

31. Letter of Lombardo, *supra* note 12; L. JAFFE & L. TRIBE, *supra* note 14, at 148. Chrysler's Clean Air Package, also called "Engine Modification Kits," may have been developed as early as 1960. Internal Memorandum, *supra* note 12, at 15632. The system consisted of an altered choke setting, a lean-idle adjustment, lean carburetor jets and a vacuum advance control valve to advance spark timing on deceleration. Letter of Lombardo, *supra* note 12. It may also have utilized distributor adjustments. Internal Memorandum, *supra* note 12, at 15632.

32. Each of the four devices had been developed by at least two nonvehicle manufacturers working together. The manufacturers for each device were:

1. American Machine & Foundry Co. and Chromalloy Co.
2. Arvin Co. and Universal Oil Products Co.
3. W. R. Grace Co. and Norris Thermador Co.
4. Walker Mfr. Co. and American Cyanamid Co.

Letter of Lombardo, *supra* note 12.

The incentive for these companies to develop PCD systems was § 1 of the California Motor Vehicle Pollution Control Act, CAL. HEALTH & SAFETY CODE § 24388 (West 1967). This section required all vehicles to be equipped with a certified device once two PCDs had been certified. Whereas previously the independent companies had no assurance that any of the "Big Four" auto companies (Ford, GM, AMC, Chrysler) would buy their PCDs, the nonvehicle companies could be certain that as soon as two of their devices were certified the Big Four would be forced to buy or license the devices from the developers.

33. Letter of Lombardo, *supra* note 12.

poration (GM) was an air injection system that had been available for use since the 1950s.[34] For the 1968 car model year, Ford and GM discarded the air injection system and adopted the Chrysler "Clean Air Package" which had been available six years earlier.[35] The devices developed by independent manufacturers were never used on new vehicles manufactured by the major auto companies.

By the end of 1964, the Los Angeles County Board of Supervisors had become convinced that AMA members were deliberately retarding the progress of PCD development.[36] In 1965, the Supervisors passed a resolution requesting the United States Attorney General to investigate the AMA cooperative agreements "in relation to possible violations of the laws concerning conspiracies, monopolies, product fixing, restraint of trade, and unfair competition," and to "institute an action for the purpose of preventing further collusive obstruction" in PCD development.[37]

In early 1969, after a two-year investigation, the Antitrust Division of the Department of Justice filed suit against the AMA, GM, Ford, Chrysler, and American Motors Corporation (AMC).[38] Several smaller auto makers were named as co-conspirators.[39] The complaint in *United States v. Automobile Manufacturers Association*[40] charged that the defendants and co-conspirators had combined to "eliminate all competition among themselves in the research, development, manufacture and installation of motor

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34. J. KRIER & E. URSIN, *supra* note 10, at 159 n.t.

35. *Id.* GM and Ford claimed to have preferred their "integrated approaches" to Chrysler's "add-on" system because their systems were more efficient. GM and Ford later adopted the Chrysler system because it was the less expensive. *Id.*

36. *Id.* at 156-57; Letter of Lombardo, *supra* note 12; Internal Memorandum, *supra* note 12, at 15632-33.

37. Resolution of the Los Angeles County Board of Supervisors, (January 28, 1965), *reprinted in* R. NADER, UNSAFE AT ANY SPEED 350-54 (1965).

38. Complaint at 2, United States v. Automobile Mfrs. Ass'n, 1969 Trade Cas. ¶ 72,907 (C.D. Cal. 1969). The complaint was filed January 10, 1969, Civil No. 69-75JWC in the United States District Court for the Central District of California (Los Angeles).

39. The smaller companies were Checker Motor Corp., Diamond T. Motor Car Co., International Harvestor Co., Studebaker Corp., White Motor Corp., Kaiser Jeep Corp. and Mack Trucks, Inc. *Id.* at 3-4. These companies were not named as defendants, but the complaint alleged that they participated as co-conspirators in the alleged conspiracy to restrain trade. *Id.* at 3.

40. 1969 Trade Cas. ¶ 72,907 (C.D. Cal. 1969).

vehicle air pollution control equipment; and . . . to eliminate competition in the purchase of patents and patent rights from other parties covering motor vehicle air pollution control equipment."[41] The alleged conspiracy violated the antitrust laws because it constituted an "unreasonable restraint of . . . interstate trade and commerce in motor vehicle air pollution control equipment in violation of Section 1 of the Sherman Act."[42]

A consent decree terminated the suit in October 1969.[43] The

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41. Complaint at 6, United States v. Automobile Mfrs. Ass'n, 1969 Trade Cas. ¶ 72,907 (C.D. Cal. 1969).

42. *Id.* at 5-6. The complaint also alleged that defendants and co-conspirators agreed that they would not compete in PCD research, development, manufacture, and installation. The cross-licensing and other agreements which constituted the cooperative program had the alleged effect of delaying the research, development, manufacture, and installation of PCDs both among the cooperators and among companies not parties to the agreement. Another alleged result of the agreements was the suppression of competition in the PCD market and in the purchase of patent rights and patents covering PCDs. *Id.* at 18.

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1976), provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on the conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

43. United States v. Automobile Mfrs. Ass'n, 1969 Trade Cas. ¶ 72,907, at 87,457 (C.D. Cal. 1969).

In the antitrust context, a consent decree is a settlement between the Department of Justice and the defendant. The Department of Justice is able to obtain the relief it desires without the expense of a trial; the defendant is able to avoid the expense of a risky trial and insure that nothing in the settlement can be used against it in a civil suit on the same facts brought by a private individual. *See* A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 380-82 (2d ed. 1970) for a description of the consent decree as a tool of government antitrust enforcement. *See also* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 758-59 (1977).

After the parties agree to a consent decree, the terms are made public and interested parties are given thirty days to submit their views as to whether the court should approve the decree. In *United States v. Automobile Mfrs. Ass'n,* the court approved the decree after holding a hearing for interested parties on October 26, 1969. United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617, 619-20 (C.D. Cal. 1969), *aff'd mem. sub nom.*, City of New York v. United States, 397 U.S. 248 (1970). At this hearing numerous state and local governmental units apdecree permanently enjoined the defendants from combining to restrain PCD development, manufacture and sales, ordered their withdrawal from the cross-licensing agreement of 1955, and pro-

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peared. *Id.* Most of these parties sought to intervene in the government's suit in order to block approval of the consent decree and force the parties to litigate the suit to judgment. A judgment against the AMA and its members could have been used as proof of liability in the intervenors' own civil suits for treble damages. *Id.* at 620. The court, however, denied all petitions for intervention on the grounds that intervention would unduly "delay and prejudice the adjudication of the original parties." *Id.*

Despite their failure to successfully intervene in the government's suit, a large number of private individuals, corporations, and state and local governmental units brought civil antitrust suits against the AMA based upon the alleged pre-1969 conspiracy. The cities which filed suit included New York, Denver, Chicago, and Philadelphia. Plaintiff states included Illinois, New Jersey, New Mexico, Connecticut, California, and Wisconsin. *In re* Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment, 1970 Trade Cas. ¶ 73,317 (C.D. Cal. 1970); City of Chicago v. General Motors Corp., 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd,* 467 F.2d 1262 (7th Cir. 1972). These cases were all transferred in 1970 to the Central District of California by the Judicial Panel for Multidistrict Litigation. *In re* Motor Vehicle Air Pollution Control Equipment, 311 F. Supp. 1349 (Jud. Panel Mult. Lit. 1970).

A series of judicial decisions followed, including two by the district court and two by the Court of Appeals for the Ninth Circuit. *In re* Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment, 1970 Trade Cas. ¶ 73,317 (C.D. Cal. 1970); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122 (9th Cir. 1973); *In re* Multidistrict Vehicle Air Pollution, 367 F. Supp. 1298 (C.D. Cal. 1973), *aff'd,* 538 F.2d 231 (9th Cir. 1976). The end result was that all the cases filed, except one, were dismissed. The courts ruled that whether or not an antitrust violation had occurred the harmful effects of air pollution were not the result of a restraint of trade. *In re* Multidistrict Vehicle Air Pollution, 367 F. Supp 1298, 1305 (C.D. Cal. 1973), *aff'd,* 538 F.2d 231 (9th Cir. 1976).

The only plaintiff to survive this round of litigation was AMF, Inc. AMF alleged that in addition to the general conspiracy by the AMA to restrain development of PCDs, AMA members conspired to monopolize the PCD market and excluded AMF. AMF, Inc. v. General Motors Corp., 591 F.2d 68 (9th Cir.), *cert. denied,* 100 S. Ct. 210 (1979). The district court found that there was no "conspiracy or concert of action" between the AMA or any of its members concerning a boycott of PCDs made by AMF or any other company. Findings of Fact and Conclusions of Law at 12, AMF, Inc. v. General Motors Corp., No. 71-16-R (C.D. Cal., filed Feb. 18, 1976). The United States Court of Appeals for the Ninth Circuit dismissed the AMF suit because the relevant statute of limitations had expired. AMF, Inc. v. General Motors Corp., 591 F.2d 68, 70-74, *cert. denied,* 100 S. Ct. 210 (1979).

Thus, despite ten years of litigation, no plaintiff successfully proved that the AMA or its members stifled PCD research and development or suppressed competition in the PCD market.

hibited any similar agreements in the future.[44] Further, the defendant manufacturers were ordered to grant to "any person" royalty-free licenses for the use of any PCD patents which had been issued or applied for during the time the cross-licensing agreement was in effect.[45] The defendant AMA was required to make freely available the technological reports under its control which had been prepared pursuant to the enjoined agreement.[46] The decree's provisions benefited those manufacturers excluded from the cross-licensing scheme and enabled possible new entrants in the PCD development market to compete on an equal footing with AMA members.

The decree also contained two renewable ten-year provisions. The first of these provisions enjoined the defendants from exchanging confidential information on applied research which pertained to PCD development, manufacture, sale, and installation.[47] This provision permitted, however, the sharing of basic research.[48] The second ten-year provision forbade the defendants from making joint statements before certain regulatory agencies concerning emission standards or regulations, including statements concerning the defendants' ability to comply with a particular standard or regulation, or to comply by a particular time.[49]

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44. United States v. Automobile Mfrs. Ass'n, 1969 Trade Cas. ¶ 72,907, at 84,457-59 (C.D. Cal. 1969).

45. *Id.* at 87,459.

46. *Id.*

47. Section IV(A)(2)(a) of the consent decree prohibited the defendants from agreeing to exchange "restricted information." The term "restricted information" was defined as

> all unpublished information of the type usually classified as company confidential concerning applied as distinguished from basic research in, or concerning the development, innovation, manufacture, use, sale or installation of Devices. It includes trade secrets, unpublished company policy, and other unpublished technical information for developing, making, improving, or lowering the cost of, Devices by a motor vehicle manufacturer.

Id. at 87,457.

48. The prohibition against exchanging "restricted information" did not include "information concerning basic research in gaining a fuller knowledge or understanding of the presence, nature, amount, causes, sources, effects or theories of control of motor vehicle emissions in the atmosphere." *Id.*

49. *Id.* at 87,458. Section IV(A)(2)(g) of the consent decree prohibited the defendants from agreeing among themselves "to file, . . . with any governmental regulatory agency in the United States authorized to issue emission standards or regulations for new motor vehicles or Federal motor vehicle safety standards or regulations, any joint statement regarding such standards or regulations." *Id.*

Joint statements pertaining to test procedures, test data, and the need for standards or regulations were permitted.[50]

B. *PCD Development During the Competitive Era*

The ten years following the decree in *United States v. Automobile Manufacturers Association* saw the rise of direct federal involvement in emission control, progress in PCD development, and acceptance by the Environmental Protection Agency (EPA) of the effectiveness of competition in PCD development.

In 1970, Congress amended the Clean Air Act to provide for the establishment of mandatory national auto emission standards.[51] One important provision in the amendments required that the makers of "light duty vehicles" reduce by ninety percent the current emission levels for carbon monoxide and hydrocarbons.[52] The deadline for accomplishing these reductions was 1975. This provision, and the other emission reduction goals established by the 1970 amendments, sought to have compliance standards set higher than the manufacturers were able to meet in 1970. Basic to the amendments' policy of "technology forcing" was the assumption that manufacturers would work hard toward timely compliance in order to avoid penalties for noncompliance, and in order to reap the financial rewards that would result from ownership of the required technology.[53] The compliance deadlines set in the

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50. The prohibition against joint statements did not include statements concerning (1) the authority of the agency involved; (2) the draftsmanship of or scientific need for standards; (3) test procedures to test data relevant to standards; or (4) the general engineering requirements of the standards. *Id.*

51. Pub. L. No. 91-604, 84 Stat. 1676 (current version at 42 U.S.C. §§ 7401-7626 (Supp. I 1977)). The Amendments required the Environmental Protection Agency (EPA) Administrator to set emission standards which would achieve a ninety percent reduction in vehicle emissions. 42 U.S.C. § 7521 (1976). *See generally* Note, *The Clean Air Act Amendments of 1970: A Threat to Federalism?*, 76 COLUM. L. REV. 990 (1976); Comment, *The Clean Air Act Amendments of 1970—Technological and Economic Feasibility*, 17 NAT. RESOURCES J. 139 (1977); Kramer, *Economics, Technology and the Clean Air Amendments of 1970: The First Years*, 6 ECOLOGY L.Q. 161 (1976).

52. 42 U.S.C. § 7521(b)(1)(A) (Supp. I 1977).

53. The technology-forcing system allows for faster progress in emission reductions than would be achieved if the EPA set standards on the basis of currently available technology. The most innovative firms are rewarded for success; the laggards are forced to either license the leading firm's device or accelerate their own PCD development. Letter of Douglas Costle of EPA to John Shenefield, Department of Justice (Oct. 4, 1978), *reprinted in* Memorandum of the United

1970 amendments were extended by amendments enacted in 1977,[54] but the underlying policy remained unchanged.

The 1970 amendments authorized the Administrator of the EPA to promulgate emission standards consistent with the legislation's emission reduction goals, and to delay compliance with the standards if necessary.[55] The 1977 amendments also allowed the Administrator to waive compliance deadlines if interim substitute standards were established.[56] The waiver of any congressionally mandated standard required that the Administrator make a finding that (1) waiver was in the public interest, or for the benefit of public health or welfare; (2) good faith efforts to meet the standards had been made; (3) the necessary technology was unavailable, taking into consideration costs, driveability, and fuel economy; and (4) independent information available to the Administrator confirmed that the necessary technology was unavailable.[57]

States in Support of Motion to Continue Sections IV(A)(2)(a) and IV(A)(2)(g) of Final Judgment [hereinafter cited as Government Memorandum], United States v. Motor Vehicles Mfrs. Ass'n, 1979-1 Trade Cas. ¶ 62,557 (C.D. Cal. 1979). *See generally* Note, *Forcing Technology: The Clean Air Act Experience*, 88 YALE L.J. 1713 (1979) (a description of technology forcing and a study of its use in controlling pollution in the electric power and copper smelting industries).

The United States Supreme Court has upheld the use of technology forcing as a means for achieving clean air goals. Union Elec. Co. v. EPA, 427 U.S. 246, 265-66 (1976) (state has power to set economically or technically infeasible emission standards in order to meet federal requirements).

54. Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7401-7626 (Supp. I 1977). These amendments basically did no more than extend the same requirement of a ninety percent reduction in emissions for another five years, until 1983. For vehicles manufactured between 1979 and 1982, the EPA was to set standards qualified by "appropriate consideration" of the cost of applying "available technology" and other considerations. 42 U.S.C. § 7521 (Supp. I 1977). *See generally* Pendlex & Morgan, *The Clean Air Act Amendments of 1977: A Selective Legislative Analysis*, 13 LAND & WATER L. REV. 747 (1978); Kramer, *The 1977 Clean Air Act Amendments: A Tactical Retreat from the Technology-Forcing Strategy?*, 15 URBAN L. ANN. 103 (1978); Note, *The Clean Air Act Amendments of 1977: Away from Technology-Forcing?*, 2 HARV. ENV'L L. REV. 1 (1977).

55. 42 U.S.C. § 7521 (1976) (current version at 42 U.S.C. § 7521 (Supp. I 1977)).

56. 42 U.S.C. § 7521 (Supp. I 1977).

57. 42 U.S.C. § 7521(b)(5)(C)(i)-(iv) (Supp. I 1977). Independent information includes studies done by the National Academy of Sciences as authorized in 42 U.S.C. § 7521(c) (Supp. I 1977). The Academy has undertaken a number of investigations in the vehicle emission control field. *See, e.g.*, NATIONAL ACADEMY OF SCIENCES, REPORT BY THE COMMITTEE ON MOTOR VEHICLE EMISSIONS (1973).

During the competitive regime which followed the 1969 consent decree, the industry was unable to present a unified front to the EPA concerning technological feasibility.[58] Since the EPA received separate accounts of the manufacturers' research efforts, the Administrator was in a position to determine independently which of the manufacturers had progressed furthest. Emission standards could then be set or adjusted accordingly. No manufacturer could successfully raise the claim of technological infeasibility if a competitor claimed the opposite. EPA Administrator Douglas M. Costle explained the benefits of the consent decree in a letter to the Department of Justice in this manner:

> The restraint against exchange of restricted information prevents the manufacturers from matching their pace of technological advancement to that of the least successful company without running the risk of being placed in a competitively disadvantageous position in meeting emission control requirements.
>
> The restraint against submission of joint statements prevents the manufacturers from making presentations to EPA that do not reflect the true level of development within the industry in order to encourage the adoption by EPA of requirements below those actually attainable by the industry.
>
> Simultaneous operation of both provisions is necessary to enable EPA to adopt the strictest requirements achievable by the industry.[59]

Progress in pollution control technology was not uniform during the 1970s. The emission reduction goals were not achieved within the timetable set by the 1970 amendments.[60] Yet progress

58. *See* notes 49-50, *supra.*

59. Letter of Douglas Costle of EPA to John Shenefield, Department of Justice (Oct. 4, 1978) *reprinted in* Government Memorandum, *supra* note 53, at 54 [hereinafter referred to as Letter of Costle].

60. In International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973), the United States Court of Appeals for the District of Columbia found that then-existing technology would not permit manufacturers to meet the 1975 and 1976 standards, and ordered the EPA to extend compliance deadlines for one year. Legislation passed in 1974 gave the manufacturers a further one-year delay. Energy Supply and Environment Coordination Act of 1974, Pub. L. No. 93-319, § 5, 88 Stat. 246. The Clean Air Act Amendments of 1977 established yet another, less stringent timetable. 42 U.S.C. §§ 7401-7626 (Supp. I 1977); *see* note 54 *supra.*

However, substantial progress was made in controlling pollution in the copper smelting and electric power industries as a result of technology forcing. Note, *Forcing Technology: The Clean Air Act Experience,* 88 YALE L.J. 1713, 1718-27 (1979). This progress appears to indicate that the technology-forcing strategy is did occur. For example, in the case of catalytic converters, the auto makers presented conflicting testimony as to the feasibility of catalyst technology during standard-setting hearings in 1972 and 1973.[61] The testimony of GM and Ford was optimistic and, according to the EPA, supported a program of gradual installation of catalyst PCD's. On the other hand, Chrysler and AMC were doubtful about the catalyst because they believed that catalyst technology would penalize fuel economy. When interim standards were adopted, the emission levels established effectively required the use of catalyst technology for 1975 passenger cars sold in California.[62] As it turned out,

> [c]ontrary to the pessimistic predictions of some manufacturers, each manufacturer installed catalysts on a majority of its 1975 models, probably due to the fuel economy and performance benefits resulting from use of the catalysts as opposed to engine modifications. As a consequence, 85% of all 1975 model year cars were equipped with catalysts, resulting in an average fuel economy gain of 13% over 1974 models.[63]

In a similar instance, a GM report on the control of emissions of nitrogen oxides (NO_X) emissions described an advanced exhaust recirculation system which could achieve greater reductions than competing manufacturers said were possible. In promulgating interim standards for NO_X, the Administrator relied on the GM report.[64]

Initially, however, neither Congress nor the EPA completely accepted the use of competition as a means of achieving technical progress. For example, an early version of the 1970 amendments, S. 4358, contained a provision exempting manufacturers who cooperated on PCD research from antitrust liability.[65] Moreover, in

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generally a success.

61. Letter of Costle, *supra* note 59, at app. 61-63.

62. California was permitted to impose its own stricter standards under 42 U.S.C. § 1857d-1 (1976).

63. Letter of Costle, *supra* note 59, at app. 62-63.

64. *Id.* at app. 63. In 1973 the EPA Administrator decided to grant a suspension of the statutory NO_X standard for the 1976 model year. This decision was based upon a consensus of industry witnesses that the auto makers would not be able to develop the requisite technology to comply with the 1976 standards. In setting interim standards according to the technology level exhibited by GM, the Administrator assumed that the other manufacturers would be able to meet the standards by either purchasing GM's PCD or developing their own. *Id.*

65. S. 4358, 91st Cong., 2nd Sess., 116 CONG. REC. 33,120 (1970). In 1971 Sen-

a 1971 appearance before the Antitrust Section of the American Bar Association, an EPA official stated that the problem of reducing auto emissions "can be solved more quickly, more efficiently, and more in the public interest by a joint undertaking . . . . [O]ur tendency . . . would be to honor the environmental goals at the expense of the antitrust goals."[66] However, Congress left the competitive regime intact despite amendments to the Clean Air Act in 1974[67] and 1977[68]; by 1978, the EPA was on record as supporting an extension of the expiring provisions of the 1969 consent decree.[69]

II. A CHALLENGE TO COMPETITION:

United States v. Motor Vehicle Manufacturers Association

In 1978, the Department of Justice moved for an extension of the two ten-year provisions of the 1969 consent decree, arguing that the provisions were still needed.[70] The attorneys for the auto makers and their trade group, which had been renamed the Motor Vehicle Manufacturers Association, argued in opposition that the government had failed to establish a need for the extension and that there was no longer any antitrust justification for the ban on information exchanges and preparation of joint state-

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ator Griffin introduced the Motor Vehicle Air Pollution Acceleration Act. The purpose of the unenacted bill was to expedite the development of PCDs by specifically exempting motor vehicle manufacturers from the antitrust laws for any cooperative program set up for research, development or manufacture of PCDs. S. 2258, 92nd Cong., 1st Sess., 117 CONG. REC. 24,461 (1971).

66. Kirk, *The Quality of Life and the Antitrust Laws: An EPA Perspective*, 40 A.B.A. ANTITRUST L. J. 293, 298-301 (1971). Mr. Kirk was the Deputy General Counsel for EPA in 1970. *Id.* at 293.

67. Section 5 of the Energy Supply and Environment Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246, extended the emission standard compliance deadlines which had been established by the 1970 amendments. *See* note 60 *supra*.

68. Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7401-7626 (Supp. I 1977). The 1977 amendments authorized the EPA Administrator to support cooperative research efforts, but they did not exempt such efforts from antitrust constraints. 42 U.S.C. § 7403 (Supp. I 1977).

69. Letter of Costle, *supra* note 59, at 53-54. As EPA Administrator, Costle stated the official EPA position on the desirability of allowing the ten-year provisions of the 1969 consent decree to expire.

70. United States v. Motor Vehicle Mfrs. Ass'n, 1979-1 Trade Cas. ¶ 62,557 (C.D. Cal. 1979). The two ten-year provisions of the consent decree are described in notes 47-50 *supra* and accompanying text.

ments.[71] In March 1979, District Judge Curtis resolved the controversy in favor of the government,[72] although his decision was reconsidered and reversed four months later.[73]

In his March 1979 decision, Judge Curtis considered the need for an extension by applying a standard of review described as the "basic purpose" test.[74] The court examined whether the basic purpose of the decree would be furthered by continuing the ban. According to the court, the basic purpose of the decree was the creation of a competitive environment for PCD research and development. This raised two questions: (1) whether changes in marketplace conditions and PCD technology had rendered the decree obsolete, and (2) whether the public benefits flowing from an extension outweighed the resulting hardships to the defendants.[75]

Marketplace conditions, it was found, had remained unchanged since 1969. Since continued progress in PCD development was still needed, and since there would be little incentive for competition in the field without the ban, Judge Curtis concluded that "circumstances in the marketplace continue to present a situation where competition in the area . . . is of paramount importance."[76] As to the question of hardship to the defendants, the court noted that it was apparent "the manufacturers have been able to develop and market emission control devices under the provisions" of the decree.[77] Because the defendants had not shown that an extension would impede continued progress, and because the control of pollution was a significant

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71. Defendant's Memorandum in Opposition to Plaintiff's Motion to Continue Sections IV(A)(2)(a) and IV(A)(2)(g) of the Final Judgment at 5-15, United States v. Motor Vehicle Mfrs. Ass'n, 1979-1 Trade Cas. ¶ 62,557 (C.D. Cal. 1979) [hereinafter cited as MVMA Brief].

72. 1979-1 Trade Cas. ¶ 62,557 (C.D. Cal. 1979).

73. United States v. Motor Vehicle Mfrs. Ass'n, 1979-2 Trade Cas. ¶ 62,759 (C.D. Cal. July 16, 1979).

74. 1979-1 Trade Cas. ¶ 62,557, at 77,232 (C.D. Cal. 1979). The court cited Chrysler Corp. v. United States, 316 U.S. 556 (1942) for the proposition that a consent decree extension should be based upon a consideration of the basic purpose of the consent decree. United States v. Armour & Co., 402 U.S. 673 (1974) was cited as authority for discerning the basic purpose solely from the text of the decree.

75. 1979-1 Trade Cas. ¶ 62,557, at 77,232 (C.D. Cal. 1979).

76. *Id.*

77. *Id.*

public benefit, the court reasoned that its "responsibility to act in the public interest" and to consider "overall public policy considerations" would be met by approving the decree.[78] Thus, the court held that the proposed extension would further the decree's basic purpose.

When the court turned to the question of whether there were any antitrust justifications for continuing the ten-year provisions, the court found it unnecessary to review this issue because of the nature of the decree itself. The court refused to consider whether the government had stated or proved an antitrust cause of action because the parties had by virtue of the decree effectively "agreed that there is a need within antitrust concepts for the proscriptions which the decree contains, and such issues may not now be litigated."[79] Consequently, the March 1979 decision granted the government's motion to extend the consent decree for ten more years.

Yet the court's analysis left one key question unanswered: Was competition actually conducive to progress in PCD development? The court had assumed that it was,[80] but it failed to inquire into the matter. Judge Curtis examined whether the basic

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78. *Id.* at 77,232-33. The court stressed that no showing had been made that the two expiring provisions imposed "severe economic hardship due to changed conditions" or that the defendants had "ever relied to their detriment upon the expiration date originally established." *Id.*

79. *Id.* at 77,231. Actually, Judge Curtis had said in approving the 1979 decree that the decree was entered "without trial or adjudication of or finding on any issue of fact or law." United States v. Automobile Mfrs. Ass'n, 1969 Trade Cas. ¶ 72,970, at 87,456-57 (C.D. Cal. 1969). It requires a leap of the imagination to say that the defendants agreed that "there was need within antitrust concepts for the proscriptions which the decree contains."

80. Although "voluminous memoranda and exhibits" were filed by both parties concerning whether competition was a boon to PCD development, the court did not attempt to analyze this material:

> It does not appear appropriate to set forth here a detailed analysis of this material. It is sufficient to say that the court concludes that because of the unique interaction of the decree and the anti-pollution statutes applicable to the emission control devices, the expiring provisions do function to foster and create the kind of competition which the consent decree envisioned. In this regard, the manufacturers have suggested that a full evidentiary hearing be held by the court, but I do not view such a hearing necessary in the light of the comprehensive arguments and evidentiary material with which the court has been supplied.

1979-1 Trade Cas. ¶ 62,557, at 77,231 (C.D. Cal. 1979).

purpose of competition would be furthered by an extension but did not review the continued validity of the basic purpose itself. An examination of whether competition still served to promote the development of pollution control technology would have been something quite different from an examination of industry behavior for the antitrust violations alleged in the government's complaint. Indeed, the court in July 1979, during reconsideration of its March decision, performed just such an examination in regard to cooperative research and development programs.[81] A similar examination of competition could have been undertaken. Moreover, in the March 1979 decision the court expressed its willingness to include "overall public policy considerations" in its deliberations.[82] Certainly whether competition helps or hinders the effort to control auto emissions was then, and is now, a public policy consideration of prime importance.

As it was, the court's failure to examine the efficacy of the competitive regime, and thus to explore the antitrust rationale underlying the use of the antitrust laws in the field of pollution control, made it easier for the defendants to win a reversal of the March 1979 order. In July 1979, the defendants successfully argued in their motion for reconsideration that competition was not working well and that cooperation was the more efficient way to further PCD research.[83]

To be sure, there had been instances where the general policy of competition had been suspended. In 1970, the Antitrust Division of the Department of Justice approved a one-year technical aid agreement between GM and AMC under which GM was to provide engineering consultation on PCD research.[84] When AMC applied for an additional one-year approval of the agreement, a company official stated that AMC did not have, and did not anticipate having, the ability to develop PCDs on its own. The extension was granted. Moreover, in a letter dated May 16, 1979, shortly after Judge Curtis' initial decision, the Antitrust Division acquiesced in a technical assistance agreement between GM and

81. United States v. Motor Vehicle Mfrs. Ass'n, 1979-2 Trade Cas. ¶ 62,759 (C.D. Cal. July 16, 1979). *See* text accompanying notes 96-99 *infra*.

82. 1979-1 Trade Cas. ¶ 62,557, at 77,232 (C.D. Cal. 1979).

83. MVMA Brief, *supra* note 71, at 29-32.

84. Wall St. J., May 4, 1979, at 4, cols. 2-3.

Chrysler.[85] The justification for the agreement was Chrysler's financial difficulties, which the company claimed might impede its ability to develop acceptable PCDs. GM agreed to provide two prototype emission control systems, and technical consultation on installation and other matters.[86]

Nonetheless, these two short-lived agreements neither marked the competitive regime as a failure, nor necessarily signified a Department of Justice retrenchment. The very nature of a competitive system creates the possibility that some participants will be less successful than others. Under the GM-Chrysler agreement, Chrysler was entitled to use any information it obtained from GM for its own competitive advantage, and the Antitrust Division was not precluded from taking action if the parties' activities under the agreement should have anticompetitive effects.[87]

However, other developments also served to raise questions about the competitive regime. The auto makers claimed that PCD research had become so costly that no one manufacturer could bear it alone.[88] Indeed, it was a lack of financial resources

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85. *Id.*; [1979] 914 ANTITRUST & TRADE REG. REP. (BNA) at A-16. Apparently GM and Chrysler simply notified the Department of Justice of the proposed agreement and the latter simply indicated its lack of interest in an antitrust challenge. The Department indicated, however, that it would take appropriate action "should circumstances subsequently indicate that the activities of the parties under the agreement may have anticompetitive effects in the research, development or sale of emission control." *Id.* at A-17. *See also* Wall St. J., May 4, 1979, at 4, cols. 2-3.

86. Wall St. J., May 4, 1979, at 4, cols. 2-3.

87. *See* note 85 *supra*.

It should be noted that the great body of the consent decree is still in effect; only two provisions had a ten-year duration. Under the permanent provisions, Chrysler and GM were enjoined from "combining or conspiring to prevent, restrain or limit the development, manufacture, installation, distribution or sale of [PCDs]." United States v. Automobile Mfrs. Ass'n, 1969 Trade Cas. ¶ 72,907, at 87,457 (C.D. Cal. 1969). Presumably the agreement between GM and Chrysler would be construed as a combination prohibited by the Sherman Act, and if its intent and effect were to limit PCD development, the Department of Justice could sue, claiming a violation of the decree. On the other hand, the decree specifically permits defendants to enter into any agreement to which the Department consents in writing. *Id.* at 87,458.

88. United States v. Motor Vehicle Mfrs. Ass'n, 1979-2 Trade Cas. ¶ 62,759, at 78,381 (C.D. Cal. July 16, 1979). *See* Note, *Antitrust Law Meets the Environmental Crisis—An Argument for Accommodation*, 1 ECOLOGY L.Q. 840, 845 (1971) [hereinafter cited as *Environmental Crisis*]. The author contends that abatement

which had prompted the GM-Chrysler and GM-AMC agreements.[89] The energy crisis added another complication. In a recent legislative initiative, the Energy Policy and Conservation Act,[90] Congress added the development of fuel efficient vehicles to the list of national objectives. Moreover, the Clean Air Act Amendments of 1977 provided for a temporary compliance waiver for manufacturers who installed fuel-conserving diesel technology,[91] and authorized the Administrator to support cooperative research efforts.[92] In addition, there was support from President Carter for a "basic research initiative" which would involve the auto industry, the government, and academic institutions in an endeavor to mesh PCD and conservation technology.[93]

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costs can represent a considerable fraction of a company's total capital investment. Some companies, for example the Portland Cement Company, have elected to shut down their factories rather than install expensive abatement facilities. Merjos, *Investing in Pollution Control for the Seventies*, in LEGAL CONTROL OF THE ENVIRONMENT 4 (R. Needham ed. 1970) (P.L.I. CRIMINAL LAW AND URBAN PROBLEMS COURSE HANDBOOK SERIES No. 21). According to a government study, "The Economic Impacts of Pollution Control," the crippling economic effects of pollution abatement will only involve manufacturing facilities which are too small, old, or inefficient. N.Y. Times, Mar. 13, 1972, at 1, col. 3. Large firms, however, are clearly more able to individually undertake research programs; it is the insufficient capital assets of small firms which necessitate their banding together in cooperative programs. *Environmental Crisis, supra* at 846.

89. Wall St. J., May 4, 1979, at 4, cols. 2-3. AMC was "too small" to compete effectively in PCD development, while Chrysler was having financial difficulties. [1979] 914 ANTITRUST & TRADE REG. REP. (BNA) at A-17.

90. 15 U.S.C. §§ 2001-2012 (1976 & Supp. I 1977). The Act set fuel economy standards and provided for a relaxation of emission standards when such relaxation will help achieve fuel economy standards.

91. 42 U.S.C. § 7521(b)(6)(B)(Supp. I 1977).

92. 42 U.S.C. § 7403 (Supp. I 1977).

93. The "Basic Research Initiative in Automotive Technology" is described in a White House Fact Sheet released to the public by the White House Press Secretary on May 18, 1979, and is reprinted in Notice of Motion and Defendants' Motion for Reconsideration at 26-27, United States v. Motor Vehicle Mfrs. Ass'n, 1979-2 Trade Cas. ¶ 62,759, at 78,379 (C.D. Cal. July 16, 1979). According to the Fact Sheet, the basic research program would be "jointly sponsored by government and industry." *Id.* at 26. Prior to the May 18 press release, Secretary of Transportation Adams had conducted discussions with auto industry leaders "in an effort to develop the general principles of a cooperative automotive basic research program." *Id.* The Fact Sheet explained that "industry leaders will work with government officials over the next four months to develop a detailed proposal to submit to the President for his approval." *Id.*

The defendants in *United States v. Motor Vehicles Mfrs. Ass'n* reached two conclusions from the Fact Sheet. First, they stated that it implied that the execu-

The escalating cost of PCD research, the Justice Department approved cooperative agreements, and the building pressure for greater fuel efficiency were sufficient reasons to cause Judge Curtis to reverse his March 1979 decision. In a brief opinion issued in July 1979, Judge Curtis reconsidered the two factors of hardship and changed circumstances and found that both weighed against the government.[94] As for hardship, the court cited the technical aid agreements approved by the Department of Justice. It noted that the agreements had the effect of placing Ford at a competitive disadvantage, since Ford would be unable to share in the information passed by GM to AMC and Chrysler. Such inequitable

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tive branch favored a climate of cooperation in the field of automotive research, and that the public interest lay not in isolated research but in cooperation. *Id.* at 3-4. Second, defendants argued that if auto companies participated in the program they would necessarily become involved, perhaps inadvertently, in exchanges of "restricted information" which the expiring provisions of the consent decree prohibited. *Id.* at 9-11. Defendants claimed that it was inconsistent for the government to request the industry's participation in a program which would violate the consent decree while the government also attempted to extend the decree.

The Department of Justice reached opposite conclusions from the White House Fact Sheet. First, the Department argued that since the Basic Research Initiative was only in a formative stage, there was no policy conflict with the Department's pro-competitive position. Memorandum of the United States in Opposition to Defendants' Joint Motion and Defendant Ford Motor Company's Separate Motion for Reconsideration of the Court's March 30, 1979 and April 24, 1979 Orders at 14-15, United States v. Motor Vehicle Mfrs. Ass'n, 1979-2 Trade Cas. ¶ 62,759 (C.D. Cal. July 16, 1979). Second, the Department noted that the Basic Research Initiative focused only on "basic research." Since the consent decree's prohibition against exchanges of restricted information did not include basic research data, the Department reasoned that there was no conflict between the decree and the Basic Research Initiative. *Id.* at 18-19.

There is arguably an important difference between allowing the auto industry to collude on joint submissions to the EPA and permitting the industry members to contribute engineers to a government-directed research program. The latter is unconcerned with setting the specific standards by which the industry must abide, while joint submissions have the potential for intentional misleading of the EPA. In the Basic Research Initiative, the industry would have little or no incentive to stall the program, since it would ultimately reap the benefits of the scientific advances funded in part by the government. Although it is possible that through the Initiative industry members may release restricted information, that possibility is a far different situation from one where industry members put their restricted, competitive information into one large pool and can thereby slow the pace of PCD development.

94. United States v. Motor Vehicles Mfrs. Ass'n, 1979-2 Trade Cas. ¶ 62,759 (C.D. Cal. July 16, 1979).

treatment, the court said, would be a hardship on Ford.[95] In regard to changed circumstances, the court found that "the present environment is so entirely different from that existing in 1969" that an extension of the ten-year provisions would be "inappropriate, counterproductive, and unjust."[96] The court cited the President's cooperative research initiative, and the shift in focus toward fuel conservation objectives, as signaling an implied government endorsement of exchanges of restricted information in the auto industry. In particular, the President's program called for "exchanges of information which are specifically proscribed in the provisions at issue."[97] More significantly, the court indirectly asserted as a finding of fact that cooperative research was the better strategy for inducing success in PCD development under present conditions. Not only were present development costs prohibitive, but the problem of designing PCDs that avoided fuel efficiency penalties was particularly complex:

> [I]n some instances, [conservation and emission control] technologies may conflict. Efforts to solve both problems therefore must proceed synergistically with full recognition of the demands and needs of each. If these efforts are to succeed, a key component now appears to be cooperation between the entities possessing the requisite technical and economic capabilities.[98]

Cooperation not only looked desirable for reducing auto emissions, but, in the court's view, it also appeared inevitable. The court reached its decision, however, without raising or discussing the merits of competition.[99]

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95. *Id.* at 78,380.

96. *Id.* at 78,381.

97. *Id.*

98. *Id.*

99. The court's opinion on reconsideration focused solely on the recent developments which seemed to favor cooperative research programs. The arguably beneficial effects of competition were not even mentioned, let alone discussed.

After the district court denied the extension of the 1969 antitrust decree, the Antitrust Division of the Department of Justice filed an appeal with the Court of Appeals for the Ninth Circuit. United States v. Motor Vehicle Mfrs. Ass'n, No. 79-3565 (9th Cir. 1979). In October 1979, the Antitrust Division asked the district court to extend the 1969 decree during the pendency of its appeal. Notice of Motion and Plaintiff's Motion for Temporary Extension of Injunctive Provisions Pending Appeal, United States v. Motor Vehicle Mfrs. Ass'n, No. 69-75-JWC (C.D. Cal. Oct. 11, 1979). The district court denied the motion. The Antitrust Division appealed this denial to the Ninth Circuit, which subsequently extended the expiring provisions for the duration of the government's appeal. United States v.

If the court had examined the merits of competition it would have been aided by the existing conceptual framework of antitrust law. The goal of antitrust law is to protect competitive enterprise. This pro-competitive bias is primarily based on two premises: (1) competition is the most effective means for inducing material progress, and (2) a competitive market system is uniquely compatible with a democratic system of government.[100] These justifications which favor competition as a means of protecting private enterprise also provide a basis for the successful development of automobile pollution control technology.

With respect to the first justification for a competitive system, the literature of antitrust contains much analysis of the logic of competitive incentives.[101] Incentives have obvious application to the problem of developing pollution systems, since with more effective incentives there is greater chance for technical progress. However, the second justification for a competitive system is equally important. If the reduction of auto emissions is a public mandate, it is essential that control over its implementation remain with those having responsibility to the public. Antitrust law, viewed as an economic aspect of democratic theory, embodies rules which define the proper allocation of control over economic resources. The way in which antitrust law defines and remedies economic abuses provides insight into how competitive incentives contribute to the maintenance of public control over publicly mandated environmental objectives.

III. ANTITRUST THEORY APPLIED TO PCD DEVELOPMENT

The analysis which follows is divided into four parts. The first part explores the major themes of antitrust law. The second section examines the characteristics of the PCD market and the functions of cooperation and competition in this setting. The relative merits of competition and cooperation are then discussed in the third and fourth sections respectively.

Motor Vehicle Mfrs. Ass'n, No. 79-3564 (9th Cir. Nov. 16, 1979).

100. *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 2-7, 11-12 (1977); E. SINGER, ANTITRUST ECONOMICS 15-26 (1968).

101. E. SINGER, *supra* note 100, at 15-26.

A. *Themes of Antitrust Law*

Antitrust law forbids unreasonable restraints of trade.[102] For example, it forbids competing producers from agreeing among themselves to charge uniform prices.[103] It forbids conspiracies to exclude potential competitive entrants to the marketplace.[104] It forbids individual firms from attempting to attain monopoly power over the production, distribution, or sale of products.[105] These and other prohibitions are designed to restrain interference with the unregulated workings of a system of competitive enterprise. This objective rests on the simple premise, in the words of Mr. Justice Black, "that the unrestrained interaction of competi-

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102. Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1 (1976). Every contract arguably has some sort of restraining effect on trade, in that it usually will bind the parties to some sort of trade practice and preclude them from exercising options which they otherwise would have had in the future. However, the prevailing view, termed the "Rule of Reason," is that only those contracts and combinations which unreasonably restrain trade are adjudged illegal. An explanation of this rule can be found in Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911), where Chief Justice White, writing for the majority, outlawed "undue" restraints on trade. *Id.* at 58-60. The classic statement identifying which restraints of trade are illegal is found in Justice Brandeis' opinion in Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918):

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restaint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an achieved objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 238.

103. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

104. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966).

105. *See, e.g.*, Swift & Co. v. United States, 196 U.S. 375, 396 (1904); American Tobacco Co. v. United States, 328 U.S. 781 (1945).

tive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions."[106]

In an ideal competitive system, anyone with sufficient capital can begin an enterprise without encountering unfair resistance from those already in the marketplace. Price competition is of primary importance because the movement of prices is the mechanism by which society values the mix of goods and services on the market at any given time.[107] The possibility of economic failure is an essential attribute of a free market. Consumer rejection of a good or service, whether for reasons of price, quality, or utility, should compel product alteration or business failure.[108] Existing producers, however, would prefer not to compete at all. If possible, they would rather achieve stability and certainty by restricting entry to the marketplace, avoiding price competition, and partitioning markets among themselves.[109] Antitrust law compels producers to be responsive to the unrestrained competitive pressures of the market.

Because companies tend to manipulate the market for their own benefit, the activities of cooperative industry groups, such as trade associations, need to be carefully scrutinized. Often, the activities of such groups are anticompetitive, as was the case in *American Column and Lumber Company v. United States.*[110] In *American Column,* an association of hardwood manufacturers instituted a plan whereby members agreed to exchange extremely detailed information concerning prices, deliveries, production plans and inventories. Members also attended meetings where they were exhorted to avoid production increases in order to keep prices high. Reports prepared and circulated by the association's statistical expert gave similar advice. The United States Supreme

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106. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

107. L. SULLIVAN, *supra* note 100, at 2-7.

108. *See* note 120, *infra*.

109. *See* L. SULLIVAN, *supra* note 100, at 333-43; E. SINGER, *supra* note 100, at 74-84. Yet, perhaps "[s]ome truth lurks in the cynical remark that not high profits but a quiet life is the chief reward of monopoly power." United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 347 (D. Mass. 1953), *aff'd,* 347 U.S. 521 (1954).

110. 257 U.S. 377 (1921).

Court found that the information exchange program had the purpose and effect of keeping hardwood prices artificially high, despite slack demand forces which would have caused lower prices in an unrestrained market.[111] As Mr. Justice Clark explained:

> Men in general are so easily persuaded to do that which will obviously prove profitable that this reiterated opinion from the analyst of their association . . . that higher prices were justified and could easily be obtained, must inevitably have resulted, as it did result, in concert of action in demanding them . . . . [T]he fundamental purpose of the 'Plan' was to procure "harmonious" individual action among a large number of naturally competing dealers with respect to . . . production and prices.[112]

Although competition is the norm in the American economy, there have been instances in which cooperative efforts have been sanctioned.[113] National emergencies have prompted Congress to exempt private industry from antitrust liability for cooperative projects.[114] The courts have refused to automatically find antitrust liability for cooperative industry efforts to standardize products,[115] especially where the effort has a safety objective[116] and an

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111. *Id.* at 407.

112. *Id.* at 407-411.

113. Congress has specifically exempted certain cooperative activities from the ambit of the antitrust statutes. For example, agriculture cooperatives are exempted by § 6 of the Clayton Act, 15 U.S.C. 17 (1976), and the Capper-Volstead Act, 7 U.S.C. § 291 (1976). Labor union activity is exempted under § 6 of the Clayton Act, 15 U.S.C. § 17 (1976).

In addition, courts have frequently exempted "regulated" industries from the antitrust laws. In these industries regulation by a government agency is so pervasive that application of the antitrust laws would not serve the usual competitive purpose. *See, e.g.*, Utility Users League v. Fed. Power Comm'n, 394 F.2d 16 (7th Cir.), *cert. denied*, 393 U.S. 953 (1968) (public utilities); Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922) (railroads); Pan American Airways, Inc. v. United States, 371 U.S. 296 (1963) (airlines).

114. For example, in 1942 Congress enacted a statute which exempted joint research ventures from antitrust liability where they would benefit national defense or security. Act of June 11, 1942, ch. 404, § 12, 56 Stat. 351, 357. However, procedural safeguards were provided. *Id.*

115. Attempts by members of an industry to standardize their product have never been held *per se* illegal by a court. *See, e.g.*, Bond Crown & Cork Co. v. Fed. Trade Comm'n, 176 F.2d 974 (4th Cir. 1949), where the court stated in dicta that "[t]he standardization of products, . . . would be innocent enough by itself, but not when taken in connection with standardization of discounts and differentials [and] publication of prices." *Id.* at 979. *See generally* L. SULLIVAN, *supra* note 100, at 275-82.

explicit government sanction.[117] These and other exceptions, however, are usually temporary or narrow,[118] lest the incentives to produce fostered by competion be weakened.

In addition to its explicit economic objective, antitrust law serves social and political objectives by keeping economic power relatively diffuse. As one commentator in the field has noted:

> It seems likely that American distrust of all sources of unchecked power is a more deep-rooted and persistent motive behind the antitrust policy than any economic belief . . . . This distrust . . . is expressed in the theories of "checks and balances" and of "separation of powers." In the United States the fact that some men possess power over the activities and fortunes of others is sometimes

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116. Where the purpose of the standardization involves public health or safety, courts have consistently upheld cooperative programs even when price uniformity results. In United States v. National Malleable & Steel Castings Co., 1957 Trade Cas. ¶ 68,890 (N.D. Ohio 1957), trade association members cooperated in the design of railroad cars for uniformity throughout the industry. The dissimilarity of couplers manufactured by different companies necessitated the manual coupling of cars by brakemen and many brakemen had been injured in the process. Automatic couplers would have obviated the need for brakemen to put their hands near the couplings. For this reason, the federal government "suggested" a intra-industry cooperative design program. *Id.* at 73,587. In upholding the program under the government's antitrust challenge, the court praised the product's standardization because of the clear benefit to the public, despite the significant price uniformity which resulted. *Id. See also* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); United States v. Johns-Manville Corp., 259 F. Supp. 440 (E.D. Pa. 1966).

While standardization is purportedly in the public interest, courts are wary of product standards which excessively regulate the size, shape, or appearance of a product. In both C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 493 (9th Cir.), *cert. denied,* 344 U.S. 892 (1952), and Structural Laminants, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154, 195 (D. Or. 1966), *aff'd per curiam,* 399 F.2d 155 (9th Cir. 1968), *cert. denied,* 393 U.S. 1024 (1969), the courts disapproved of design standards when performance standards would have been more appropriate.

117. The dairy industry's standardization of Grade A milk in response to a city ordinance in Pevely Dairy Co. v. United States, 178 F.2d 363 (8th Cir. 1949), *cert. denied,* 339 U.S. 942 (1950), led the court to discount the existence of price uniformity and reverse a lower court finding of a Sherman Act § 1 violation.

118. Even traditionally regulated industries are not immune from antitrust liability. For example, in Pan American World Airways v. United States, 371 U.S. 296, 304-05 (1963), the court refused to remove all facets of the airlines' activities from antitrust scrutiny even though the airlines were closely regulated by the Civil Aeronautics Board. In Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), Mr. Justice Douglas stated that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *Id.* at 372.

> recognized as inevitable but never accepted as satisfactory. It is always hoped that any particular holder of power, whether political or economic, will be subject to the threat of encroachment by other authorities.[119]

The diffusion of power entailed by the decentralization of economic decisionmaking protects the political rights of citizens. Concentrations of economic power form a basis for the growth and exercise of political power, as when a firm uses economic leverage to influence the shaping of legislation or the setting of regulatory standards for the industry. Antitrust enforcement is one factor which keeps the boundaries between private economic power and state power intact, lest a blurring of the boundaries cause a devaluation of political rights. Thus, while antitrust law condemns monopolies because they lead to higher prices, lower product quality, and lessened consumer choice, the antimonopoly sanction also performs the function of preventing the excessive accumulation of political power in private hands.

B. *Creating a Market for Pollution Control Devices*

The marketplace provides no natural incentives for the auto industry to produce minimally polluting cars.[120] A PCD-equipped car costs more, and even assuming that most consumers desire clean air and are willing to pay for it, there is no assurance in a free market that others will purchase cars with PCDs. Moreover, the individual car buyer knows that her own decision to purchase

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119. A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 430 (2d ed. 1970).

120. For discussion of the theory of market failure and economic externality, *see* Lanzillotti & Blair, *supra* note 24, at 440; J. KRIER & E. URSIN, *supra* note 10, at 28-30; Davis & Kamien, *Externalities and the Quality of Air and Water*, in SELECTED LEGAL AND ECONOMIC ASPECTS OF ENVIRONMENTAL PROTECTION (C. Meyers & A. Tarlock eds. 1971); E. DOLAN, TANSTAAFL—THE ECONOMIC STRATEGY FOR ENVIRONMENTAL CRISIS 24-32 (1971).

Some commentators have argued that heightened consumer consciousness of the benefits of clean air operates as a demand incentive on auto makers. "[O]ne cannot ignore the public relations benefits of an aggressive pollution control effort . . . . Companies without a positive track record may well reap a competitive disadvantage [for consumers] are not unmindful of the benefits of pollution control . . . ." Zener, *Antitrust and Pollution Control: An EPA Perspective*, 36 U. PITT. L. REV. 705, 706 (1975). Although Mr. Zener's remarks assumed the existence of mandatory standards as well as consumer concern, an organized consumer movement in a regulation free marketplace could eventually induce the production of cleaner cars. Regulation may, however, bring about the same result more quickly.

a clean car will have little impact on reducing air pollution. In these circumstances, most consumers will not buy clean cars because the extra cost will not bring about the desired increment in consumer satisfaction; that is, it will not buy clean air. The industry, therefore, gets a simple message: higher priced, minimally polluting cars will not sell.

The problem can be restated from the standpoint of the manufacturer. Even if one assumes that manufacturers would prefer not to make polluting cars, the cost of making polluting cars is lower than the cost of cars equipped with PCDs. If the auto maker passes the cost of pollution control along to the consumer, it would be placed at a competitive disadvantage in relation to makers of polluting cars. Absorbing the cost would also entail a competitive disadvantage, since the manufacturer would receive no economic benefit for the expense.[121] Thus, there is no economic incentive to be pollution conscious.

It is government intervention, not the free market system, which creates the marketplace for PCD technology. The "demand" for PCDs stems from the existence of mandatory emission standards. All auto makers must comply, and no new car consumer is able to choose between cars with or without PCDs. Clean air legislation can be said to represent the collective desire of con-

121. *See* Lanzillotti & Blair, *supra* note 24, at 440; Rowe, *Antitrust Policies and Environmental Controls*, 29 BUS. LAW 897, 902 (1974). The astronomical absolute costs of PCD development alone would be a deterrent to industry abatement efforts. The February 1979 Survey of Current Business provided the following table of abatement costs incurred by industry and government. Expenditures shown are for reduction of pollutants, conservation of natural resources, and research and development. Figures are in millions of dollars.

	1972	1973	1974	1975	1976	1977
Private industry						
on capital account	210	323	410	721	913	1119
on current account	457	641	1064	1380	1591	1808
Federal government enterprise	18	30	61	78	78	80
State & local government expenditures	12	16	24	44	42	40

Rutledge, *Pollution Abatement and Control Expenditures in Constant and Current Dollars*, 59 SURVEY OF CURRENT BUS. 13, 16 (table 3) (Feb. 1979).

sumers that the auto industry develop PCD technology.

However, the marketplace created by regulation lacks one essential feature of a natural marketplace: a profit motive. A government-mandated PCD is still as unattractive to a consumer as an optional PCD because it raises the product's cost without necessarily increasing individual consumer satisfaction.[122] Thus, if manufacturers engage in a cooperative research and development effort, they have a strong incentive to keep costs down by avoiding rapid progress. Each knows that if the most expensive technologies were adopted, even though they may be the most efficient, it would harm the industry as a whole by adding to the cost of the product.[123] The only countervailing incentive is the need to comply with the government's established standards. But, if the government relies only on the industry's reports on the ability of manufacturers to comply, the manufacturers can control the pace of progress to their benefit by arranging for emission targets to be set as low as possible. Each manufacturer can check up on the progress of the others and make sure that no one reports a breakthrough which the others might be forced to adopt. Thus, the incentives and rewards for compliance with a minimal, uniform pace of progress are similar to the incentives for uniformity in *American Column*, that is, a more stable business environment conducive to mutual economic benefit.

C. *Competition and PCD Development*

If auto makers are forced to compete in PCD research and development, the functioning of the PCD market will more closely resemble a natural marketplace. The need to maintain a competitive position in the marketplace will replace, to some extent, the incentive lost with the profit motive. Yet the essential justification for enforcing competition in the pollution control context is that the benefits flowing from the operation of a natu-

122. However, if every consumer knew that every other consumer had to put a PCD on her vehicle, she would realize that the ambient air quality was bound to improve. Consequently, she might not mind spending money for a PCD.

123. In a highly concentrated industry such as motor vehicle manufacturing, firms can communicate and coordinate their conduct more easily than industries with large numbers of competing firms. A 1963 study by the United States Bureau of the Census indicated that the four largest firms in the passenger car industry accounted for 99% of all car shipments. L. SULLIVAN, *supra* note 100, at 333; Internal Memorandum, *supra* note 12, at 15627.

ral marketplace, as described and protected by antitrust law, can also be obtained in the PCD market. Whether this justification exists can be determined by an examination of the inducements for material progress and the diffusion of excess private power inherent in a competitive pollution control strategy.

There are two distinct kinds of progress which are necessary for the attainment of clean air objectives. One kind is progress in applied research, that is, progress in the discovery of engineering principles and methods which will lower emissions. The second kind is progress in the speedy implementation of existing solutions through the physical redesign or modification of vehicles. The competitive regime endorsed by antitrust law must be able to induce progress in both senses.

In other contexts, progress in research has benefited from competitive pressure and an incentive structure which allows high rewards for success. One example is furnished by pure science. In his book on the discovery of the physical structure of DNA, scientist James D. Watson related how the knowledge that a rival researcher was performing similar work provided an incentive and sense of urgency to Watson's work preceding the discovery.[124] Another example is found in the work of inventors, where the prospect of material gain through the discovery of patentable inventions is a strong incentive for individual scientists and engineers

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124. J. WATSON, THE DOUBLE HELIX (1968). Linus Pauling, working at the California Institute of Technology, was the chief rival of Watson and the other researchers at Cambridge University's Cavendish Laboratory. At one point, Watson and his chief collaborator Francis Crick believed that Pauling's soon-to-be published paper on the structure of DNA contained the solution which the Cavendish group had been searching for. Obtaining a copy of the manuscript, Watson and Crick found to their joy that Pauling's account was fundamentally flawed:

> The blooper was too unbelievable to keep secret for more than a few minutes. I dashed over to Roy Markham's lab to spurt out the news . . . . Markham predictably expressed pleasure that a giant had forgotten elementary college chemistry . . . .
>
> Now our immediate hope was that Pauling's chemical colleagues would be more than ever awed by his intellect and not probe the details of his model . . . . We had anywhere up to six weeks before Linus again was in full-time pursuit of DNA.

Id. at 161-62. Watson and Crick continued their work, for which they were later awarded the Nobel Prize.

For an account of other instances of scientific rivalry, including Newton's meticulous efforts to establish his priority over Leibnitz, *see* R. Merton, *Behavior Patterns of Scientists*, in THE SOCIOLOGY OF SCIENCE 325-42 (1973).

to achieve technological breakthroughs.[125] In fact, a Department of Commerce study has found that fundamental progress in areas with direct application to industry is just as likely to originate in an inventor's workshop as from a large cooperative effort in a major company's laboratory.[126] In addition, studies on the sociology

125. The federal patent statutes grant to inventors a seventeen-year monopoly over the making, using or selling of patentable discoveries for inventions meeting the conditions of patentability. 35 U.S.C. §§ 101-103, 154 (Supp. I 1977).

It is generally accepted that financial gain is in fact a spur to innovation. *See* W. BOWMAN, PATENT AND ANTITRUST LAW, A LEGAL AND ECONOMIC ANALYSIS 36-37 (1975). Indeed, the need for economic incentives for technology development is recognized even in systems which sharply limit private property rights. *See, e.g.*, M. BALZ, INVENTION AND INNOVATION UNDER SOVIET LAW 104-108 (1975). The fact that invention may also be motivated by the "joy of work, guilt from not working, service to mankind, sheer habit, instinctive urges to gamble, or propensity for contrivance" does not negate the efficacy of financial incentives. W. BOWMAN, *supra*, at 34-35.

Nevertheless, there are differences of opinion on whether the United States patent monopoly system provides the best structure of incentives for invention and innovation. For example, there is a dispute whether granting patent rights directly to individuals working within large research enterprises would be more efficacious than the present system where inventors employed by industry or government are often required to assign their rights to discoveries to their employers. Such assignments are permitted by the patent statute. 35 U.S.C. § 261 (1976). It has been argued that forcing employee inventors to relinquish patent rights removes a key incentive to invention. *See generally* Dratler, *Incentives for People: The Forgotten Purpose of the Patent System*, 16 HARV. J. OF LEGS. 129 (1979); Gambrell, *Invention and Innovation Incentives to Meet the Energy Crisis: Playing It Safe Is Too Risky*, 16 HOUS. L. REV. 365, 389-97 (1979) In addition, it has been argued that the patent system misallocates resources by overvaluing invention. W. BOWMAN, *supra*, at 16-28.

126. The Department of Commerce study on technological innovation identified a multitude of major inventions which originated either with individuals working alone or from small organizations. Such inventions include xerography, DDT, insulin, rockets, streptomycin, penicillin, titanium, shell molding, cyclotrons, cotton pickers, shrinkproof knitted wear, dacron polyester fibre "terylene," catalytic cracking of petroleum, zippers, automatic transmissions, gyrocompass, frequency modulation (FM) radio, self-winding wristwatch, the continuous hot-strip method of rolling steel, helicopters, mercury dry cells, power steering, kodachrome, air conditioning, polaroid cameras, ballpoint pens, tungsten carbide, bakelite, and the oxygen steelmaking process. DEPARTMENT OF COMMERCE AD HOC PANEL ON INVENTION AND INNOVATION, TECHNICAL INNOVATION: ITS ENVIRONMENT AND MANAGEMENT 18 (1967).

Some researchers hold that there is a negative correlation between firm size and inventiveness:

> [E]xisting [knowledge] suggests that beyond a certain not very large size, the bigger the firm the less efficient its knowledge-producing activities are

of science indicate that research groups formed around a particular theory or line of research tend to be unreceptive to scientific notions inconsistent with the group's program.[127] The implication of this phenomenon is that research is furthered by the existence of competing groups with conflicting views. Thus, whether motivated by the lure of high reward or the fear of failure, competition among researchers furthers research progress in two ways: first, it causes researchers or research teams to use their best efforts; second, it favors a proliferation of diverse approaches to the research problem.

Clearly, technological progress in any context depends on more than just competitive incentives. It requires technical work-

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> likely to be. Evidently, as the size of [the] firm increases, there is a decrease per dollar of R & D [Research & Development] in (a) the number of patented inventions, (b) the percentage of patented inventions used commercially, and (c) the number of significant inventions.

J. SCHMOOKLER, PATENTS, INVENTION AND ECONOMIC CHANGE 39 (1972). Schmookler suggests a number of reasons for this phenomenon. One is that the flexibility and opportunities for recognition and appreciation available in smaller firms attract higher quality personnel. Big firms, by their nature, must divide tasks into small units. Each individual researcher is therefore less able to understand other aspects of either the production process or the research enterprise, which hampers his ability to contribute to the effort. Further, in larger firms each person's influence is watered down and his suggestions have less chance of acceptance. There are more managers and therefore more potential vetoers. Finally, the highly stratified nature of a large firm leads those who are hired as innovators to reject or discount ideas generated by those working in the production or sales aspect of the enterprise. *Id.* at 43-45.

127. Rewards for scientific achievement, one author notes, operate "fairly and rationally only within limits, since the judges of last resort—the editors and the most respected referees—are the established scientists. Work which challenges an established tradition often is resisted and sometimes ignored." G. KNELLER, SCIENCE AS A HUMAN ENDEAVOR 206-07 (1978).

Antitrust law recognizes that the stultification of technical progress is one of the consequences of monopoly power. In United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954), the defendant manufacturer was found to have monopolized the market for machines used in shoe production, and was ordered *inter alia* to offer its machines for sale to others and to make its patents available to potential shoe machinery manufacturers for reasonable royalties. *Id.* at 352, 354. In justifying these remedies, Judge Wyzanski commented that "one of the dangers of extraordinary experience is that those who have it may fall into grooves created by their own expertness . . . . The dominance of any one enterprise inevitably unduly accentuates that enterprise's experience and views as to what is possible, practical, and desirable with respect to technological development . . . ." *Id.* at 346-47.

ers with innate ability and dedication. It may also depend on the organizational structure of the research effort, the climate prevailing in society at the time, or the sense of urgency attending the task. Nevertheless, if competition is demonstrably one crucial factor in inducing progress in research, it should not be removed from the complex mix of incentives impinging upon the researcher's motivation without good reason.

Competition has apparently furthered progress in applied research on PCDs, both by pressuring auto manufacturers to put forth their best efforts in meeting compliance standards, and by sponsoring diverse approaches to the pollution control problem.[128] The development of a workable catalyst technology by GM and Ford, and GM's success in designing an advanced exhaust gas recirculation system might not have occurred, or might not have occurred as quickly, if the manufacturers had pooled their efforts. Although it cannot be proven that in the long run a cooperative regime might not be just as effective in developing the ideal pollution control technology, it can be said that competition creates a system of incentives which gives manufacturers every reason to succeed in PCD research. The motivation is chiefly financial: the exclusive owner of rights to a new, efficient PCD can expect to receive licensing fees from other auto makers if the PCD is the only method for meeting emission standards.[129] In addition, there is the incentive of rivalry between different groups of engineers and scientists. Both of these incentives are lacking in a cooperative system.

Competition also furthers progress in the speedy implementation of identified technological solutions. The mechanism for inducing such implementation is the EPA-established compliance standard. Government standards, when mandatory, ensure that available technology will be utilized when it is necessary for compliance. In order to set the highest standards attainable, the EPA must be able to accurately assess the state of the art in PCD development.[130] Under a competitive regime, the EPA is in a better

128. *See* text accompanying notes 61-64 *supra*.

129. *See* note 32 *supra*.

130. A related problem is determining when the optimum level of pollution abatement is reached. Although it might be possible to reach a point where motor vehicles emit zero pollutants, the cost of such a level of abatement would probably be prohibitively expensive. This is because the relationship between pollution abatement costs and the degree of pollution abatement is nonlinear; that is, as the

position to make such an assessment, since the manufacturers are less able to control the information the Administrator relies on in setting standards. Competing manufacturers submit separate and independent reports on the state of the art and, like rivals in a sealed bid competition, remain unaware of what the other reports contain. As a result, the EPA can set compliance standards from a relatively independent position.

Competition also assists technical progress in both applied research and implementation in several other respects. Since manufacturers working independently are likely to adopt different research approaches, the EPA can pick and choose among the most promising lines of research when setting standards. These standards might well be higher than those which would be attained by a cooperative effort employing a single research methodology, or a research effort managed by a single group.[131] Furthermore, under a cooperative regime the responsibility for failure is easily diffused. The blame for failure can be shifted from one part of the cooperative enterprise to another. In the absence of clear responsibility, it will be harder to pinpoint the precise cause of failure and to use that knowledge as a basis for making further progress. By contrast, success or failure among independent competitors is more easily determined.

Most of these progressive aspects of the competitive regime have been recognized by the EPA and by the Department of Transportation, and were used by these agencies to justify an extension of the information sharing and joint statement provisions

level of abatement increases, the cost of abatement increases at an accelerated rate. Thus, the hundredth per cent of abatement costs much more than the first per cent. J. KRIER & E. URSIN, *supra* note 10, at 25; Wolozin, *The Economics of Air Pollution: Central Problems*, 33 LAW & CONTEMP. PROB. 227, 230 (1968). If at some point the costs of vehicle pollution abatement rise astronomically for each additional unit of abatement, then consumers (those that breathe the air and use vehicles) will not desire totally pure air. Rather, they will prefer an optimal pollution level, where demand for clean air meets supply and the air is acceptably clean relative to abatement costs. At this optimal point, called a *Pareto Optimum*, an additional increment of vehicle pollution abatement would cost more than the benefit received. Consumers would rather breathe somewhat dirty air while using the money saved on something else. *See* Davis & Kamier, *supra* note 120, at 4-5; W. BAXTER, PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION (1974); E. DOLAN, *supra* note 120, at 32-39.

131. *See* notes 126-127 *supra* and accompanying text.

of the 1969 AMA decree.[132] A less apparent, but no less important, justification for extension draws on the political lessons embodied in the antitrust laws: competition in the PCD context preserves the division of power between the private and public sectors. As in the economic sphere, the use of competition in the field of PCD research and development brings about the diffusion of power. Competing manufacturers have less influence in the setting of standards which affect them, and therefore have less control over the pace and manner in which clean air goals are attained.[133] The achievement of public goals remains securely in the hands of public officials, not in the hands of decision makers who have little accountability to the public. The danger avoided is one which guided the development of the antitrust laws, namely, the loss of democratic control over the attainment of collective goals.[134] Given the economic forces which militate against the achievement of environmental objectives,[135] the potential for such a loss of control should be of particular concern to environmentalists.

D. *The Cooperative Alternative*

The arguments in favor of cooperation divide into two parts. First, cooperation is said to be more efficient and productive considering the costs, risks, and urgency involved. Second, cooperation is said to be inevitable.

Commentators have advocated the use of cooperative research and development programs when the costs of research and development are so astronomical that no one firm can underwrite a program.[136] Scale economies may be involved, so that a firm must be of a certain size before it can profitably engage in research and development. Such scale economies are involved in the vehicle industry generally, where four firms control ninety-nine

132. Government Memorandum, *supra* note 53, at 53, 79.

133. *See* text accompanying notes 61-64 *supra*.

134. *See* text accompanying note 119 *supra*.

135. These forces are termed "externalities," meaning they are external to the marketplace. Because air is a free commodity, the market cannot efficiently allocate its use through price. As a result, profit-maximizing firms are not penalized for their pollution of the resource, and they are encouraged to use technological processes which maximize use of the free resource. For a discussion of market failure and externalities, *see* the sources cited in note 120 *supra*.

136. *Environmental Crisis*, *supra* note 88, at 862-65.

percent of the market for domestic autos.[137] Similar scale economies might be involved in PCD manufacture, although many smaller companies are in fact able to develop and supply PCDs to the major auto makers.[138]

In markets where products change rapidly, a manufacturer must spend considerable resources on research and development. Financial returns from such research can be remote, since several years may elapse from the time research money is spent until a new product enters the market. The PCD market is undoubtedly one where research and development is expensive, risky, and brings a low return. Commentators, however, have uniformly argued that the one type of firm which can most easily bear the brunt of high research and development costs is the large oligopolist in a highly concentrated industry.[139] The near monopolistic profits these firms earn lessen the financial strain of product development programs. The automobile manufacturers, with the possible exception of Chrysler, are examples of firms which can afford to do PCD research individually. Their secure spot in the marketplace and their vast economic resources ensure sufficient fiscal strength for withstanding high costs.

An additional argument for collaboration in PCD development involves the element of risk.[140] PCD research is inherently risky because, given the complexity of the automobile engine, exhaust pollution does not result from one single source.[141] A firm

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137. *See* D. HAMBERG, RESEARCH & DEVELOPMENT: ESSAYS 37 (1966). A 1968 study by the National Science Foundation found that firms of less than 1,000 employees spent 4% of the total amount spent by private industry on research and development while firms with 1,000-10,000 employees spent 12% and firms of over 10,000 spent 84%. NATIONAL SCIENCE FOUNDATION, RESEARCH & DEVELOPMENT IN INDUSTRY 1968, at 27 (1970). *See also* Editorial Note, *Joint Research Ventures Under the Antitrust Laws*, 39 GEO. WASH. L. REV. 1112, 1116-17 (1971) [hereinafter cited as *Joint Ventures*].

138. Small firms were apparently able to compete in PCD research and development with the Big Four even though the smaller firms were not in the vehicle manufacturing business. *See* note 32 *supra* and accompanying text.

139. *Joint Ventures, supra* note 137, at 1116.

140. D. HAMBERG, *supra* note 137, at 37; E. MANSFIELD, THE ECONOMICS OF TECHNOLOGICAL CHANGE 102-10 (1968).

141. There are three basic areas of an internal combustion engine which emit pollutants: the crankcase (which produces an estimated 25% of total pollutants), the carburetor and fuel tank (15-25% from evaporation), and the exhaust (50-60%). Internal Memorandum, *supra* note 12, at 15629.

might conduct extensive testing on a promising PCD only to find that the whole line of research was in the wrong direction. Since consumers do not naturally desire PCDs, there would be little hope for adapting the technology to other consumer products. Indeed, some emission reduction proposals call for a redesign of the internal combustion engine.[142] Pursuing this proposal would clearly entail a high degree of risk for whomever invests the money for research.

Another source of risk stems from the regulatory process itself. The technology-forcing policy of the EPA may invalidate a firm's research project by choosing a standard that only a competitor's product can meet. Moreover, even if a firm produces a product which meets an EPA standard, the EPA is likely to subsequently raise the standard to stimulate new advances in the field.[143] The firm might not be able to modify its PCD to meet the higher standard. As a result, the firm might have to scrap its whole line of research and begin again.

If the public sector is unwilling to underwrite the costs and risks of PCD research, perhaps the auto makers should be given a boost by permitting joint submissions and information exchanges. Still, since industry collusion in PCD research is likely to impede the attainment of environmental goals, it would be better in the long run to allocate the risk to the auto makers if they can afford to do individual research. The Department of Justice, however, apparently believed that some of the auto makers could not afford the cost of PCD research. On two separate occasions in 1979 it approved agreements for exchanges of restricted information.[144] The Department did not challenge GM's exchange agreement with AMC because the latter was "too small" to develop its own PCDs, and Chrysler's agreement with GM was permitted because

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142. Commentators have advocated alternative engine designs using, for example, steam and electricity. *See* Angeletti, *Transmogrification: State and Federal Regulation of Automotive Air Pollution*, 13 NAT. RESOURCES J. 448, 451 n.23 (1973) (a reference index of alternative engine designs). While design of a new type of engine would be expensive, smaller firms have been successful in the past. Examples are the Rankine and Minto steam engines and Lear's vapor-turbine engine. *Id.*

143. *See* Government Memorandum, *supra* note 53, at 55-78 for numerous examples of EPA raising emission standards in order to stimulate PCD development.

144. *See* notes 84-85 *supra* and accompanying text.

the Department doubted Chrysler's ability to meet EPA regulations.[145] Yet these exceptions make little sense when, in fact, many smaller manufacturers have developed their own PCDs in hopes of selling them to the major auto makers.[146]

Another justification for permitting the cooperative exchange of research and development information is the presence of time pressure. Some commentators theorize that a cooperative effort may be able to reach a specific research goal more quickly than independent researchers.[147] However, the time pressure justification is valid only if the cooperators have an incentive to reach their research and development goal. When there is an incentive for researchers to delay achievement of the goal, as in the PCD market, there is no reason to believe that a solution will be found any sooner under a cooperative regime than under a competitive one. Government supervision of an industry-wide cooperative research program may possibly prevent blatant obstruction of the research effort, but it is unlikely that government participation alone can provide industry with the incentive to develop increasingly effective PCDs.

Some commentators, citing the reasons above and noting the ways in which government action has endorsed cooperative PCD research, argue that the use of cooperation is inevitable. PCD research is said to be too complex and expensive to thrive under a competitive regime.[148] The need to control air pollution is likened to a war effort, and parallels are drawn to the antitrust exemptions that have been carved out for cooperative efforts during national emergencies.[149] Yet, if cooperation is inevitable, then it is essential that the cooperative enterprise and its members be made accountable to the public for the way in which clean air goals are achieved. Perhaps such enterprises should be incorporated in their own right and overseen by a board of directors representing diverse interests. In any case, if such cooperative efforts are employed in the future to solve other pressing and complex

145. *See* note 89 *supra*.

146. *See* note 32 *supra* and accompanying text.

147. Lanzillotti & Blair, *supra* note 24, at 443; *Environmental Crisis, supra* note 88, at 845; *Joint Ventures, supra* note 137, at 1113.

148. *See, e.g., Joint Ventures, supra* note 137, at 1112-13 & nn.7-9; Verleger & Crowley, *Air Pollution, Water Pollution, Industrial Cooperation and the Antitrust Laws*, 4 LAND & WATER L. REV. 475, 479-80 (1969).

149. *See* note 114 *supra* and accompanying text.

national problems, the American economic and political system could be radically altered.

CONCLUSION

The provisions of the 1969 antitrust consent decree, coupled with the technology-forcing strategy of the Clean Air Act Amendments of 1970 and 1977, ensure that the PCD research and development efforts of the major auto makers take place in a competitive environment. Competition is an effective safeguard against industry foot-dragging and collusion, and has been instrumental in inducing the technological progress necessary to meet the nation's auto pollution control objectives. A competitive regime in the PCD context also ensures that the regulatory process remains under the control of government officials responsible to the public. Thus, competition is compatible with both techological progress and the democratic process. Although cooperative research has a number of advantages, perhaps the chief one being lower cost, the dangers posed by cooperation and the great benefits available from competition favor the competitive regime.

In any event, as *United States v. Motor Vehicle Manufacturers Association* comes up for appellate review,[150] the judiciary must not shrink from inquiring closely into the relative virtues of competition and cooperation. Only after careful inquiry can it make an informed decision as to which method is best suited for fostering the development of pollution control technology.

150. United States v. Motor Vehicle Mfrs. Ass'n, No. 79-3565 (9th Cir., order expediting appeal filed Nov. 9, 1979).

I also point out that, under the Court's own standards, it is largely irrelevant whether respondent's experts were of the opinion that "additional training programs, including self-care programs, were needed to reduce [respondent's] aggressive behavior," *ibid.*—a prescription far easier for "spectators" to give than for an institution to implement. The training program devised for respondent by petitioners and other professionals at Pennhurst was, according to the Court's opinion, "presumptively valid"; and "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Ante*, at 2462.
331 Thus, even if respondent could demonstrate that the training programs at Pennhurst were inconsistent with generally accepted or prevailing professional practice—if indeed there be such—this would not avail him so long as his training regimen was actually prescribed by the institution's professional staff.

Finally, it is worth noting that the District Court's instructions in this case were on the whole consistent with the Court's opinion today; indeed, some instructions may have been overly generous to respondent. Although the District Court erred in giving an instruction incorporating an Eighth Amendment "deliberate indifference" standard, the court also instructed, for example, that petitioners could be held liable if they "were aware of and failed to take all reasonable steps to prevent repeated attacks upon" respondent. See *ante*, at 2456. Certainly if petitioners took "*all* reasonable steps" to prevent attacks on respondent, they cannot be said to have deprived him either of reasonably safe conditions or of training necessary to achieve reasonable safety.

457 U.S. 332, 73 L.Ed.2d 48

ARIZONA, Petitioner

v.

MARICOPA COUNTY MEDICAL SOCIETY et al.

No. 80–419.

Argued Nov. 4, 1981.

Decided June 18, 1982.

In an action by the state of Arizona for injunctive relief against alleged antitrust violations, the United States District Court for the District of Arizona denied plaintiff's motion for summary judgment on issue of liability. The Court of Appeals, Ninth Circuit, affirmed, 643 F.2d 553. On grant of certiorari, the Supreme Court, Justice Stevens, held that: (1) price-fixing agreements could not escape per se condemnation on the ground that they were horizontal and fixed maximum prices; (2) fact that doctors, rather than nonprofessionals, were parties to price-fixing agreements did not save them from invalidity under first section of Sherman Act, nor did fact that judiciary has little antitrust experience in health care industry; (3) anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some; and (4) action of physician members of Arizona foundations for medical care in setting, by majority vote, maximum fees to be claimed in full payment for health services provided to policyholders of the foundation-approved insurance plans was per se unlawful under first section of Sherman Act.

Reversed.

Justice Powell dissented and filed opinion in which Chief Justice Burger and Justice Rehnquist joined.

Opinion after remand, 578 F.Supp. 1262.

1. Monopolies ⟹12(1.10)

The "rule of reason" in antitrust law requires factfinder to decide whether under all circumstances of case the restrictive practice imposes unreasonable restraint on competition. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

2. Monopolies ⟹17(1.7)

Price-fixing agreements could not escape per se condemnation on the ground that they were horizontal and fixed maximum prices. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Monopolies ⟹17(1.7)

The per se rule is grounded on faith in price competition as market force and not on policy of low selling prices at price of eliminating competition. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. Monopolies ⟹12(11)

Fact that doctors, rather than nonprofessionals, were parties to price-fixing agreements did not save them from invalidity under first section of Sherman Act, nor did fact that judiciary has little antitrust experience in health care industry. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Public Health Service Act, § 1301 et seq. as amended 42 U.S.C.A. § 300e et seq.

5. Monopolies ⟹17(1.7)

Anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

6. Constitutional Law ⟹70.1(11)

Judicial adherence to per se rule in Sherman Act cases is grounded not only on economic prediction, judicial convenience and business certainty, but also on recognition of respective roles of judiciary and Congress in regulating economy. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies ⟹12(11)

Action of physician members of Arizona foundations for medical care in setting, by majority vote, maximum fees to be claimed in full payment for health services provided to policyholders of the foundation-approved insurance plans was per se unlawful under first section of Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; McCarran-Ferguson Act, § 1 et seq., 15 U.S.C.A. § 1011 et seq.; Public Health Service Act, § 1301 et seq. as amended 42 U.S.C.A. § 300e et seq.

*Syllabus**

Respondent foundations for medical care were organized by respondent Maricopa County Medical Society and another medical society to promote fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans. The foundations, by agreement of their member doctors, established the maximum fees the doctors may claim in full payment for health services provided to policyholders of specified insurance plans. Petitioner State of Arizona filed a complaint against respondents in Federal District Court, alleging that they were engaged in an illegal price-fixing conspiracy in violation of § 1 of the Sherman Act. The District Court denied the State's motion for partial summary judgment, but certified for interlocutory appeal the question whether the maximum-fee agreements were illegal *per se* under § 1 of the Sherman Act. The Court of Appeals affirmed the denial of the motion for partial summary judgment and held that the certified question could not be answered without evaluating the purpose and effect of the agreements at a full trial.

Held: The maximum-fee agreements, as price-fixing agreements, are *per se* unlawful under § 1 of the Sherman Act. Pp. 2472–2480.

(a) The agreements do not escape condemnation under the *per se* rule against

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

price-fixing agreements because they are horizontal and fix maximum prices. Horizontal agreements to fix maximum prices are on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219; *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998. The *per se* rule is violated here by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, experience, training, or willingness to employ innovative and difficult procedures in individual cases. Such a restraint may also discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. P. 2475.

(b) Nor does the fact that doctors rather than nonprofessionals are the parties to the price-fixing agreements preclude application of the *per se* rule. Respondents do not claim that the quality of the professional ser⊥333vices their members provide is enhanced by the price restraint, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572, and *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637, distinguished, and their claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services. Pp. 2475–2476.

(c) That the judiciary has had little antitrust experience in the health care industry is insufficient reason for not applying the *per se* rule here. "[T]he Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222, 60 S.Ct. 811, 843, 84 L.Ed. 1129. Pp. 2476–2477.

(d) The *per se* rule is not rendered inapplicable in this case for the alleged reason that the agreements in issue have procompetitive justification. The anticompetitive potential in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Even when respondents are given every benefit of doubt, the record in this case is not inconsistent with the presumption that respondents' agreements will not significantly enhance competition. The most that can be said for having doctors fix the maximum prices is that doctors may be able to do it more efficiently than insurers, but there is no reason to believe any savings that might accrue from this arrangement would be sufficiently great to affect the competitiveness of these kinds of insurance plans. Pp. 2477–2478.

(e) Respondents' maximum-fee schedules do not involve price-fixing in only a literal sense. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1, distinguished. As agreements among independent competing entrepreneurs, they fit squarely into the horizontal price-fixing mold. Pp. 2479–2480.

9th Cir., 643 F.2d 553, reversed.

Kenneth R. Reed, Phoenix, Ariz., for petitioner.

Stephen M. Shapiro, Washington, D. C., for the United States, as amicus curiae, by special leave of Court.

⊥334 Philip P. Berelson, Phoenix, Ariz., for respondents.

⊥335 Justice STEVENS delivered the opinion of the Court.

The question presented is whether § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, has been violated by agreements among competing physicians setting, by majority vote, the maximum fees that they may claim in full ⊥336 payment for health services provided to policyholders of specified insurance plans. The United States Court of Appeals for the Ninth Circuit held that the question could not be answered without evaluating the actual purpose and effect of the agreements at a full trial. 643 F.2d 553 (1980). Because the undisputed facts disclose a violation of the statute, we granted certiorari, 450 U.S. 979, 101 S.Ct. 1512, 67 L.Ed.2d 813 (1981), and now reverse.

I

In October 1978 the State of Arizona filed a civil complaint against two county medical societies and two "foundations for medical care" that the medical societies had organized. The complaint alleged that the defendants were engaged in illegal price-fixing conspiracies.[1] After the defendants filed answers, one of the medical societies was dismissed by consent, the parties conducted a limited amount of pretrial discovery, and the State moved for partial summary judgment on the issue of liability. The District Court denied the motion,[2] but entered an order pursuant to 28 U.S.C. § 1292(b), ⌊certifying for interlocutory appeal the question "whether the FMC membership agreements, which contain the promise to abide by maximum fee schedules, are illegal per se under section 1 of the Sherman Act."[3] ⌊337

The Court of Appeals, by a divided vote, affirmed the District Court's order refusing to enter partial summary judgment, but each of the three judges on the panel had a different view of the case. Judge Sneed was persuaded that "the challenged practice is not a per se violation." 643 F.2d, at ⌊560.[4] Judge Kennedy, although concurring, cautioned that he had not ⌊338

1. The complaint alleged a violation of § 1 of the Sherman Act as well as of the Arizona antitrust statute. The state statute is interpreted in conformity with the federal statute. 643 F.2d 553, 554, n. 1 (CA9 1980). The State of Arizona prayed for an injunction but did not ask for damages.

2. The District Court offered three reasons for its decision. First, citing *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), the court stated that "a recent antitrust trend appears to be emerging where the Rule of Reason is the preferred method of determining whether a particular practice is in violation of the antitrust law." App. to Pet. for Cert. 43. Second, "the two Supreme Court cases invalidating maximum price-fixing, [*Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), and *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968)], need not be read as establishing a per se rule." *Id.*, at 44. Third, "a profession is involved here." *Id.*, at 45. Under the rule-of-reason approach, the plaintiff's motion for partial summary judgment on the issue of liability could not be granted "because there is insufficient evidence as to the [purpose and effect of the allegedly unlawful practices and the power of the defendants.]" *Id.*, at 47.

The District Court also denied the defendants' motion to dismiss based on the ground that they were engaged in the business of insurance within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* See App. to Pet. for Cert. 39–41. The defendants did not appeal that portion of the District Court order. 643 F.2d, at 559, and n. 7.

3. The quoted language is the Court of Appeals' phrasing of the question. *Id.*, at 554. The District Court had entered an order on June 5, 1979, providing, in relevant part:

"The plaintiff's motion for partial summary judgment on the issue of liability is denied with leave to file a similar motion based on additional evidence if appropriate." App. to Pet. for Cert. 48.

On August 8, 1979, the District Court entered a further order providing:

"The Order of this Court entered June 5, 1979 is amended by addition of the following: This Court's determination that the Rule of Reason approach should be used in analyzing the challenged conduct in the instant case to determine whether a violation of Section 1 of the Sherman Act has occurred involves a question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the Order denying plaintiff's motion for partial summary judgment on the issue of liability may materially advance the ultimate determination of the litigation. Therefore, the foregoing Order and determination of the Court is certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b)." *Id.*, at 50–51.

4. Judge Sneed explained his reluctance to apply the *per se* rule substantially as follows: The record did not indicate the actual purpose of the maximum-fee arrangements or their effect on competition in the health care industry. It was not clear whether the assumptions made about typical price restraints could be carried over to that industry. Only recently had this Court applied the antitrust laws to the professions. Moreover, there already were such significant obstacles to pure competition in the industry that a court must compare the prices that obtain under the maximum-fee arrangements with those that would otherwise prevail rather than with those that would prevail under ideal competitive conditions. Furthermore, the Ninth

found "these reimbursement schedules to be per se proper, [or] that an examination of these practices under the rule of reason at trial will not reveal the proscribed adverse effect on competition, or that this court is foreclosed at some later date, when it has more evidence, from concluding that such schedules do constitute per se violations." *Ibid.*[5] Judge Larson dissented, expressing the view that a *per se* rule should apply and, alternatively, that a rule-of-reason analysis should condemn the arrangement even if a *per se* approach was not warranted. *Id.*, at 563–569.[6]

⊥339 ⊥Because the ultimate question presented by the certiorari petition is whether a partial summary judgment should have been entered by the District Court, we must assume that the respondents' version of any disputed issue of fact is correct. We therefore first review the relevant undisputed facts and then identify the factual basis for the respondents' contention that their agreements on fee schedules are not unlawful.

II

The Maricopa Foundation for Medical Care is a nonprofit Arizona corporation composed of licensed doctors of medicine, osteopathy, and podiatry engaged in private practice. Approximately 1,750 doctors, representing about 70% of the practitioners in Maricopa County, are members.

The Maricopa Foundation was organized in 1969 for the purpose of promoting fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans.[7] The foundation performs three primary activities. It establishes the schedule of maximum fees that participating doctors agree to accept as payment in full for services performed for patients insured under plans approved by the foundation. It reviews the medical necessity and appropriateness of treatment provided by its members to such insured persons. It is authorized to draw checks on insurance company accounts to pay doctors for ⊥services performed for cov- ⊥340
ered patients. In performing these functions, the foundation is considered an "insurance administrator" by the Director of the Arizona Department of Insurance. Its participating doctors, however, have no financial interest in the operation of the foundation.

Circuit had not applied *Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), and *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), to horizontal agreements that establish maximum prices; some of the economic assumptions underlying the rule against maximum price fixing were not sound.

5. Judge Kennedy's concurring opinion concluded as follows:

"There does not now appear to be a controlling or definitive analysis of the market impact caused by the arrangements under scrutiny in this case, but trial may reveal that the arrangements are, at least in their essentials, not peculiar to the medical industry and that they should be condemned." 643 F.2d, at 560.

6. Judge Larson stated, in part:

"Defendants formulated and dispersed relative value guides and conversion factor lists which together were used to set an upper limit on fees received from third-party payors. It is clear that these activities constituted maximum price-fixing by competitors. Disregarding any 'special industry' facts, this conduct is per se illegal. Precedent alone would mandate application of the per se standard.

"I find nothing in the nature of either the medical profession or the health care industry that would warrant their exemption from per se rules for price-fixing." *Id.*, at 563–564 (citations omitted).

7. Most health insurance plans are of the fee-for-service type. Under the typical insurance plan, the insurer agrees with the insured to reimburse the insured for "usual, customary, and reasonable" medical charges. The third-party insurer, and the insured to the extent of any excess charges, bears the economic risk that the insured will require medical treatment. An alternative to the fee-for-service type of insurance plan is illustrated by the health maintenance organizations authorized under the Health Maintenance Organization Act of 1973, 42 U.S.C. § 300e *et seq.* Under this form of prepaid health plan, the consumer pays a fixed periodic fee to a functionally integrated group of doctors in exchange for the group's agreement to provide any medical treatment that the subscriber might need. The economic risk is thus borne by the doctors.

The Pima Foundation for Medical Care, which includes about 400 member doctors,[8] performs similar functions. For the purposes of this litigation, the parties seem to regard the activities of the two foundations as essentially the same. No challenge is made to their peer review or claim administration functions. Nor do the foundations allege that these two activities make it necessary for them to engage in the practice of establishing maximum-fee schedules.

At the time this lawsuit was filed,[9] each foundation made use of "relative values" and "conversion factors" in compiling its fee schedule. The conversion factor is the dollar amount used to determine fees for a particular medical specialty. Thus, for example, the conversion factors for "medicine" and "laboratory" were $8 and $5.50, respectively, in 1972, and $10 and $6.50 in 1974. The relative value schedule provides a numerical weight for each different medical service—thus, an office consultation has a lesser value than a home visit. The relative value was multiplied by the conversion factor to determine the maximum fee. The fee schedule has been revised periodically. The foundation board of trustees would solicit advice from various medical
⌊341 societies about the need ⌊for change in either relative values or conversion factors in their respective specialties. The board would then formulate the new fee schedule and submit it to the vote of the entire membership.[10]

The fee schedules limit the amount that the member doctors may recover for services performed for patients insured under plans approved by the foundations. To obtain this approval the insurers—including self-insured employers as well as insurance companies[11]—agree to pay the doctors' charges up to the scheduled amounts, and in exchange the doctors agree to accept those amounts as payment in full for their services. The doctors are free to charge higher fees to uninsured patients, and they also may charge any patient less than the scheduled maxima. A patient who is insured by a foundation-endorsed plan is guaranteed complete coverage for the full amount of his medical bills only if he is treated by a foundation member. He is free to go to a nonmember physician and is still covered for charges that do not exceed the maximum-fee schedule, but he must pay any excess that the nonmember physician may charge.

The impact of the foundation fee schedules on medical fees and on insurance premiums is a matter of dispute. The State of Arizona contends that the periodic upward revisions of the maximum-fee schedules have the effect of stabilizing and enhancing the level of actual charges by physi-

8. The record contains divergent figures on the percentage of Pima County doctors that belong to the foundation. A 1975 publication of the foundation reported 80%; a 1978 affidavit by the executive director of the foundation reported 30%.

9. In 1980, after the District Court and the Court of Appeals had rendered judgment, both foundations apparently discontinued the use of relative values and conversion factors in formulating the fee schedules. Moreover, the Maricopa Foundation that year amended its bylaws to provide that the fee schedule would be adopted by majority vote of its board of trustees and not by vote of its members. The challenge to the foundation activities as we have described them in the text, however, is not mooted by these changes. See *United States v. W. T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953).

10. The parties disagree over whether the increases in the fee schedules are the cause or the result of the increases in the prevailing rate for medical services in the relevant markets. There appears to be agreement, however, that 85–95% of physicians in Maricopa County bill at or above the maximum reimbursement levels set by the Maricopa Foundation.

11. Seven different insurance companies underwrite health insurance plans that have been approved by the Maricopa Foundation, and three companies underwrite the plans approved by the Pima Foundation. The record contains no firm data on the portion of the health care market that is covered by these plans. The State relies upon a 1974 analysis indicating that insurance plans endorsed by the Maricopa Foundation had about 63% of the prepaid health care market, but the respondents contest the accuracy of this analysis.

⌊342 cians, and ⌊that the increasing level of their fees in turn increases insurance premiums. The foundations, on the other hand, argue that the schedules impose a meaningful limit on physicians' charges, and that the advance agreement by the doctors to accept the maxima enables the insurance carriers to limit and to calculate more efficiently the risks they underwrite and therefore serves as an effective cost-containment mechanism that has saved patients and insurers millions of dollars. Although the Attorneys General of 40 different States, as well as the Solicitor General of the United States and certain organizations representing consumers of medical services, have filed *amicus curiae* briefs supporting the State of Arizona's position on the merits, we must assume that the respondents' view of the genuine issues of fact is correct.

This assumption presents, but does not answer, the question whether the Sherman Act prohibits the competing doctors from adopting, revising, and agreeing to use a maximum-fee schedule in implementation of the insurance plans.

III

The respondents recognize that our decisions establish that price-fixing agreements are unlawful on their face. But they argue that the *per se* rule does not govern this case because the agreements at issue are horizontal and fix maximum prices, are among members of a profession, are in an industry with which the judiciary has little antitrust experience, and are alleged to have procompetitive justifications. Before we examine each of these arguments, we pause to consider the history and the meaning of the *per se* rule against price-fixing agreements.

A

[1] Section 1 of the Sherman Act of 1890 literally prohibits *every* agreement "in restraint of trade." [12] In *United States* ⌊*v.* ⌊343 *Joint Traffic Assn.*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898), we recognized that Congress could not have intended a literal interpretation of the word "every"; since *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), we have analyzed most restraints under the so-called "rule of reason." As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.[13]

The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex. *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609–610, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515 (1972). And the result of the process in any given case may provide little certainty or guidance about the legality of

12. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...." 15 U.S.C. § 1.

13. Justice Brandeis provided the classic statement of the rule of reason in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918):

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

a practice in another context. *Id.*, at 609, n. 10, 92 S.Ct., at 1134, n.10; *Northern Pacific R. Co. v. United States, supra,* 356 U.S., at 5, 78 S.Ct., at 518.

The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of *per* ⌊344 *se* rules.[14] Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.[15] As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.[16]

Thus the Court in *Standard Oil* recognized that inquiry under its rule of reason ended once a price-fixing agreement was proved, for there was "a conclusive presumption which ⌊345 brought [such agreements] within the statute." 221 U.S., at 65, 31 S.Ct., at 517. By 1927, the Court was able to state that "it has ... often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398, 47 S.Ct. 377, 379, 71 L.Ed. 700.

> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." *Id.*, at 397–398, 47 S.Ct., at 379.

Thirteen years later, the Court could report that "for over forty years this Court has consistently and without deviation ad-

14. For a thoughtful and brief discussion of the costs and benefits of rule-of-reason versus *per se* rule analysis of price-fixing agreements, see F. Scherer, Industrial Market Structure and Economic Performance 438–443 (1970). Professor Scherer's "opinion, shared by a majority of American economists concerned with antitrust policy, is that in the present legal framework the costs of implementing a rule of reason would exceed the benefits derived from considering each restrictive agreement on its merits and prohibiting only those which appear unreasonable." *Id.*, at 440.

15. "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." *Northern Pacific R. Co. v. United States,* 356 U.S., at 5, 78 S.Ct., at 518 (citations omitted). See *United States v. Columbia Steel Co.*, 334 U.S. 495, 522–523, 68 S.Ct. 1107, 1121–1122, 92 L.Ed. 1533 (1948).

16. Thus, in applying the *per se* rule to invalidate the restrictive practice in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), we stated that "[w]hether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us." *Id.*, at 609, 92 S.Ct., at 1134. The Court made the same point in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S., at 50, n. 16, 97 S.Ct., at 2557, n. 16:

> "*Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them."

hered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 60 S.Ct. 811, 841, 84 L.Ed. 1129 (1940). In that case a glut in the spot market for gasoline had prompted the major oil refiners to engage in a concerted effort to purchase and store surplus gasoline in order to maintain stable prices. Absent the agreement, the ⌊346 companies argued, competition was cutthroat and self-defeating. The argument did not carry the day:

> "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Id.*, at 221–222, 60 S.Ct., at 843.

The application of the *per se* rule to maximum-price-fixing agreements in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), followed ineluctably from *Socony-Vacuum:*

> "For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. We reaffirm what we said in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 [60 S.Ct. 811, 844, 84 L.Ed. 1129]: 'Under ⌊347 the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*' " 340 U.S., at 213, 60 S.Ct., at 839.

Over the objection that maximum-price-fixing agreements were not the "economic equivalent" of minimum-price-fixing agreements,[17] *Kiefer-Stewart* was reaffirmed in *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968):

> "Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price

17. *Albrecht v. Herald Co.*, 390 U.S., at 156, 88 S.Ct., at 875 (Harlan, J., dissenting).

charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." *Id.*, at 152–153, 88 S.Ct., at 872–873 (footnote omitted).

We have not wavered in our enforcement of the *per se* rule against price fixing. Indeed, in our most recent price-fixing case we summarily reversed the decision of another Ninth ⊥348 Circuit panel that a horizontal agreement among competitors to fix credit terms does not necessarily contravene the antitrust laws. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980).

B

[2, 3] Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices.[18] The *per se* rule "is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition." Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U.L.Rev. 137, 142 (1962). In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

[4] Nor does the fact that doctors—rather than nonprofessionals—are the parties to the price-fixing agreements support the respondents' position. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788, n. 17, 95 S.Ct. 2004, 2013, n.17, 44 L.Ed.2d 572 (1975), we stated that the "public service aspect, and other features of the professions, may ⊥349 require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696, 98 S.Ct. 1355, 1367, 55 L.Ed.2d 637 (1978). The price-fixing agreements in this case, however, are not premised on public service or ethical norms. The respondents do not argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint. The respondents' claim for relief from the *per se* rule is simply that the doctors' agreement not to charge certain insureds more than a fixed price facilitates the successful marketing of an attractive insurance plan. But the claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services.

We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry.[19] The argument quite obviously

18. It is true that in *Keifer-Stewart*, as in *Albrecht*, the agreement involved a vertical arrangement in which maximum resale prices were fixed. But the case also involved an agreement among competitors to impose the resale price restraint. In any event, horizontal restraints are generally less defensible than vertical restraints. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); Easterbrook, Maximum Price Fixing, 48 U.Chi.L.Rev. 886, 890, n. 20 (1981).

19. The argument should not be confused with the established position that a *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged. See *White Motor Co. v. United States*, 372 U.S. 253, 83 S.Ct.

is inconsistent with *Socony-Vacuum.* In unequivocal terms, we stated that, "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." 310 U.S., at 222, 60 S.Ct., at 843. We also stated that "[t]he elimination of so-called competitive evils [in an industry] is no legal justification" for price-fixing agreements, *id.*, at 220, 60 S.Ct., at 843, yet the Court of Appeals
⊥350 refused to apply the *per se* rule in ⊥this case in part because the health care industry was so far removed from the competitive model.[20] Consistent with our prediction in *Socony-Vacuum,* 310 U.S., at 221, 60 S.Ct., at 843, the result of this reasoning was the adoption by the Court of Appeals of a legal standard based on the reasonableness of the fixed prices,[21] an inquiry we
⊥351 have so often condemned.[22] Finally, ⊥the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pacific R. Co. v. United States,* 356 U.S., at 5, 78 S.Ct., at 518.

[5] The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered

696, 9 L.Ed.2d 738 (1963). Nor is our unwillingness to examine the economic justification of this particular application of the *per se* rule against price fixing inconsistent with our reexamination of the general validity of the *per se* rule rejected in *Continental T.V., Inc. v. GTE Sylvania Inc., supra.*

20. "The health care industry, moreover, presents a particularly difficult area. The first step to understanding is to recognize that not only is access to the medical profession very time consuming and expensive both for the applicant and society generally, but also that numerous government subventions of the costs of medical care have created both a demand and supply function for medical services that is artificially high. The present supply and demand functions of medical services in no way approximate those which would exist in a purely private competitive order. An accurate description of those functions moreover is not available. Thus, we lack baselines by which could be measured the distance between the present supply and demand functions and those which would exist under ideal competitive conditions." 643 F.2d, at 556.

21. "Perforce we must take industry as it exists, absent the challenged feature, as our baseline for measuring anticompetitive impact. The relevant inquiry becomes whether fees paid to doctors under that system would be less than those payable under the FMC maximum fee agreement. Put differently, confronted with an industry widely deviant from a reasonably free competitive model, such as agriculture, the proper inquiry is whether the practice enhances the prices charged for the services. In simplified economic terms, the issue is whether the maximum fee arrangement better permits the attainment of the monopolist's goal, viz., the matching of marginal cost to marginal revenue, or in fact obstructs that end." *Ibid.*

22. In the first price-fixing case arising under the Sherman Act, the Court was required to pass on the sufficiency of the defendants' plea that they had established rates that were actually beneficial to consumers. Assuming the factual validity of the plea, the Court rejected the defense as a matter of law. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897). In *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637 (1978), we referred to Judge Taft's "classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable." See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (CA6 1898), aff'd, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). In our latest price-fixing case, we reiterated the point: "It is no excuse that the prices fixed are themselves reasonable." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647, 100 S.Ct. 1925, 1927, 64 L.Ed.2d 580 (1980).

for some.[23] Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application. Even when the respondents are given every benefit of the doubt, the limited record in this case is not inconsistent with the presumption that the respondents' agreements will not significantly enhance competition.

The respondents contend that their fee schedules are procompetitive because they make it possible to provide consumers of health care with a uniquely desirable form of insurance coverage that could not otherwise exist. The features of the foundation-endorsed insurance plans that they stress are a choice of doctors, complete insurance coverage, and lower premiums. The first two characteristics, however, are hardly unique to these plans. Since only about
352 70% of the doctors in the relevant market are members of either foundation, the guarantee of complete coverage only applies when an insured chooses a physician in that 70%. If he elects to go to a nonfoundation doctor, he may be required to pay a portion of the doctor's fee. It is fair to presume, however, that at least 70% of the doctors in other markets charge no more than the "usual, customary, and reasonable" fee that typical insurers are willing to reimburse in full.[24] Thus, in Maricopa and Pima Counties as well as in most parts of the country, if an insured asks his doctor if the insurance coverage is complete, presumably in about 70% of the cases the doctor will say "Yes" and in about 30% of the cases he will say "No."

It is true that a binding assurance of complete insurance coverage—as well as most of the respondents' potential for lower insurance premiums [25]—can be obtained only if the insurer and the doctor agree in advance on the maximum fee that the doctor will accept as full payment for a particular service. Even if a fee schedule is therefore desirable, it is not necessary that the doctors do the price fixing.[26] The

23. "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226, n. 59, 60 S.Ct. 811, 844, n. 59, 84 L.Ed. 1129 (1940).

24. According to the respondents' figures, this presumption is well-founded. See Brief for Respondents 42, n. 120.

25. We do not perceive the respondents' claim of procompetitive justification for their fee schedules to rest on the premise that the fee schedules actually reduce medical fees and accordingly reduce insurance premiums, thereby enhancing competition in the health insurance industry. Such an argument would merely restate the long-rejected position that fixed prices are reasonable if they are lower than free competition would yield. It is arguable, however, that the existence of a fee schedule, whether fixed by the doctors or by the insurers, makes it easier—and to that extent less expensive—for insurers to calculate the risks that they underwrite and to arrive at the appropriate reimbursement on insured claims.

26. According to a Federal Trade Commission staff report: "Until the mid-1960's, most Blue Shield plans determined in advance how much to pay for particular procedures and prepared fee schedules reflecting their determinations. Fee schedules are still used in approximately 25 percent of Blue Shield contracts." Bureau of Competition, Federal Trade Commission, Medical Participation in Control of Blue Shield and Certain Other Open-Panel Medical Prepayment Plans 128 (1979). We do not suggest that Blue Shield plans are not actually controlled by doctors. Indeed, as the same report discusses at length, the belief that they are has given rise to considerable antitrust litigation. See also D. Kass & P. Pautler, Bureau of Economics, Federal Trade Commission, Staff Report on Physician Control of Blue Shield Plans (1979). Nor does this case present the question whether an insurer may, consistent with the Sherman Act, fix the fee schedule and enter into bilateral contracts with individual doctors. That question was not reached in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979). See *id.*, at 210, n. 5, 99 S.Ct., at 1072, n. 5. In an *amicus curiae* brief, the United States expressed its opinion that such an arrangement would be legal unless the plaintiffs could establish that a conspiracy among providers was at work. Brief for United States as *Amicus Curiae*, O.T.1978, No. 77-952, pp. 10-11. Our point is simply that the record provides no factual basis for the respondents' claim that the doctors must fix the fee schedule.

⊥353 ⊥record indicates that the Arizona Comprehensive Medical/Dental Program for Foster Children is administered by the Maricopa Foundation pursuant to a contract under which the maximum-fee schedule is prescribed by a state agency rather than by the doctors.[27] This program and the Blue Shield plan challenged in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979), indicate that insurers are capable not only of fixing maximum reimbursable prices but also of obtaining binding agreements with providers guaranteeing the insured full reimbursement of a participating provider's fee. In light of these examples, it is not surprising that nothing in the record even arguably supports the conclusion that this type of insurance program could not function if the fee schedules were set in a different way.

The most that can be said for having doctors fix the maximum prices is that doctors may be able to do it more efficiently than insurers. The validity of that assumption is far from obvious,[28] but in any
⊥354 event there is no reason to believe ⊥that any savings that might accrue from this arrangement would be sufficiently great to affect the competitiveness of these kinds of insurance plans. It is entirely possible that the potential or actual power of the foundations to dictate the terms of such insurance plans may more than offset the theoretical efficiencies upon which the respondents' defense ultimately rests.[29]

C

[6] Our adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. *United States v. Topco Associates, Inc.*, 405 U.S., at 611–612, 92 S.Ct., at 1135. Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the *per se* rule in this case
therefore are ⊥better directed to the Legis- ⊥355
lature. Congress may consider the exception that we are not free to read into the statute.[30]

27. In that program the foundation performs the peer review function as well as the administrative function of paying the doctors' claims.

28. In order to create an insurance plan under which the doctor would agree to accept as full payment a fee prescribed in a fixed schedule, someone must canvass the doctors to determine what maximum prices would be high enough to attract sufficient numbers of individual doctors to sign up but low enough to make the insurance plan competitive. In this case that canvassing function is performed by the foundation; the foundation then deals with the insurer. It would seem that an insurer could simply bypass the foundation by performing the canvassing function and dealing with the doctors itself. Under the foundation plan, each doctor must look at the maximum-fee schedule fixed by his competitors and vote for or against approval of the plan (and, if the plan is approved by majority vote, he must continue or revoke his foundation membership). A similar, if to some extent more protracted, process would occur if it were each insurer that offered the maximum-fee schedule to each doctor.

29. In this case it appears that the fees are set by a group with substantial power in the market for medical services, and that there is competition among insurance companies in the sale of medical insurance. Under these circumstances the insurance companies are not likely to have significantly greater bargaining power against a monopoly of doctors than would individual consumers of medical services.

30. "[Congress] can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach." *United States v. Topco Associates, Inc.*, 405 U.S., at 610, n. 10, 92 S.Ct., at 1134, n. 10. Indeed, it has exempted certain industries from the full reach of the Sherman Act. See, *e.g.*, 7 U.S.C. §§ 291, 292 (Capper-Volstead Act, agricultural cooperatives); 15 U.S.C. §§ 1011–1013 (McCarran-Ferguson Act, insurance); 49 U.S.C. § 5b (Reed-Bulwinkle Act, rail and motor carrier rate-fixing bureaus); 15 U.S.C. § 1801 (newspaper joint operating agreements).

IV

Having declined the respondents' invitation to cut back on the *per se* rule against price fixing, we are left with the respondents' argument that their fee schedules involve price fixing in only a literal sense. For this argument, the respondents rely upon *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

In *Broadcast Music* we were confronted with an antitrust challenge to the marketing of the right to use copyrighted compositions derived from the entire membership of the American Society of Composers, Authors and Publishers (ASCAP). The so-called "blanket license" was entirely different from the product that any one composer was able to sell by himself.[31] Although there was little competition among individual composers for their separate compositions, the blanket-license arrangement did not place any restraint on the right of any individual copyright owner to sell his own compositions separately to any buyer at
⊥356 any price.[32] But a ⊥"necessary consequence" of the creation of the blanket license was that its price had to be established. *Id.*, at 21, 99 S.Ct., at 1563. We held that the delegation by the composers to ASCAP of the power to fix the price for the blanket license was not a species of the price-fixing agreements categorically forbidden by the Sherman Act. The record disclosed price fixing only in a "literal sense." *Id.*, at 8, 99 S.Ct., at 1556.

[7] This case is fundamentally different. Each of the foundations is composed of individual practitioners who compete with one another for patients. Neither the foundations nor the doctors sell insurance, and they derive no profits from the sale of health insurance policies. The members of the foundations sell medical services. Their combination in the form of the foundation does not permit them to sell any different product.[33] Their combination has merely permitted them to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care.

The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market. The agreement under attack is ⊥an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers. It is true that some are surgeons, some anesthesiologists, and some psychiatrists, but the doctors do not sell a package of three kinds of services. If a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price-fixing agree- ⊥357

31. "Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material." 441 U.S., at 22, 99 S.Ct., at 1563 (footnote omitted).

32. "Here, the blanket-license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions covered by the license. But the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets." *Id.*, at 23–24, 99 S.Ct., at 1564 (footnote omitted).

33. It may be true that by becoming a member of the foundation the individual practitioner obtains a competitive advantage in the market for medical services that he could not unilaterally obtain. That competitive advantage is the ability to attract as customers people who value both the guarantee of full health coverage and a choice of doctors. But, as we have indicated, the setting of the price *by doctors* is not a "necessary consequence" of an arrangement with an insurer in which the doctor agrees not to charge certain insured customers more than a fixed price.

ment among the doctors would be perfectly proper. But the fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price-fixing mold.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice BLACKMUN and Justice O'CONNOR took no part in the consideration or decision of this case.

Justice POWELL, with whom THE CHIEF JUSTICE and Justice REHNQUIST join, dissenting.

The medical care plan condemned by the Court today is a comparatively new method of providing insured medical services at predetermined maximum costs. It involves no coercion. Medical insurance companies, physicians, and patients alike are free to participate or not as they choose. On its face, the plan seems to be in the public interest.

The State of Arizona challenged the plan on a *per se* antitrust theory. The District Court denied the State's summary judgment motion, and—because of the novelty of the issue—certified the question of *per se* liability for an interlocutory appeal. On summary judgment, the record and all inferences therefrom must be viewed in the light most favorable to the respondents. Nevertheless, rather than identifying clearly the controlling principles and remanding for decision on a completed record, this Court makes its own *per se* judgment of invalidity. The respondents' contention that the "consumers" of medical services 358
are benefited substantially by the plan is given short shrift. The Court concedes that "the parties conducted [only] a limited amount of pretrial discovery," *ante,* at 2469, leaving undeveloped facts critical to an informed decision of this case. I do not think today's decision on an incomplete record is consistent with proper judicial resolution of an issue of this complexity, novelty, and importance to the public. I therefore dissent.

I

The Maricopa and Pima Foundations for Medical Care are professional associations of physicians organized by the medical societies in their respective counties.[1] The foundations were established to make available a type of prepaid medical insurance plan, aspects of which are the target of this litigation. Under the plan, the foundations insure no risks themselves. Rather, their key function is to secure agreement among their member physicians to a maximum-price schedule for specific medical services. Once a fee schedule has been agreed upon following a process of consultation and balloting, the foundations invite private insurance companies to participate by offering medical insurance policies based upon the maximum-fee schedule.[2] The insurers agree to offer complete reimbursement to 359
their insureds for the full amount of their medical bills—so long as these bills do not exceed the maximum-fee schedule.

1. The Pima Foundation is open to any Pima County area physician licensed in Arizona. It has a renewable 5-year membership term. A voluntary resignation provision permits earlier exit on the January 1 following announcement of an intent to resign.

The Maricopa Foundation admits physicians who are members of their county medical society. The Maricopa Foundation has a renewable 1-year term of membership. Initial membership may be for a term of less than a year so that a uniform annual termination date for all members can be maintained.

The medical *societies* are professional associations of physicians practicing in the particular county. The Pima County Medical Society, but not the Pima Foundation, has been dismissed from the case pursuant to a consent decree.

2. Three private carriers underwrite various Pima Foundation-sponsored plans: Arizona Blue Cross-Blue Shield, Pacific Mutual Life Insurance Co., and Connecticut General Life Insurance Co. The latter two companies also underwrite plans for the Maricopa Foundation, as do five other private insurance companies. Apparently large employers, such as the State of Arizona and Motorola, also act as foundation-approved insurers with respect to their employees' insurance plans.

An insured under a foundation-sponsored plan is free to go to any physician. The physician then bills the foundation directly for services performed.[3] If the insured has chosen a physician who is *not* a foundation member and the bill exceeds the foundation maximum-fee schedule, the insured is liable for the excess. If the billing physician *is* a foundation member, the foundation disallows the excess pursuant to the agreement each physician executed upon joining the foundation.[4] Thus, the plan offers complete coverage of medical expenses but still permits an insured to choose any physician.

II

This case comes to us on a plaintiff's motion for summary judgment after only limited discovery. Therefore, as noted above, the inferences to be drawn from the record must be viewed in the light most favorable to the respondents. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962).
360 This requires, as the Court acknowledges, that we consider the foundation arrangement as one that "impose[s] a meaningful limit on physicians' charges," that "enables the insurance carriers to limit and to calculate more efficiently the risks they underwrite," and that "therefore serves as an effective cost-containment mechanism that has saved patients and insurers millions of dollars." *Ante*, at 2472. The question is whether we should condemn this arrangement forthwith under the Sherman Act, a law designed to *benefit* consumers.

Several other aspects of the record are of key significance but are not stressed by the Court. First, the foundation arrangement forecloses *no* competition. Unlike the classic cartel agreement, the foundation plan does not instruct potential competitors: "Deal with consumers on the following terms and no others." Rather, physicians who participate in the foundation plan are free both to associate with other medical insurance plans—at any fee level, high or low—and directly to serve uninsured patients—at any fee level, high or low. Similarly, insurers that participate in the foundation plan also remain at liberty to do business outside the plan with any physician—foundation member or not—at any fee level. Nor are physicians locked into a plan for more than one year's membership. See n. 1, *supra*. Thus freedom to compete, as well as freedom to withdraw, is preserved. The Court cites no case in which a remotely comparable plan or agreement is condemned on a *per se* basis.

Second, on this record we must find that insurers represent consumer interests. Normally consumers search for high quality at low prices. But once a consumer is insured[5]—*i.e.*, has chosen a medical insurance plan—he is largely indifferent to the 361
amount that his physician charges if the coverage is full, as under the foundation-sponsored plan.

The insurer, however, is *not* indifferent. To keep insurance premiums at a competitive level and to remain profitable, insurers—including those who have contracts with the foundations—step into the con-

3. The foundations act as the insurance companies' claims agents on a contract basis. They administer the claims and, to some extent, review the medical necessity and propriety of the treatment for which a claim is entered. The foundations charge insurers a fee for their various services. In recent years, this fee has been set at 4% of the insurers' premiums.

4. This agreement provides in part that the physician agrees "to be bound ... with respect to maximum fees ... by any fee determination by the [f]oundation consistent with the schedule adopted by the [foundation physician] membership ...." App. 31–32. The agreement also provides that foundation members "understand and agree that participating membership in the [f]oundation shall not affect the method of computation or amount of fees billed by me with respect to any medical care for any patient." *Ibid.*

5. At least seven insurance companies are competing in the relevant market. See n. 2, *supra*. At this stage of the case we must infer that they are competing vigorously and successfully.

The term "consumer"—commonly used in antitrust cases and literature—is used herein to mean persons who need or may need medical services from a physician.

sumer's shoes with his incentive to contain medical costs. Indeed, insurers may be the only parties who have the effective power to restrain medical costs, given the difficulty that patients experience in comparing price and quality for a professional service such as medical care.

On the record before us, there is no evidence of opposition to the foundation plan by insurance companies—or, for that matter, by members of the public. Rather seven insurers willingly have chosen to contract out to the foundations the task of developing maximum-fee schedules.[6] Again, on the record before us, we must infer that the foundation plan—open as it is to insurers, physicians, and the public—has in fact benefited consumers by "enabl[ing] the insurance carriers to limit and to calculate more efficiently the risks they underwrite." *Ante*, at 2472. Nevertheless, even though the case is here on an incomplete summary judgment record, the Court conclusively draws contrary inferences to support its *per se* judgment.

III

It is settled law that once an arrangement has been labeled as "price fixing" it is to be condemned *per se*. But it is equally well settled that this characterization is
362 not to be applied as a talisman to every arrangement that involves a literal fixing of prices. Many lawful contracts, mergers, and partnerships fix prices. But our cases require a more discerning approach. The inquiry in an antitrust case is not simply one of "determining whether two or more potential competitors have literally 'fixed' a 'price.' ... [Rather], it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label '*per se* price fixing.' That will often, but not always, be a simple matter." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9, 99 S.Ct. 1551, 1557, 60 L.Ed.2d 1 (1979).

Before characterizing an arrangement as a *per se* price-fixing agreement meriting condemnation, a court should determine whether it is a " 'naked restrain[t] of trade with no purpose except stifling of competition.' " *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972), quoting *White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963). See also *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977). Such a determination is necessary because "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than ... upon formalistic line drawing." *Id.*, at 58–59, 97 S.Ct., at 2561–2562. As part of this inquiry, a court must determine whether the procompetitive economies that the arrangement purportedly makes possible are substantial and realizable in the absence of such an agreement.

For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), we held unlawful as a *per se* violation an engineering association's canon of ethics that prohibited competitive bidding by its members. After the parties had "compiled a voluminous discovery and trial record," *id.*, at 685, 98 S.Ct., at 1362, we carefully considered—rather than rejected out of hand—the engineers' "affirmative defense" of their agreement: that competitive bidding would tempt engineers to do inferior work that would threaten public 363
health and safety. *Id.*, at 693, 98 S.Ct., at 1366. We refused to accept this defense because its merits "confirm[ed] rather than refut[ed] the anticompetitive purpose and

6. The State introduced no evidence on its summary judgment motion supporting its apparent view that insurers effectively can perform this function themselves, without physician participation. It is clear, however, that price and quality of professional services—unlike commercial products—are difficult to compare. Cf. *Bates v. State Bar of Arizona*, 433 U.S. 350, 391–395, 97 S.Ct. 2691, 2712–2715, 53 L.Ed.2d 810 (1977) (opinion of POWELL, J.). This is particularly true of medical service. Presumably this is a reason participating insurers wish to utilize the foundations' services.

effect of [the] agreement." *Ibid.* The analysis incident to the "price fixing" characterization found no substantial procompetitive efficiencies. See also *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646, n. 8, and 649–650, 100 S.Ct. 1925, 1927, n. 8, and 1928–1929, 64 L.Ed.2d 580 (1980) (challenged arrangement condemned because it lacked "a procompetitive justification" and had "no apparent potentially redeeming value").

In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., supra*, there *was* minimum price fixing in the most "literal sense." *Id.*, at 8, 99 S.Ct., at 1556. We nevertheless agreed, unanimously,[7] that an arrangement by which copyright clearinghouses sold performance rights to their entire libraries on a blanket rather than individual basis did not warrant condemnation on a *per se* basis. Individual licensing would have allowed competition between copyright owners. But we reasoned that licensing on a blanket basis yielded substantial efficiencies that otherwise could not be realized. See *id.*, at 20–21, 99 S.Ct., at 1562–1563. Indeed, the blanket license was itself "to some extent, a different product." *Id.*, at 22, 99 S.Ct., at 1563.[8]

In sum, the fact that a foundation-sponsored health insurance plan *literally* involves the setting of ceiling prices among competing physicians does not, of itself, justify condemning the plan as *per se* illegal. Only if it is clear from the record that the agreement among physicians is "so ⊥364 plainly ⊥anticompetitive that no elaborate study of [its effects] is needed to establish [its] illegality" may a court properly make a *per se* judgment. *National Society of Professional Engineers v. United States, supra*, at 692, 98 S.Ct., at 1365. And, as our cases demonstrate, the *per se* label should not be assigned without carefully considering substantial benefits and procompetitive justifications. This is especially true when the agreement under attack is novel, as in this case. See *Broadcast Music, supra*, at 9–10, 99 S.Ct., at 1556–1557; *United States v. Topco Associates, Inc., supra*, at 607–608, 92 S.Ct., at 1133 ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations").

IV

The Court acknowledges that the *per se* ban against price fixing is not to be invoked every time potential competitors *literally* fix prices. *Ante*, at 2479–2480. One also would have expected it to acknowledge that *per se* characterization is inappropriate if the challenged agreement or plan achieves for the public procompetitive benefits that otherwise are not attainable. The Court does not do this. And neither does it provide alternative criteria by which the *per se* characterization is to be determined. It is content simply to brand this type of plan as "price fixing" and describe the agreement in *Broadcast Music*—which also literally involved the fixing of prices—as "fundamentally different." *Ante*, at 2479.

In fact, however, the two agreements are similar in important respects. Each involved competitors and resulted in cooperative pricing.[9] Each arrangement also was

7. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S., at 25, 99 S.Ct., at 1565 (Stevens, J., dissenting in part) ("The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding").

8. Cf. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54, 97 S.Ct. 2549, 2559, 53 L.Ed.2d 568 (1977) (identifying achievement of efficiencies as "redeeming virtue" in decision sustaining an agreement against *per se* challenge); L. Sullivan, Law of Antitrust § 74, p. 200 (1977) (*per se* characterization inappropriate if price agreement achieves great economies of scale and thereby improves economic performance); *id.*, § 66, p. 180 (higher burden might reasonably be placed on plaintiff where agreement may involve efficiencies).

9. In this case the physicians in effect vote on foundation maximum-fee schedules. In *Broadcast Music*, the copyright owners aggregated their copyrights into a group package, sold rights to the package at a group price, and distributed the proceeds among themselves according to an agreed-upon formula. See *Columbia Broadcasting System, Inc. v. American*

⊥365 prompted⊥by the need for better service to the consumers.[10] And each arrangement apparently makes possible a new product by reaping otherwise unattainable efficiencies.[11] The Court's effort to distinguish *Broadcast Music* thus is unconvincing.[12]

⊥366 ⊥The Court, in defending its holding, also suggests that "respondents' arguments against application of the *per se* rule ... are better directed to the Legislature." *Ante*, at 2478. This is curious advice. The Sherman Act does not mention *per se* rules. And it was not Congress that decided *Broadcast Music* and the other relevant cases. Since the enactment of the Sherman Act in 1890, it has been the duty of *courts* to interpret and apply its general mandate—and to do so for the benefit of consumers.

As in *Broadcast Music*, the plaintiff here has not yet discharged its burden of proving that respondents have entered a plainly anticompetitive combination without a substantial and procompetitive efficiency justification. In my view, the District Court therefore correctly refused to grant the State's motion for summary judgment.[13] This critical and disputed issue of fact re-

Society of Composers, Authors and Publishers, 562 F.2d 130, 135–136 (CA2 1977).

10. In this case, the foundations' maximum-fee schedules attempt to rectify the inflationary consequence of patients' indifference to the size of physicians' bills and insurers' commitment to reimburse whatever "usual, customary, and reasonable" charges physicians may submit. In *Broadcast Music*, the market defect inhered in the fact that "those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses." 441 U.S., at 4–5, 99 S.Ct., at 1554.

11. In this case, the record before us indicates that insurers—those best situated to decide and best motivated to inspire trust in their judgment—believe that the foundations are the most efficient providers of the maximum-fee scheduling service. In *Broadcast Music*, we found that the blanket copyright clearinghouse system "reduce[d] costs absolutely ...." *Id.*, at 21, 99 S.Ct., at 1563.

12. The Court states that in *Broadcast Music* "there was little competition among individual composers for their separate compositions." *Ante*, at 2479. This is an irrational ground for distinction. Competition *could* have existed, 441 U.S., at 6, 99 S.Ct., at 1555; see also 562 F.2d, at 134–135, 138, but did not because of the cooperative agreement. That competition yet persists among *physicians* is not a sensible reason to invalidate their agreement while refusing similarly to condemn the *Broadcast Music* agreements that were *completely* effective in eliminating competition.

The Court also offers as a distinction that the foundations do not permit the creation of "any different product." *Ante*, at 2479. But the foundations provide a "different product" to precisely the same extent as did *Broadcast Music's* clearinghouses. The clearinghouses provided only what copyright holders offered as individual sellers—the rights to use individual compositions. The clearinghouses were able to obtain these same rights more efficiently, however, because they eliminated the need to engage in individual bargaining with each individual copyright owner. See 441 U.S., at 21–22, 99 S.Ct., at 1563.

In the same manner, the foundations set up an innovative means to deliver a basic service—insured medical care from a wide range of physicians of one's choice—in a more economical manner. The foundations' maximum-fee schedules replace the weak cost containment incentives in typical "usual, customary, and reasonable" insurance agreements with a stronger cost control mechanism: an absolute ceiling on maximum fees that can be charged. The conduct of the insurers in this case indicates that they believe that the foundation plan as it presently exists is the most efficient means of developing and administering such schedules. At this stage in the litigation, therefore, we must agree that the foundation plan permits the more economical delivery of the basic insurance service—"to some extent, a different product." *Broadcast Music*, 441 U.S., at 22, 99 S.Ct., at 1563.

13. Medical services differ from the typical service or commercial product at issue in an antitrust case. The services of physicians, rendered on a patient-by-patient basis, rarely can be compared by the recipient. A person requiring medical service or advice has no ready way of comparing physicians or of "shopping" for quality medical service at a lesser price. Primarily for this reason, the foundations—operating the plan at issue—perform a function that neither physicians nor prospective patients can perform individually. On a collective—and average—basis, the physicians themselves express a willingness to render certain identifiable services for not more than specified fees, leaving patients

mains unresolved. See Fed.Rule Civ.Proc. 56(c).

367 V

I believe the Court's action today loses sight of the basic purposes of the Sherman Act. As we have noted, the antitrust laws are a "consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343, 99 S.Ct. 2326, 2333, 60 L.Ed.2d 931 (1979). In its rush to condemn a novel plan about which it knows very little, the Court suggests that this end is achieved only by invalidating activities that *may* have some potential for harm. But the little that the record does show about the effect of the plan suggests that it is a means of providing medical services that in fact benefits rather than injures persons who need them.

In a complex economy, complex economic arrangements are commonplace. It is unwise for the Court, in a case as novel and important as this one, to make a final judgment in the absence of a complete record and where mandatory inferences create critical issues of fact.

457 U.S. 368, 73 L.Ed.2d 74

UNITED STATES, Petitioner

v.

Learley Reed GOODWIN.

No. 80–2195.

Argued April 21, 1982.
Decided June 18, 1982.

Defendant was convicted in the United States District Court for the District of Maryland, Herbert F. Murray, J., for forcible assault on a federal officer and fleeing and eluding a police officer, and he appealed. The Court of Appeals for the Fourth Circuit, 637 F.2d 250, reversed on basis of due process violation arising from a presumption of prosecutorial vindictiveness, and certiorari review was obtained. The Supreme Court, Justice Stevens held that presumption of prosecutorial vindictiveness was not warranted in case in which defendant was indicted and convicted of a felony charge arising from same incident as previously pending misdemeanor charges after defendant decided not to plead guilty and requested trial by jury on the misdemeanor charges where there was no actual evidence of vindictiveness and absent of such a presumption of vindictiveness no due process violation was established.

Reversed and remanded.

Justice Blackmun filed an opinion concurring in the judgment.

Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

1. Constitutional Law ⟹82(1)

An individual may not be punished for exercising a protected statutory constitutional right. U.S.C.A.Const.Amends. 5, 14.

2. District and Prosecuting Attorneys ⟹8

Just as a prosecutor may forego legitimate charges already brought in an effort to save time and expense of trial, a prosecutor may file additional charges if an initial expectation that defendant would plead guilty to lesser charges proves unfounded.

3. Constitutional Law ⟹257.5

Presumption of prosecutorial vindictiveness was not warranted in case in

free to choose the physician. We thus have a case in which we derive little guidance from the conventional "perfect market" analysis of antitrust law. I would give greater weight than the Court to the uniqueness of medical services, and certainly would not invalidate on a *per se* basis a plan that may in fact perform a uniquely useful service.

Affirmance of the District Court's holding would not have immunized the medical service plan at issue. Nor would it have foreclosed an eventual conclusion on remand that the arrangement should be deemed *per se* invalid. And if the District Court had found that petitioner had failed to establish a *per se* violation of the Sherman Act, the question would have remained whether the plan comports with the rule of reason. See, *e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 441, n. 16, 98 S.Ct. 2864, 2875, n. 16, 57 L.Ed.2d 854 (1978).

said to be so pronounced or persistent as to permeate the entire atmosphere of the trial and require defendant's conviction to be reversed.

First, because the fact of the co-defendants guilty plea was already properly admitted in evidence, the case cited by Redd is not on point. Accordingly, we find no error with respect to this part of the final issue on improper conduct.

[25] Second, we do not interpret the Assistant U.S. Attorney's words "sits here" as a comment on Redd's right not to testify. Thus, we find no error with respect to this part of the improper conduct issue.

XI.

In conclusion, defendants have not presented sufficient cause to overturn their convictions. Although certain evidence presented by the government may not have been credible and may have been uncorroborated, we find that there was sufficient evidence to sustain. We find that Redd, Richmond and Angel have failed to make the strong showing necessary to require severance where defendants are properly joined pursuant to Fed.R.Crim.P. 8(b). We further find that the actions of the trial court were not prejudicial to Warner. Also, we cannot conclude that the trial court's findings regarding the quantities of drugs for purposes of sentencing were clearly erroneous.

The trial court's finding that Redd was a minor participant was also not clearly erroneous. Although the trial court erred in concluding that, because Redd was not in custody, she was not entitled to *Miranda* warnings, we find that this ruling was harmless error. The jury instructions fairly and adequately submitted the issues and applicable law to the jury. Finally, we find no prosecutorial error.

As a result of the foregoing, the convictions and sentences of defendants Robin Warner, Michelle Angel, Joyce Richmond and Juniata Redd are AFFIRMED.

In re DETROIT AUTO DEALERS ASSOCIATION, INC., et al.,

BARNETT PONTIAC–DATSUN, INC., et al., Petitioners,

v.

FEDERAL TRADE COMMISSION, Respondent.

Nos. 89–3388 to 89–3392.

United States Court of Appeals, Sixth Circuit.

Argued March 12, 1990.

Decided Jan. 31, 1992.

Automobile dealers petitioned for review of decision of Federal Trade Commission which held invalid and illegal an agreement between dealers to limit showroom hours. The Court of Appeals, Wellford, Senior Circuit Judge, held that: (1) nonstatutory labor exemption from antitrust laws did not apply to agreement, and (2) determination that agreement was invalid was not erroneous.

Affirmed in part and remanded.

Ryan, Circuit Judge, filed opinion concurring in part and dissenting in part.

1. Monopolies ⚷12(8), 24(5)

Nonstatutory labor exemption from antitrust laws did not apply to agreement among automobile dealers to restrict their hours of operation; however, remand to Federal Trade Commission was required for determination of whether same conclusion applied to distinct minority of automobile dealers that entered into collective bargaining agreements with sales employees' unions specifying hours of showroom operation.

2. Monopolies ⚷12(8)

Statutory labor exemption from antitrust laws specifically provides for labor unions and labor organizations, and exemption may only be asserted by labor organization itself, not by employers. Clayton Act, § 6, 15 U.S.C.A. § 17; Norris-LaGuardia Act, §§ 4, 5, 13, 29 U.S.C.A. §§ 104, 105, 113.

3. Monopolies ⚩12(8)

Nonstatutory labor exemption from antitrust laws is not as narrowly limited as statutory exemption; it extends antitrust immunity to both labor unions, employees and to nonlabor parties; those who have engaged in bona fide labor negotiations. Clayton Act, § 6, 15 U.S.C.A. § 17; § 20, 29 U.S.C.A. § 52; Norris-LaGuardia Act, §§ 4, 5, 13, 29 U.S.C.A. §§ 104, 105, 113.

4. Monopolies ⚩24(5)

While Court of Appeals reviewed legal conclusions of Federal Trade Commission essentially de novo in suit concerning application of nonstatutory labor exemption from antitrust laws to agreement between automobile dealers to limit showroom hours, court owed some measure of deference to Commission's conclusions and its informed judgment in area dealing with alleged unfair and anticompetitive commercial conduct of large group of competitors who had formed together without dispute to agree upon hours of operation and to bring pressure upon similarly situated dealers to comply.

5. Trade Regulation ⚩840

When Federal Trade Commission overrules ALJ and substitutes its own findings, reviewing court should carefully scrutinize Commission's determinations of fact, and therefore its conclusions based upon those facts.

6. Monopolies ⚩24(4)

Federal Trade Commission's determination that agreement among automobile dealers to limit showroom hours brought about restraint of trade without adequate efficiency showing or other justification was not erroneous, even though court did not agree in all respects with Commission's rationale. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

Kathleen McCree Lewis, Dykema & Gossett, Roy R. Hunsinger (briefed), Stringari, Fritz, Kreger, Ahearn, Bennett & Hunsinger, Detroit, Mich., Glenn A. Mitchell (argued and briefed), Stein, Mitchell & Mezines, Washington, D.C., for petitioners in No. 89-3391.

Donald S. Clark, Secretary, David C. Shonka (argued and briefed), Office of the General Counsel, F.T.C., Washington, D.C., for respondent.

Lawrence F. Raniszeski (briefed), Colombo & Colombo, Birmingham, Mich., Kathleen McCree Lewis, Dykema & Gossett, Detroit, Mich., Glenn A. Mitchell (argued and briefed), Stein, Mitchell & Mezines, Washington, D.C., for petitioners in No. 89-3390.

Kathleen McCree Lewis, Dykema & Gossett, Detroit, Mich., James F. Rill, Jeffrey W. King, Christopher J. MacAvoy (briefed), Collier, Shannon & Scott, Glenn A. Mitchell (argued and briefed), Stein, Mitchell & Mezines, Washington, D.C., for petitioners in No. 89-3392.

Kathleen McCree Lewis, Dykema & Gossett, Detroit, Mich., Glenn A. Mitchell (argued and briefed), Basil J. Mezines (briefed), David U. Fierst (briefed), Stein, Mitchell & Mezines, Washington, D.C., for petitioners in No. 89-3388.

Kathleen McCree Lewis, Dykema & Gossett, Detroit, Mich., Glenn A. Mitchell (argued and briefed), Stein, Mitchell & Mezines, Howard E. O'Leary (briefed), Washington, D.C., for petitioners in No. 89-3389.

Before RYAN, Circuit Judge, LIVELY and WELLFORD *, Senior Circuit Judges.

WELLFORD, Senior Circuit Judge.

The respondent, Federal Trade Commission (FTC), issued a final order bearing upon trade practices of Detroit area automobile dealers after a lengthy investigation on February 22, 1989. By this challenged order, FTC held invalid and illegal an agreement or agreements to limit hours of

* The Honorable Harry W. Wellford assumed senior status on January 21, 1991.

operations among the competing automobile dealers involved in this controversy, and their trade associations. Most of the more than ninety dealers, some eighteen trade associations, and seventy-eight individual principal owners or operators of the automobile dealerships have petitioned to set aside the FTC order.

In 1984, the FTC issued an administrative complaint against petitioners and others charging them with arbitrary and anticompetitive action in keeping their automobile showrooms closed all day Saturdays and on three weekday evenings through alleged coercive and unlawful means (an asserted violation of 15 U.S.C. § 45). After hearings on this complaint, the administrative law judge (ALJ) issued an initial decision on July 14, 1987, in which he found that petitioners' agreement to limit showroom hours was engendered by labor disputes with automobile salesmen, and concluded that there was no violation as charged. FTC counsel appealed to the entire Commission, which unanimously reversed the ALJ decision, holding that, at least in part, the agreement constituted an effort by competitors to avoid collective bargaining with salesmen and, ultimately, unionization.

The Commission held that the agreement to limit showroom hours was not the product of arms' length negotiations, was designed to frustrate labor negotiations with the salesmen, and that antitrust laws should be held to apply to this type conduct. In sum, the Commission held that the claimed nonstatutory exemption did not apply and that the agreement brought about a restraint on "an important form of output and a dimension in which new car dealers compete" without an adequate efficiency showing, or other justification.

Petitioners defended unsuccessfully against the administrative charges by contending that there was no adverse effect on new car prices in the Detroit area, and that, under all the circumstances, the agreement was reasonable and legitimate. The order, which is now the subject of appeal, barred dealers from continuing to operate under the agreement's limited showroom hours, and it prohibited petitioners from inducing others to abide by the agreement in this respect. The order required dealers to stay open at least 64 hours per week for one year and to advertise these extended open hours of operation. Petitioner associations are required to keep transcripts of all business meetings for five years and (1) to amend any bylaws inconsistent with the order; (2) to prohibit discussions of hours of operation; and (3) to expel members who violate the proscription about hours of operation. Finally, the FTC order mandated certain reporting in order to monitor compliance, and the furnishing of copies of the order to employees. Petitions for review of individual dealers and associations concerned were timely filed and have been consolidated. They meet the requirements of *Minority Employees v. Tennessee*, 901 F.2d 1327 (6th Cir.), *cert. denied sub nom., Davis v. Tennessee Dept. of Employment Sec.*, — U.S. —, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990), in all respects.[1]

It is undisputed that the business of each petitioner is in retail sales of new automobiles in the Detroit metropolitan area, and that the agreement in dispute among petitioners is not directly mandated by any multi-employer collective bargaining agreement. In 1959, when a labor organization began efforts to unionize salesmen, most of the petitioners and other dealerships selling new cars in Detroit were open every weekday night and on Saturdays as well. Two competing unions were involved in unionization attempts by 1960. Each demanded multiemployer bargaining, uniform work weeks, shorter hours, higher commissions, and other benefits. As a consequence, by agreement among themselves, petitioners, and others, began to reduce hours that showrooms were open.[2] The FTC complained that the series of agreements resulting in shorter hours were not with un-

1. William Hickey, one of petitioners in No. 89-3391, is now deceased and he has been dismissed from the proceeding.

2. Detroit Automobile Dealers Association (DADA) recommended during 1959 that dealers close two nights a week.

ions nor with salesmen, but were arranged among petitioners to forestall growing and bitter disputes concerning hours of operation. Petitioners emphasize that the agreements were the result of demands by salespersons, or their purported representatives, to reduce the long working hours without reducing their income.

There is little dispute about the fact that at dealer association meetings union demands were discussed and the associations and members determined to resist unionization vigorously. The unions lost most of their 1959 efforts to unionize after two night closings were effectuated. By 1973, petitioners concede that they were closed at night except Mondays and Thursdays, and also closed all day Saturdays. The ALJ was persuaded by petitioners that the reduction of hours was "the *result* of a labor dispute—the give and take of a struggle between labor and management." (Emphasis added). The ALJ also held that "[s]ome closings were in fact collectively bargained," and that "[s]ales employees negotiated a prohibition on reopening." He also decided that "sales employees and their unions reinforced their demands for uniform shorter hours by intimidation and violence on many occasions and over many years," and that "[s]ome dealers agreed orally and informally with sales employees and their unions to meet the demands for uniform shorter hours." All this, he concluded, was "part of the collective bargaining process." At the same time, it seems clear that DADA was engaged in concerted and consistent efforts to "persuade" those uncooperative dealers who were not complying with the shorter hours arrangement to do so. Not only did the ALJ find the labor exemption to apply, he also concluded that the constricted hours of operation did not bring about any substantial injury to competition nor to consumers in the form of higher prices for new cars.

During the 1970s, the Teamsters Union made further organizational efforts, including picketing and institution of strikes, on behalf of dealer sales personnel using Saturday closings as a basis for recruitment. The union was unable to attain this general goal, however, through collective bargaining with dealers, their association, or their representatives, but the Teamsters Union did attain agreements not to extend existing hours of operations. Both the dealers and their sales personnel were concerned about competitors staying open longer hours and thereby drawing business away from "cooperating" dealers. There was some evidence that dealers thought the Saturday closings brought about less customer shopping for lower prices and thus increased dealer profit margins. There was evidence of violence and intimidation by salespersons and others, including union sympathizers, to bring about shorter hours. Petitioners uniformly and consistently resisted multi-employer bargaining to thwart the union's efforts in this regard. The Commission concedes that a "decision not to form a multi-employer bargaining unit is not fatal to respondents' nonstatutory labor exemption defenses."

FTC points out that Detroit is the only area in the country which has new car dealers closed on Saturdays. Petitioners claim the closings came about to accomplish labor peace and in response to union and salespersons' constant pressure. Dealers who did open, or attempt to open, on Saturdays have been subject to picketing, threats, violence, and damage to their property, and some of this picketing has been on the part of sales personnel.

This case presents an issue of first impression and of great difficulty and has been vigorously pressed by both parties. Petitioners' position is set forth succinctly in their brief at 9:

> The Federal Trade Commission erred as a matter of law and of fact in ruling that the uniform reduction of business hours by automobile dealers was not exempt from the antitrust laws pursuant to the nonstatutory labor exemption. The FTC also erred in finding and concluding that the uniform reduction of hours constitutes a restraint of trade in violation of Section 5 of the FTC Act. 15 U.S.C.

§ 45.[3]

The FTC summarizes its position in response as follows:

> The Commission correctly held that the nonstatutory labor exemption is a narrow adjunct to the statutory exemption, and that its application requires a balancing between the congressional policies favoring competition and those favoring bona fide labor negotiations [and] ... should be subject to close scrutiny.
>
> Substantial evidence supports the Commission's finding in this case that the dealers agreed among themselves and not with their employees. Indeed, the dealers admit that they entered into their agreement to avoid labor negotiations and to frustrate the unionization effort. The Commission properly found that the dealers' agreement restricting showroom hours did not result from bona fide arms' length labor negotiations.

In reviewing the FTC decision, we gave plenary review to its analysis of legal issues, but it is entitled, nevertheless, to some deference. *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986). We must determine whether the interpretation of the statute in this case made by FTC, a government agency, is "reasonable, consistent, and persuasive." *Whiteside v. Secretary of Health & Human Servs.,* 834 F.2d 1289, 1292 (6th Cir.1987).

On the other hand, the FTC's findings of fact, "if supported by evidence," are determinative. 15 U.S.C. § 45(c); *Indiana Federation of Dentists,* 476 U.S. at 454, 106 S.Ct. at 2015. We review these findings on the standard of whether there is substantial evidence in the record to support the finding made, not on a preponderance of evidence standard. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). We will "accept the Commission's *findings of fact* if they are supported by 'such relevant evidence' as a *reasonable* mind might accept as adequate to support a conclusion." *Indiana Federation of Dentists,* 476 U.S. at 454, 106 S.Ct. at 2015 (quoting *Universal Camera,* 340 U.S. at 477, 71 S.Ct. at 458) (emphasis added).

I. NONSTATUTORY LABOR EXEMPTION

The parties seem to agree that the purpose of the nonstatutory labor exemption is to advance policies and objectives of the labor laws including "association of employees to eliminate competition over wages and working conditions." *Connell Construction Co. v. Plumbers & Steamfitters, Local Union No. 100,* 421 U.S. 616, 622, 95 S.Ct. 1830, 1834, 44 L.Ed.2d 418 (1975). Petitioners argue that what was done to limit showroom hours was, in effect, done by salesperson employees who may act in concert to achieve better working conditions whether through a union, or otherwise, citing *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962). That case, however, concerns the undoubted right of employees to act in concert against their own employer over a legitimate issue of working conditions under § 7 of the National Labor Relations Act. The question in *Washington Aluminum Co.* concerned only a few employees of the respondent company who had been terminated due to engaging in a work stoppage over claimed unreasonable and intolerable working conditions.

We find a paucity of cases dealing with this labor exemption issue. *National Ass'n of Women's & Children's Apparel Salesmen, Inc. v. FTC,* 479 F.2d 139 (5th Cir.), *cert. denied,* 414 U.S. 1004, 94 S.Ct. 360, 38 L.Ed.2d 240 (1973), dealt with an appeal from a FTC cease and desist order precluding NAWCAS, an association of ready-to-wear clothing salespersons, from refusing to deal with certain manufacturers from regional trade shows sponsored and carried on by NAWCAS. Among other things, in discussing the nonstatutory labor exemption, the court observed that "the antitrust laws yield only insofar as the

3. As a back up position, petitioners assert that the FTC order, in any event, "violates the Norris-LaGuardia Act whether or not the exemption applies [by forcing] dealers to violate the labor laws by preventing bargaining on mandatory subjects of bargaining."

union pursues legitimate subjects of collective bargaining." *Id.* at 144. The association in *National Ass'n* was deemed disqualified from functioning as a labor organization under the circumstances of that case, which did not involve directly an employer's refusal to bargain with or to recognize a legitimate labor organization.[4]

Another court considered the nature and background of the nonstatutory labor exemption to the antitrust laws in *Amalgamated Meat Cutters & Butchers Workmen, Local Union No. 576 v. Wetterau Foods,* 597 F.2d 133 (8th Cir.1979):

> [I]t is necessary to examine congressional intent in the context of accommodating the Sherman Act to the policies of federal labor laws. The antitrust laws were enacted to prevent restraints to free competition in business and commercial transactions that tend to restrict production, control prices or otherwise control the market to the detriment of consumers. *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940). They were not enacted to regulate labor relations.
>
> Congress provided a statutory labor exemption from the antitrust laws. 15 U.S.C. §§ 17 and 26; 29 U.S.C. §§ 52, 104, 105 and 113; *see Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 621, 622, 95 S.Ct. 1830 [1834], 44 L.Ed.2d 418 (1975). Although these statutes do not directly address the activities involved in this case where the agreement is between two employers, these statutes demonstrate a congressional purpose to restrict the application of the antitrust laws when they unduly interfere with the goals of federal labor law. In resolving conflicts in areas where federal antitrust and labor policies seemingly overlap, the Supreme Court has recognized a nonstatutory labor exemption.
>
> . . . .
>
> Defining the boundaries of this exemption has not proved an easy task. A court must balance the degree of interference with federal labor policy with the magnitude of the restraint of trade and whether the restraint directly or indirectly affects market prices and free competition for the consuming public.

Id. at 135, 136 (footnotes omitted).

Wetterau found that the agreement between two employers to furnish workers to a party strike bound employer did not violate antitrust laws and "had no purpose or effect beyond the scope of the labor dispute, [and] ... had no anticompetitive effect unrelated to the collective bargaining negotiations." *Id.* at 135, 136. The nonstatutory labor exemption was therefore found to apply. *See by analogy Newspaper Drivers & Handlers Local No. 372 v. NLRB,* 404 F.2d 1159 (6th Cir.1968), *cert. denied,* 395 U.S. 923, 89 S.Ct. 1775, 23 L.Ed.2d 240 (1969); *see also Mackey v. National Football League,* 543 F.2d 606, 612 (8th Cir.1976), *cert. dismissed,* 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977) ("under appropriate circumstances, we find that a non-labor group may avail itself of the [nonstatutory] labor exemption.").[5] *Mackey* discussed the nonstatutory labor exemption at some length and held that it turned "upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case." *Id.* at 613.

The FTC cites *Mackey* in support of its position as follows:

> [T]he policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

543 F.2d at 614.

Courts have declined, in any event, to adopt a *per se* analysis of the nonstatutory labor exemption issue "in favor of an inquiry into the reasonableness of the re-

4. The court discussed the standard of review in a footnote: whether or not "the evidence in the record reasonably supports the administrative conclusion." *Id.* at 145 n. 10.

5. *Mackey* held also that "the basis of the nonstatutory exemption is the national policy favoring collective bargaining." 543 F.2d at 612.

straint under the circumstances." *Mackey,* 543 F.2d at 619, *citing White Motor Co. v. United States,* 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963); *Worthen Bank & Trust Co. v. National Bank Americard, Inc.,* 485 F.2d 119 (8th Cir.1973), *cert. denied,* 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974).

We adopted the standards set out in *Mackey* in analyzing another professional sport controversy between a hockey player and the National Hockey League. Those standards deemed to be proper in *Mackey* were reiterated in *McCourt v. California Sports, Inc.,* 600 F.2d 1193 (6th Cir.1979):

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

Id. at 1197–98 (citations omitted).

In *McCourt,* unlike *Mackey* in the dispute with the NFL, we found that the parties had been engaged in "good faith, arm's-length bargaining" recognizing that "nothing in the labor law compels either party ... to yield on its initial bargaining position." *Id.* at 1200. Thus, we held that the nonstatutory labor exemption applied to the owners' actions.

The delicate balancing involved in the labor exemption may be observed in the following expressions from *Connell Construction Co. v. Plumbers,* 421 U.S. at 622–23, 95 S.Ct. at 1834–35:

> Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, *e.g., Federation of Musicians v. Carroll,* 391 U.S. 99 [88 S.Ct. 1562, 20 L.Ed.2d 460] (1968), the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market.

(Citations omitted).

[1] The FTC argues that because the agreement at issue was among dealers, not involving unions or employees, there was a direct antitrust violation through restraint of trade by means of closing of showrooms and foreclosing availability of new cars to the public. FTC adds that the purpose of the dealers' agreement was "to avoid collective bargaining and to obtain the benefits of reduced competition ... [and to avoid] arm's-length good faith bargaining." Petitioners respond that they were forced, through union and collective salesperson pressure, to reach agreement on standardized and uniform—and limited—showroom hours. We must decide whether the agreement should be subject to the nonstatutory labor exemption and therefore be immunized from antitrust scrutiny.

Although the great bulk of salespersons involved with petitioners are nonunion employees, we have stated that the labor laws recognize no distinction between "union and unorganized employees who ... join[ ] in concerted actions to deal with their grievances." *Vic Tanny Int'l, Inc. v. NLRB,* 622 F.2d 237, 241 (6th Cir.1980). *See NLRB v. Loyd A. Fry Roofing Co.,* 651 F.2d 442, 445 (6th Cir.1981).

[2] The statutory labor exemption from antitrust laws specifically provides for labor unions and labor organizations. Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52;

Norris–LaGuardia Act, 29 U.S.C. §§ 104, 105, 113; *Connell,* 421 U.S. at 621, 622, 95 S.Ct. at 1834, 1835. This exemption may only be asserted by a labor organization itself, not by employers. *James R. Snyder Co. v. Associated Gen. Contractors,* 677 F.2d 1111, 1118 n. 10 (6th Cir.), *cert. denied,* 459 U.S. 1015, 103 S.Ct. 374, 74 L.Ed.2d 508 (1982); *United States v. Hutcheson,* 312 U.S. 219, 232, 61 S.Ct. 463, 466, 85 L.Ed. 788 (1941).

[3] The nonstatutory labor exemption is not so narrowly limited; it extends antitrust immunity to both labor unions, employees, and to non-labor parties; those who have engaged in *bona fide* labor negotiations. *Connell* recognized a "limited nonstatutory exemption from antitrust sanctions" to a union-employer agreement which limited competition based upon favored collective bargaining principles. 421 U.S. at 622, 95 S.Ct. at 1834; *but cf. Carpenter's Local Union No. 1846 v. Pratt–Farnsworth,* 690 F.2d 489 (5th Cir.1982) (nonstatutory exemption only incidentally applicable to employers; not applicable when employers combined to hire only non-union contractors and subcontractors), *cert. denied,* 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983).

The FTC concedes that there were some dealers among petitioners that negotiated agreements with labor unions. The FTC decision, however, held that these negotiated agreements "simply perpetuated the results of earlier collusions" between petitioners. Further, the FTC argues that even if some negotiations took place, these few "cannot shield an otherwise anticompetitive agreement." *Allen Bradley Co. v. Local Union No. 3,* 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945). On the other hand, petitioners maintain that because a few petitioners negotiated agreements with a union concerning hours of work, all are protected by the nonstatutory labor exemption.

Hours of work have been held to be "subjects ... about which employers and unions must bargain." *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea,* 381 U.S. 676, 691, 85 S.Ct. 1596, 1602, 14 L.Ed.2d 640 (1965). Similarly, hours during which automobile showrooms will be open by employer dealers are subjects of bargaining between dealers and their employees, whether or not represented by a union. In *Jewel Tea,* the Court held that an agreement, reached through "bona fide, arm's-length bargaining" limiting the number of hours retail meat departments would be open to the public (closing at 6 p.m.) was "beyond the reach of the Sherman Act." *Id.* at 690–91, 85 S.Ct. at 1602–03. The decision was based on the rationale that working hours were "a subject of immediate and legitimate concern to union members," *id.* at 692, 85 S.Ct. at 1603, without any extended analysis as to whether and to what extent this limitation affected the public adversely in the antitrust context. In *Jewel Tea,* the limitation upon hours of operation in retail grocery meat departments was imposed by a powerful combination of meat cutters, the defendant union, upon a recalcitrant employer operator, Jewel Tea, after reaching an agreement with other grocery operators in the Chicago area. Here, by contrast, the FTC claims to represent the public interest by protecting the public's ability to buy during longer hours as opposed to the workers' group claim to represent the public interest through limitation of hours as in *Jewel Tea.* The question remains: was this done by Detroit car dealers after or through a process of bona fide, arm's-length dealing with car salespersons and their representatives, as was found to be the situation in *Jewel Tea?* Or is the situation in our case like that described in *Jewel Tea* as "not exempt from the Sherman Act ... an effort by the unions [or associations of dealers] to protect one group of employers from competition by another?" *Id.* at 693, 85 S.Ct. at 1603; *see also International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n,* 483 F.2d 384, 393 (3d Cir.1973), *amended,* 494 F.2d 1353 (1974). If the latter, then the case by the FTC depended "on whether the elements of a conspiracy in restraint of trade or an attempt to monopolize had been proved [and] whether the restraint was unreasonable." *Id.* 381 U.S. at 693 & n. 6, 95 S.Ct.

at 1603 & n. 6 [6]; *California State Council of Carpenters v. Associated Gen. Contractors, Inc.*, 648 F.2d 527, 544 (9th Cir.1980) (denial of rehearing en banc), *rev'd on other grounds*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983).

The FTC found that the agreement in controversy in this case was "an unlawful restraint of trade," or "an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act," as charged in the FTC complaint. The FTC final opinion recited the undisputed history of restricting new car sales operations by dealers and the efforts of DADA "to bring remaining members [still operating on Friday nights in 1964] into compliance" with a Friday night closing policy, and later similar efforts concerning Tuesday night closings. The opinion also recognized that salespersons wanted shorter showroom hours, and particularly, "*uniform* showroom hours," and that, beginning in the 1950s unions seeking to organize salespersons were demanding uniform shorter showroom hours through attempted multi-employer bargaining. Petitioners were advised by their counsel to resist multi-employer bargaining in order to avoid unionization of salespersons. The FTC agreed with the ALJ's finding that counsel also advised petitioners in order to effect this goal "to make uniform concessions to sales employees."

The FTC also recognized that there were a number of strikes at individual dealers in connection with similar union organizing attempts by a new union in 1967 and 1968, some of which were "lengthy ... involved violence, threats of violence, and vandalism." "The question of shorter hours focused on Saturdays." [7] By 1970, salespersons rallied and petitioned DADA to close on Saturdays. There were additional strikes during the early 1970s; "threats, physical assaults, and property damage were common," and dealers "were apparently unable to resolve the salesmen's complaints." The FTC further opined that "ultimately, the dealers concluded the only way to avoid unionization and to achieve labor peace was to give in to the demand for uniform, year-round Saturday closings."

The ALJ and the Commission reached different conclusions essentially on these same factfindings concerning applicability of the nonstatutory labor exemption. The Commission focused on direct "collective bargaining" as the key element of the nonstatutory labor exemption, citing *Mackey*, and *Zimmerman v. National Football League*, 632 F.Supp. 398 (D.D.C.1986). At the same time it conceded that the exemption is not limited "only to collective bargaining agreements [nor to] formal labor contract[s]." In *Richards v. Neilsen Freight Lines*, 810 F.2d 898 (9th Cir.1987), an independent trucker sued four major truckers and the union that represented employees of the defendants claiming an antitrust violation in the form of a conspiracy among defendants to boycott plaintiff and force it to recognize the defendant union. *Richards* held that "any restraint the Union imposed falls within the scope of the nonstatutory labor exemption to the antitrust laws." *Id.* at 904. That court went further to hold:

> Even if such conduct were a violation of the labor law, it would bear such a close and substantial economic relation to a union's legitimate attempt to organize a specific employer that it falls well within the purpose and the coverage of the exemption from antitrust liability.

Id. at 904.

In *Richards*, Judge (now Justice) Kennedy found the purpose of such exemption was "to permit employees to organize and act to improve wages and working conditions." *Id.* at 905; *cf. California State*, 648 F.2d at 544. The court in that case required plaintiff to demonstrate that defendant's actions, even if in concert and

6. "[T]he decided cases do not appear to offer any easy answer to the question whether in a particular case an operating-hours restraint is unreasonable." *Id.* at 693 n. 6, 95 S.Ct. at 1603 n. 6.

7. The new union, ASA, won elections at 100 dealerships, and negotiated collective bargaining agreements with 29 of these, but ASA was not successful at ending Saturday work.

triggered by defendant union, "created substantial anticompetitive effects tangential or unrelated to the legitimate central purpose of organizing a company." *Id.* at 905. While we believe *Richards* goes to the extreme in protecting union activity to organize an employer and force it to submit to a "standard" or uniform union contract utilized with union carriers as being covered by the nonstatutory labor exemption, that case does recognize that the exemption may apply to situations where a collective bargaining restraint had not already been applied to the plaintiff, and the Commission recognized *Richards* as authority to this effect. On the other hand, in *Zimmerman*, 632 F.Supp. 398, the court held that a "direct restraint on the business market is not shielded by the labor exemption." *Id.* at 405 ("agreements that primarily affect competitors of the employer or ... economic actors completely removed from the bargaining relationship" are not protected.).

By contrast, the Commission viewed the agreement in controversy here as "inherently suspect" in limiting hours of operation. The agreement was suspect because it "cut down" shopping, according to the Commission, thus preventing the "forcing down" of prices. "Showroom hours," in other words, were found to be "a basis on which dealers compete for customers." Next the Commission found that petitioners had shown "no valid procompetitive justifications." [8] This difference of opinion between the ALJ and the Commission on the same facts illustrates both the complexity and difficulty of this case which differs materially from the relatively few cases which have analyzed and considered this exemption in other factual contexts.

[4] While we review the legal conclusions essentially de novo, we owe some measure of deference to the Commission's conclusions and its "informed judgment" in this area dealing with alleged unfair and anticompetitive commercial conduct of a large group of competitors who have formed together without dispute to agree upon hours of operation and to bring pressure upon the similarly situated dealers to comply. *Indiana Federation of Dentists*, 447 U.S. at 454, 106 S.Ct. at 2015. Petitioners strenuously argue that the alleged anticompetitive conduct was motivated by a desire for labor peace and that the agreement primarily benefitted salespersons who pressured them over a long period of time for shorter, and uniform, hours of operation. The FTC argues that there was no negotiation with labor unions, or even arm's length bargaining with representatives of salespersons, that brought about the agreement.

Our examination of the opinion of the Commission satisfies us that it considered carefully the background and factual circumstances involved in the ultimate agreement among petitioners to stay open only Monday and Thursday nights and to remain closed on Saturdays. We are also satisfied that the Commission analyzed and set out in its opinion the legal precedent and rationale for its decision. We find no error in the following specific legal conclusions of the Commission:

> 1. To say that collective bargaining is at the heart of the [nonstatutory labor] exemption, however, is not to say that the exemption applies only to collective bargaining agreements.
>
> 2. [T]he cases also demonstrate that concerted conduct does not automatically qualify for the exemption simply because it is motivated by labor concerns ... motivation by labor concerns is only a necessary and not a sufficient condition for application of the nonstatutory exemption.
>
> 3. The vast majority of nonstatutory labor exemption cases involve some sort of concerted activity or agreement between a union and an employer.
>
> 4. [T]hose few cases [involving only employers] clearly show that the nonstatutory labor exemption protects employer

8. Lower dealer overhead and attracting higher calibre salespersons were discussed briefly and dismissed as insufficient in this regard. These reasons given by petitioners may not be "justifications," but they may represent valid bases for actions that have relationship with competitive purposes.

agreements only when those agreements are part of the give-and-take of a negotiation process.

5. [T]he agreement ... was designed to *prevent* collective bargaining ... to *avoid* arm's length negotiation.

6. The mere fact that sales employees benefit from the hours restraint also cannot justify granting an exemption ... since they have the same incentive to reduce competition as the dealers.

7. *Jewel Tea* [381 U.S. at 676, 85 S.Ct. at 1596] and the present case have superficial similarities. Both involve a restriction on marketing hours and efforts by labor unions to obtain shorter working hours. But in *Jewel Tea,* unlike the case before us, the agreement was one to which the employees and employers were parties. Moreover, there was no question in *Jewel Tea* that the restrictive agreement had been reached through bona fide, arm's length bargaining.

8. Respondents [petitioners here as a group] have agreed among themselves, not with their employees.

9. [T]he decision not to form a multiemployer bargaining unit is not fatal to [the] nonstatutory labor exemption defense.

Petitioners rely on *Jewel Tea,* but we find the distinctions pointed out by the Commission are well reasoned. Both sides cite *Mackey.* Again, we believe that the Commission's analysis of that case (and the standards applicable to a nonstatutory labor exemption), as adopted by this court in *McCourt,* 600 F.2d 1193 (6th Cir.1979), is sound and that the petitioner's reliance thereon is misplaced under the circumstances.

In sum, we are not persuaded that the legal reasoning of the Commission is erroneous as to the non-applicability of the nonstatutory labor exemption generally under the circumstances of this case. We find the question to be particularly difficult in light of the undoubted desire of petitioners to obtain labor peace in adopting the restrictions on showroom hours. This desire on the part of the dealers was generated by violence, assaults, vandalism, threats, and pressure from union adherents and many sales personnel to bring about shorter hours and multi-employer bargaining and resultant uniformity. The agreement also came about, in part, upon the advice of labor counsel to petitioners as to the best way to avoid violent confrontation and threats of violence to dealers and to prevent unionization. We agree with the Commission that the process generally was not, nevertheless, a direct product of employer collective bargaining, nor of arm's length dealing with salespersons.

II. INDIVIDUAL DEALERS WHO ENTERED INTO COLLECTIVE BARGAINING AGREEMENTS AND/OR SHORTENED HOURS UNDER UNION THREATS

We must next consider whether the above conclusion applies to all of the petitioner dealers. Here we have problems with the legal conclusion reached by the Commission. The record indicates that some of the petitioner dealers entered into collective bargaining agreements with unions representing their sales employees which specified hours of showroom operation. The Commission acknowledged that some dealers did sign such agreements but only a "very few."

We have agreed with the FTC's conclusion generally that the agreement in controversy was not subject to the nonstatutory labor exemption claimed by petitioners. We now consider whether this same conclusion applies to the distinct minority of petitioner dealers who entered into collective bargaining agreements with unions representing their sales employees with specified hours of showroom operation. It is not clear to us under the *factual* findings whether under these several separate collective bargaining agreements there was bona fide negotiation and effectual limitation of showroom hours. That the agreement on showroom operating hours was not reached through *bona fide* negotiations and was rather a part of pre-existing collusion is a legal conclusion, not a factual finding, as to the "few" dealers who signed or entered into union contracts dealing with hours of operation.

The Commission concluded that any such union contract limitation of showroom hours by the few dealers involved "incorporated ... reductions orchestrated by DADA ... [and] simply perpetuated the results of earlier collusion." If, however, direct negotiations and collective bargaining with salesperson employees or their representatives, by any petitioner actually brought about additional or different limits on showroom hours of operation, any such dealer or dealers may well be able to claim a nonstatutory labor exemption.

We believe that a remand is appropriate, therefore, for further Commission consideration on this particular question. Further proof may be presented on this issue, if necessary. Such individual dealer-employee/union negotiations, if in apparent good faith, should not be discounted merely because they brought about an agreement in order to attain labor peace. The important question, as stated by FTC is "whether *bona fide* bargaining took place" with respect to restrictions on hours of operation. (Citing *Zimmerman v. National Football League*, 632 F.Supp. 398). The agreement before the Commission and before us now, without question, is the "agreement among dealers to establish uniform showroom hours," but we find it material for the FTC to consider whether separate dealer-union agreements existed with unions which "contained bargained-for hours restrictions," which were the product of genuine collective bargaining.

The ALJ made extensive fact findings and conclusions concerning individual dealer closeups during weekday evenings and, especially, during Saturdays. The ALJ found that a number of dealers closed by reason of agreements with a union and others were forced to close due to strikes and union violence. The Commission concluded, however, to the contrary that "it would be improper to impute to the respondents' agreement any protection the nonstatutory exemption may offer individual dealer-employee negotiations." While we agree with the Commission that the dealer's *association*, the collective group of dealers, cannot properly claim the benefit of the nonstatutory exemption for the reasons we have discussed, we disagree that individual dealers should not be carefully considered and examined individually with respect to whether some may actually have negotiated with unions or representatives for shorter showroom hours in good faith (or under force and threats of vandalism, violence, picketing and property damage).

Our remand, then, concerns a requirement that the Commission consider carefully the record and the ALJ findings regarding any individual dealers who may be entitled to claim an exemption under the circumstances of bona fide collective bargaining with a union for shorter showroom hours or as a direct result of *union directed* violence and force for shorter showroom hours.[9] The Commission made no adequate analysis of the ALJ factfinding and conclusions in this regard, nor did it state whether or why the ALJ findings were not supported by evidence in the record. *See* n. 9. In sum, we remand for the Commission to determine whether there was a restraint on hours of showroom operation *imposed by a union* rather than by the collective agreement with and among the other dealers or the association. *See Rich-*

9. The ALJ concluded, among other things:

1. "[s]ome closings were in fact collectively bargained;"

2. "[s]everal respondents [petitioners] did negotiate collective bargaining agreements with an hours restraint;"

3. "[t]he record shows that the parties to bargaining agreements treated the shorter hours as a contractual requirement;"

4. "[t]he parties to Teamsters' labor contracts, for example, interpreted the 'maintenance of standards' provision in the written collective bargaining agreements to preclude dealers from opening on Saturday;"

5. "[t]he sales employees *and their unions* reinforced their demands for uniform shorter hours by intimidation and violence...." (emphasis added);

6. "[s]ome dealers agreed orally and informally with sales employees *and their unions* to meet the demands for uniform shorter hours. This was part of the collective bargaining process" (emphasis added; footnote omitted).

ards v. Neilsen Freight Lines, 810 F.2d 898.

[5] When the Commission overrules the ALJ and substitutes its own findings, we should carefully scrutinize the Commission's determinations of fact, and therefore its conclusions based upon those facts. Our task, however, is to determine whether the Commission's findings are supported by substantial evidence. *Thiret v. FTC,* 512 F.2d 176 (10th Cir.1975). The FTC conclusions will be upheld if supported by such relevant evidence that a reasonable mind might accept as adequate to support that conclusion. *Sterling Drug, Inc. v. FTC,* 741 F.2d 1146 (9th Cir.1984), *cert. denied,* 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 143 (1985). We remand for the limited purposes indicated with these principles in mind.

III. RESTRAINT OF TRADE

[6] We believe that a Rule of Reason is the preferable analysis to apply to our consideration of petitioners' conduct under § 1 of the Sherman Act. We, therefore, make "an inquiry into the reasonableness of the restraint under the circumstances." *See Mackey,* 543 F.2d at 619.

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918) (quoted in *White Motor Co. v. United States,* 372 U.S. 253, 261, 83 S.Ct. 696, 700, 9 L.Ed.2d 738 (1963)).

The Supreme Court did not adopt a *per se* analysis of the allegedly anticompetitive conduct involved under an agreement among college members of the NCAA. *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).[10] The FTC concludes that "showroom hours are an important form of output and a dimension in which new car dealers clearly compete." We agree with the Commission to the extent that showroom hours may be an area of competition among the dealers.

The Supreme Court has stated that it is slow to condemn rules of associations and agreements defining business relationship "where the economic impact of certain practices is not immediately obvious." *Indiana Federation of Dentists,* 476 U.S. at 459, 106 S.Ct. at 2018. Thus, we are disposed to apply here a Rule of Reason to consider the impact of the limitation of showroom hours upon competition in general, and upon new car customers, in particular, in the Detroit area since the impact appears to us not to be immediately apparent. We look, then, as was the case in *Indiana Federation of Dentists,* to see whether FTC has demonstrated "actual detrimental effects" or "the potential for genuine adverse effects on competition." *Id.* at 460, 106 S.Ct. at 2018. Giving the Commission's conclusion some deference, we,

10. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), the Court noted that a joint selling arrangement among potential competitors, although seemingly anticompetitive on its face, might provide sufficient operating efficiencies to render the restraint reasonable under the circumstances. In *NCAA v. Board,* 468 U.S. at 103, 104 S.Ct. at 2961, the Court concluded that it must evaluate and consider under a Rule of Reason petitioners' "justifications for the restraints," and the anticompetitive effect of the action in question.

nevertheless, examine its conclusion in light of its findings, as supported by this record, to determine whether petitioners' justifications for their conduct are legitimate, plausible, substantial and reasonable. In this regard, we examine the evidence of the power of petitioners in the relevant market. *See Jetro Cash & Carry Enter. v. Food Distrib. Center,* 569 F.Supp. 1404, 1414 n. 7 (E.D.Pa.1983); *Amjac Ltd. v. Northlake Mall,* 1973–1 Trade Cas. (CCH) ¶ 74,150, at 94,290 n. 5 (N.D.Ga. 1973); *Dunkel Oil Corp. v. Anich,* 1944 Trade Cas. (CCH) ¶ 57,306 (E.D.Ill.1944); and *Ohio ex rel. Brown v. Cincinnati Automobile Dealers Ass'n,* 71 Ohio Op.2d 467 (1974).

We first examine the Commission's equation of reduction in hours of operation to reduction in "output." It may be, as stated in another part of the Commission's opinion, that agreed reduction of showroom operating hours is a limitation upon "a form of competition among dealers," but that is not quite the same thing as a limit upon production or output. The analysis made by the Commission for the proposition resulting in its conclusion of limitation of output and anticompetitive effect is based upon *Mass Bd. of Registration in Optometry,* DICT # 9195 (F.T.C. June 13, 1988). The Commission's equation of limited hours and reduction in "output" carried over to its analysis of petitioners' claims of operating efficiency in respect to reducing showroom hours. *See* note 22 of its decision and its discussion of "cost per unit of output." The analysis concerns three interrelated inquiries:

1) Is the restraint "inherently suspect?" ("absent an efficiency justification");

2) Is there a "plausible" efficiency justification for the practice? (Can it be "rejected without extensive factual inquiry?"); and

3) Is the justification "really valid?" (Assessed under the "full balancing test of the Rule of Reason").[11]

Based on what it stated was a "common sense approach," the Commission found limitation of showroom hours to be inherently suspect. It found that a car dealer was "a provider of sales and support services," and that its "output" is not measured in terms of units sold.[12] While this might force customers to shift their shopping hours, the commission makes no reference to nearby or suburban car dealers available to many customers not a part of petitioners' association. Citing Robert Bork from *The Antitrust Parodox* (1978), the Commission leaps to the conclusion "there is no economic difference between an agreement to limit shopping hours and an agreement to increase price." Bork himself stated however, while counselling to the contrary, that it is "presumably, more likely that a judge in the Brandeis tradition would uphold an agreement by automobile dealers to close on Sundays than an agreement by the same dealers to add $200 to the price of each car." *Id.* at 85 (1976). Unlike this example cited, there is no showing in this case, and the Commission can claim no reliance on a showing of higher prices or profit margins achieved by petitioners compared to other dealers similarly situated.

The Commission relies on expressions of hope by association representatives that costs would be reduced and that "grosses" would be "improved" and that hours limitation would also bring about "a better buying climate" and "cut down shopping." Whether these expressions or hopes were realized leads us to examine the other inquiries in the three-prong analysis of *Mass. Bd. of Registration of Optometry* utilized by the commission. We believe that the

11. In note 18 of its decision dealing with this analysis, the Commission makes reference to two recent Supreme Court decisions, *Arizona v. Maricopa County Medical Soc'y,* 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980), which followed a *per se* approach, which the Commission described as a "more traditional line," and then added: "[o]ur method of analysis is consistent with the traditional approach."

12. The Commission referred to "dicta" from *Jewel Tea* in support of its approach that limitation of hours was inherently suspect or an "obvious restraint." 381 U.S. at 692, 85 S.Ct. at 1603.

inherently suspect conclusion arises from a *per se* approach by the Commission absent a demonstrated effect on the price of cars in the Detroit area.[13] The Commission, moreover, cites *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 106 S.Ct. 2009, in support of its analysis, but neglects to note that the Rule of Reason was specifically adopted in that case.

The Commission concluded in note 22 that the "efficiency justifications" presented by the dealers "(1) lower dealer overhead costs, (2) the ability to attract higher-quality sales personnel, and (3) the prevention of unionization" were not "plausible." Although conceding that "dealer overhead may have been reduced," the Commission concluded that "unit costs did not decrease," based on its prior conclusion that there was a reduction in "output," that is, showroom hours of operation. Again, in note 22, the Commission cites *National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), in support of its theory, again without recognizing that the Rule of Reason approach, was lauded in that case, which described it as giving "the [Sherman] Act both flexibility and definition ... [and] focus[ing] directly on the challenged restraint's impact on competitive conditions." 435 U.S. at 688, 98 S.Ct. at 1603. *Professional Engineers,* it should be further noted, bore directly on fees to be charged by the professional association ("a total ban on competitive bidding"), and thus the restraint was found to be subject to a *per se* rule. *Id.* at 696, 98 S.Ct. at 1367. The Commission found, moreover, that preventing unionization could not be "legitimate" justification for competitive purposes because of a "national policy *favoring* the association of employees to bargain in good faith with employers over wages, hours and working conditions." (Emphasis added). We are not sure such a policy, if it exists, precludes this purported justification,[14] but we have agreed with the Commission that the dealers' agreement does not come within the nonstatutory exemption, and that acts designed to impede union organization may be antithetical to a national labor policy.

The Commission cites *Indiana Federation of Dentists* to sustain its rationale that limiting showroom hours is inherently suspect and that the offered justifications were not plausible even if prices and profit margins were unaffected by the agreed limitations. While *Indiana Federation of Dentists* was not directly concerned with "price fixing as such," it noted particularly that the practice in question involved "the proposition that making it more costly for the insurers and patients who are the dentists' customers to obtain information needed for evaluating the dentists' diagnoses has [a] procompetitive effect." 476 U.S. at 459, 106 S.Ct. at 2018. The court further noted that

> [t]he premise of the [dentists'] argument is that, far from having no effect on the cost of dental services chosen by patients and their insurers, the provision of x rays will have too great an impact: it will lead to the reduction of costs [as to the patient or consumer] through the selection of inadequate treatment.

Id. at 463, 106 S.Ct. at 2020. Through a concerted boycott, dentists in *Indiana Federation of Dentists* denied to their patients and insurers relevant information whereby costs ultimately could be expected to be effected, and thus the Court held that actual price increase was not required to be proven even under a Rule of Reason approach. We perceive some difference between withholding of relevant cost information and restricting showroom hours, but in deference to the Commission, we are

13. The Commission does not contest that "the ALJ found no evidence that the Saturday closing caused an increase in retail prices of cars in the Detroit area, or that the hours reductions increased dealers' gross margins on sales."

14. The policy of the NLRA is to enable employees to organize for *collective* bargaining purposes for negotiating wages, hours, and conditions of employment without hindrance from employers or unfair local constraints, statutory or otherwise. Whether this law *favors* such association, or whether it merely permits such association without unfair restraint or impediment, is another question. The unions which represented salesmen in this case worked hard to effectuate the limitation on showroom hours.

not prepared to hold the analogy to be erroneous.

The Commission concluded that prices may have risen "above competitive levels" even if they remained the same, because "we would expect car prices to have gone down in response to dealers' lower overhead costs." Note 24. Ultimately, the Commission concluded that there was no demonstrated "procompetitive efficiency justification," and thus the dealers' agreement in question "cannot be squared with the antitrust laws."

While we do not agree in all respects with the Commission's rationale, we find some legal basis and support for its conclusions in an area that is murky and unclear. Limitation of hours has been held to be an anticompetitive restraint although relief in that case was limited and the damages to users or customers was found to be "entirely speculative." *Tennessee, ex rel. Leech v. Highland Memorial Cemetery, Inc.*, 489 F.Supp. 65, 68 (E.D.Tenn.1980). We do not equate limitation of hours to price-fixing, but we do not find error in the Commission's conclusion that hours of operation in this business is a means of competition, and that such limitation may be an unreasonable restraint of trade.[15] We also find no error in the Commission's treatment of petitioners' other defenses (except as to II above).

IV. SCOPE OF RELIEF

We defer generally to the discretion of the Commission with respect to relief ordered once there has been demonstrated an unreasonable restraint of trade. "[T]he courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613, 66 S.Ct. 758, 760, 90 L.Ed. 888 (1946). At the same time, courts have occasion to review the extent and scope of remedies ordered and have found them to be over broad or unjustified. *See Porter & Doetsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir.1979), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980); *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212 (9th Cir.1979); *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir.1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977).

We find no error in parts I and II of the attached Commission final order issued February 22, 1989. As to part III requiring each dealership to operate for sales purposes "a minimum of 64 hours per week ... for a period of one year," we have concern that such an order is overly board and intrusive on the manner of operation, and without a reasonable relation to the practices condemned. We suggest that the Commission consider giving dealers an option to maintain showroom hours for at least an *average* of ten and a half hours a day during weekdays, coupled with operation on Saturdays for some minimum additional time for the one year period. This might serve as a permissible option to the mandated 64 hour week specified in part III, which we question as *reasonably* related to the improper practices determined.

We find no error in parts IV, V, and VI of the final order. We find no error in part VII A, B and C but direct that the Commission consider further whether 30 days is sufficient time to investigate a complaint, have a minimal hearing, and record the findings before expelling a purported violator. We take this remand action under our authority to "modify or set aside orders of the Commission." 15 U.S.C. § 45(d).

We find no error in parts VIII, IX, X, and XI of the final order.

We thus AFFIRM the Commission generally in this close and difficult case. We REMAND for limited purposes set out in part II, and for consideration of parts III and VIID of the final order on remedy.

15. Neither do we necessarily agree that "the parties' focus on retail prices misses the point in this case." Under a Rule of Reason analysis effect on prices, output and market forces in a competitive market of a particular practice is frequently relevant and may be determinative. The special factors noted in this case support the Commission's conclusion on restraint of trade despite lack of evidence of increased prices.

RYAN, Circuit Judge, concurring in part and dissenting in part.

In my view, the Federal Trade Commission's decision should be affirmed in its entirety. Although I will discuss my disagreement with the majority opinion in some detail, I note at the outset two overriding and related concerns.

I.

First, the scope of our review of the FTC's determinations in this case is very limited. "[F]indings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). The court "must accept the Commission's findings of fact if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 454, 106 S.Ct. 2009, 2015, 90 L.Ed.2d 445 (1986) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 71 S.Ct. 456, 458, 95 L.Ed. 456 (1951)). Legal conclusions are "for the courts to resolve," but courts must give "some deference" to the Commission's interpretation of the statute it is charged with enforcing. *Indiana Fed'n of Dentists,* 476 U.S. at 454, 106 S.Ct. at 2015. Thus, we properly ask only whether the FTC's interpretation is "reasonable, consistent, and persuasive." *Whiteside v. Secretary of Health & Human Services,* 834 F.2d 1289, 1292 (6th Cir.1987). Respectfully, I do not believe the majority opinion satisfactorily adheres to these standards for review.

My second concern is that the majority opinion fails to offer any valid reasons for rejecting the FTC's factual findings and legal conclusions.

While I agree with the majority's conclusion that the nonstatutory labor exemption from the antitrust laws does not apply to the agreement among the dealers to restrict their hours of operation, I do not agree with the analysis employed in the rest of the opinion or with the order remanding the case to the FTC to essentially do once again what it has already done. In my view, the FTC's decision is well-reasoned and correct. I would affirm it in its entirety. Therefore, I concur in part I of the majority opinion and in the result in part III, and respectfully dissent from parts II and IV of the opinion.

II.

In part II, the majority orders a remand to the FTC for the "limited purpose[ ]" of determining whether individual dealers might be able to take refuge under the nonstatutory labor exemption as the result of their "direct negotiations and collective bargaining with salesperson employees or their representatives...." On remand, the Commission is to "consider carefully the record and the ALJ findings regarding any individual dealers who may be entitled to claim an exemption under the circumstances of bona fide collective bargaining with a union for shorter showroom hours or as a direct result of *union directed* violence and force for shorter showroom hours." I can conceive of no reason, indeed no lawful basis, to order remand on this question since it is readily apparent that the FTC has already considered, and rejected, the dealers' position on this factual issue.

In addition to finding that the dealers' agreement to restrict hours was not protected by the nonstatutory labor exemption, the FTC found that collective bargaining agreements signed by a few dealers, which also restricted hours of operation, were also not protected:

> [T]hese agreements ... did not establish *bargained-for* showroom hours. The agreements merely incorporated, by means of maintenance of standards provisions, the pre-existing hours reductions orchestrated by DADA. Thus, those agreements did not memorialize hours limitations negotiated between dealers and employees; they simply perpetuated the results of earlier collusion.

In determining whether the nonstatutory labor exemption applied, the FTC used the correct legal analysis as "[t]he important question is whether *bona fide* bargaining took place such that the policies in favor of such bargaining should take precedence over antitrust concerns." *Zimmerman v. National Football League,* 632 F.Supp. 398, 408 (D.D.C.1986); *see also Mackey v. National Football League,* 543 F.2d 606, 614 (8th Cir.1976), *cert. dismissed,* 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977). *Bona fide* bargaining does not occur where one party unilaterally imposes a provision on a weaker party or where the agreement merely incorporates a preexisting rule. *See Mackey,* 543 F.2d at 613, 615–16.

In this case, the FTC found as a fact that the agreement on hours had not been reached through *bona fide* negotiations but instead was merely the incorporation of the preexisting collusion. This factual finding that the "maintenance of standards" provisions were not the result of arm's length negotiations should be determinative. 15 U.S.C. § 45(c). The majority opinion, however, states:

> It is not clear to us under the *factual* findings whether under these several separate collective bargaining agreements there was bona fide negotiation and effectual limitation of showroom hours. That the agreement on showroom operating hours was not reached through *bona fide* negotiations and was rather a part of pre-existing collusion is a legal conclusion, not a factual finding, as to the "few" dealers who signed or entered into union contracts dealing with hours of operation.... If ... direct negotiations and collective bargaining with salesperson employees or their representatives, by any petitioner actually brought about additional or different limits on showroom hours of operation, any such dealer or dealers may well be able to claim a nonstatutory labor exemption.

The majority is correct that "if" arm's length negotiations on hours occurred, such activity would be protected. It fails, however, to suggest any reason why the FTC's finding that no such arm's length negotiations occurred should not be accepted and, indeed, binding. The Commission specifically found that while the provisions "effectively prohibited some individual dealers from *extending* their hours of operation ... [they] did not have the effect of requiring dealers to close on Saturday unless they were already doing so when the contract was signed." Thus, the Commission found that any agreement between individual dealers and their employees or any union to reduce or restrict the hours of operation merely incorporated the preexisting agreement the dealers reached among themselves and was not the result of *bona fide* bargaining. That is a finding of fact, and it is supported in the evidence. Indeed, the majority does not hold that the FTC's finding in this matter is not supported by substantial evidence. Rather, the dealers are simply given another chance on remand to litigate an issue already decided by the Commission and supported by evidence in the record. For this reason, I respectfully dissent from part II of the majority opinion remanding this action to the FTC for reconsideration on the question of whether individual dealers may be able to claim antitrust immunity under the nonstatutory labor exemption.

III.

I also disagree, for two reasons, with the majority's analysis in part III holding that the Commission erred in employing a *per se* analysis instead of the rule of reason. First, the FTC did not use a *per se* analysis in analyzing whether petitioners' conduct resulted in a restraint of trade. Second, I do not agree that the Commission should have conducted a full rule of reason analysis in this case.

In deciding which analysis to employ, the FTC observed that in recent cases, *Indiana Fed'n of Dentists,* 476 U.S. 447, 106 S.Ct. 2009; *NCAA v. Board of Regents,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984); and *Broadcast Music, Inc. v. CBS, Inc.,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), the Supreme Court, instead of applying the *per se* label to restraints which arguably fit within the traditional *per se* analysis, considered the competitive justifications for the restraints without employing the full market analysis necessary for a rule of reason analysis. The FTC thus concluded that "*BMI, NCAA,* and *IFD,* read together, suggest that the *per se* rule and the rule of reason are converging." The FTC, quoting *Massachusetts Board of Registration in Optometry,* FTC Docket No. 9195, slip op. at 12–13 (June 13, 1988), summarized the three-step inquiry it believed was mandated by the converging rules:

> First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and reduce output"? For example, horizontal price-fixing and market division are inherently suspect because they are likely to raise price by reducing output. If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (e.g., by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition.

The FTC explained that it used this analysis because it "focus[es] on the economic realities and substantive concerns about competition that ultimately must govern our decisions." The FTC then found, under the first inquiry, that the agreement was inherently suspect as a limitation on output and, under the second inquiry, that there were no plausible efficiency justifications for the agreement. Finding the restriction invalid under the second inquiry, the FTC did not reach the third inquiry's full-blown economic analysis.

Although the *result* reached by this analysis is the same as would have been reached under the *per se* rule—the agreement was found illegal without resort to full economic analysis—the FTC did not use a *per se* analysis. Under a *per se* analysis, the agreement would have been invalid without any consideration of its procompetitive effects. The FTC, however, did consider the efficiency justifications offered by the respondents before concluding that the agreement had an anticompetitive effect.

Though the majority never concedes the existence of the three-prong "merged" analysis, I believe that this approach is a sensible one. As the Supreme Court observed, "there is often no bright line separating per se from Rule of Reason analysis." *NCAA,* 468 U.S. at 104 n. 26, 104 S.Ct. at 2962 n. 26. Under both rules, "the essential inquiry remains the same—whether or not the challenged restraint enhances competition." *Id.* at 104, 104 S.Ct. at 2961. The merged approach, which recognizes this essential similarity, makes sense because it allows consideration of the economic and efficiency justifications of traditionally *per se* illegal practices, without the often unnecessary, cumbersome and complicated analysis of the rule of reason. The Supreme Court has recognized that a full rule of reason analysis may not be necessary where the anticompetitive effect is obvious. *Indiana Fed'n of Dentists,* 476 U.S. at 459–60, 106 S.Ct. at 2018–19; *NCAA,* 468 U.S. at 109, 104 S.Ct. at 2964; *National Soc'y of Professional Eng'rs v. United States,* 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978). If the justification for the horizontal restraint in dispute is clearly implausible, condemnation of the practice should not be delayed until, under the rule of reason approach, "all aspects of definition, market power, intent, and net competitive effect have been analyzed—a process that many consider to be the antitrust equivalent to Chinese water torture." *Massachusetts Board*, slip op. at 10–11. The FTC found that the hours of operation agreement reduced output and that the respondents offered no plausible economic justification for this agreement. It is eminently sensible that the FTC ended its inquiry there instead of engaging in a rule of reason analysis described by the Supreme Court as " 'an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries ... an inquiry so often wholly fruitless when undertaken.' " *BMI*, 441 U.S. at 8 n. 11, 99 S.Ct. at 1556 n. 11 (quoting *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958)).

I also disagree with that portion of part III of the majority opinion wherein the issue of the economic analysis and classification of the dealers' agreement to restrict on the hours of operation is discussed. The FTC, under the first step of the three-prong analysis, concluded that the agreement to restrict hours of operation was inherently suspect as a limitation on output. The majority rejects this conclusion:

> It may be, as stated in another part of the Commission's opinion, that agreed reduction of showroom operating hours is a limitation upon "a form of competition among dealers," but that is not quite the same thing as a limit upon production or output. The analysis made by the Commission for the proposition resulting in its conclusion of limitation of output and anticompetitive effect is based upon *Mass Bd. of Registration in Optometry*, DICT # 9195 (F.T.C. June 13, 1988). The Commission's equation of limited hours and reduction in "output" carried over to its analysis of petitioners' claims of operating efficiency in respect to reducing showroom hours....
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> ....
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> Based on what it stated was a "common sense approach," the Commission found limitation of showroom hours to be inherently suspect. It found that a car dealer was "a provider of sales and support services," and that its "output" is not measured in terms of units sold. (Footnote omitted.) While this might force customers to shift their shopping hours, the commission makes no reference to nearby or suburban car dealers available to many customers not a part of petitioners' association. Citing Robert Bork from *The Antitrust Paradox* (1978), the Commission leaps to the conclusion "there is no economic difference between an agreement to limit shopping hours and an agreement to increase price." ... Unlike this example cited, there is no showing in this case, and the Commission can claim no reliance on a showing of higher prices or profit margins achieved by petitioners compared to other dealers similarly situated.

I disagree with the majority opinion because I find the FTC's reasoning persuasive, and because the majority fails to give any reasons for rejecting the FTC's conclusion.

The FTC first used common sense, an appropriate basis for agency decisionmaking, *Indiana Fed'n of Dentists*, 476 U.S. at 456, 106 S.Ct. at 2016, to show that a mandatory reduction in hours was a limitation on output:

> A consumer may consider any number of factors in deciding where to shop, including price, selection, location, reputation, and service, but surely one of those factors is whether the business provides hours that are convenient to the consumer's schedule. If several competitors are identical in all respects except the business hours they offer, the consumer will choose which ones to patronize on the basis of that difference; the consumer is unlikely to remain indifferent.

The FTC's analysis makes sense when applied to the new car market. Each line dealership sells identical cars. A consumer will patronize a particular dealership because it offers the manufacturer's product, the car, in a better package. That package, which may include a better price, better service on the car, and greater convenience in purchasing the car through extended hours, is the dealer's product. Moreover, these common sense observations are supported by case law. In *Local*

Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 692, 85 S.Ct. 1596, 1603, 14 L.Ed.2d 640 (1965), the Supreme Court recognized that limitations on hours of operation are an "obvious restraint on the product market." Other courts have agreed that limiting hours eliminates one form of competition. *Jetro Cash & Carry Enter., Inc. v. Food Distribution Ctr.*, 569 F.Supp. 1404, 1415 (E.D.Pa.1983); *Leech v. Highland Memorial Cemetery*, 489 F.Supp. 65, 68 (E.D.Tenn. 1980).

Economic theory also supports the FTC's conclusion that restricting hours restricts the product market:

> We presume that consumers allocate their time in the manner they think is most efficient or beneficial to them. By completely eliminating certain shopping hours, the respondents' agreement forces consumers to shift their car shopping to hours they otherwise would not have chosen for that activity. The forced restructuring of their schedules raises the opportunity cost to consumers of car shopping. This increase in costs encourages consumers to spend less time comparing prices, features, and service, and thereby reduces pressure on dealers to provide the prices, features, and services consumers desire. And even if the amount of time spent shopping remains unchanged, the restriction reduces efficiency, since without it consumers could reorganize their activities in a way that would increase their overall satisfaction.

Former Circuit Judge Robert Bork agreed with this characterization when he compared an agreement among car dealerships to raise prices by $200 and an agreement by dealers to close on Sundays. Although some courts would traditionally be more likely to condemn the price fixing agreement, Judge Bork points out that the two are indistinguishable:

> Both are limitations upon competition whose sole purpose is to increase the dealers' income by restricting output. The output in one case is the number of cars sold (which will decrease with the raised price); the output in the other case is the provision of convenience of shopping to consumers (which will decrease with the Sunday closing).... From the consumers' point of view such agreements are ... indistinguishable. Consumers who lose the convenience of shopping on Sunday are deprived of something that is as much an economic good as is money. There is no acceptable way for a judge to decide that a restriction in the offering of a convenience is any less objectionable than a restriction in the number of automobiles sold.

Bork, *The Antitrust Paradox* 85–86 (1978). I find this economic analysis, upon which the FTC could properly rely, *Indiana Fed'n of Dentists*, 476 U.S. at 456, 106 S.Ct. at 2016, convincing.

Finally, and most importantly, the record supports the FTC's position. The FTC quotes letters from DADA to dealers showing that the "respondents expected the hours restriction to benefit them by limiting comparison shopping." One letter from a DADA executive informed a dealer that the evening closing hours were popular with dealers because "with fewer shopping hours, the public can devote less time to shopping, and consequently forcing down prices." Another letter stated that "the line groups with 100% cooperation have found that this program minimizes shopping by prospective buyers." In addition to the letters, the FTC noted that dealers consistently fought the DADA evening closing program and that the dealerships of no other metropolitan area were closed on Saturdays. The FTC concluded that "[t]he former factor suggests that some dealers in Detroit see a competitive advantage in keeping longer hours than their rivals, and the latter suggests that in cities where there is no agreement to keep showrooms closed, competitive forces lead dealers to keep them open."

Questions concerning the competitive effects of a policy are factual. *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir.1986), *cert. denied*, 481 U.S. 1038, 107 S.Ct. 1975, 95 L.Ed.2d 815 (1987). These factual findings of the FTC, supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Universal Camera,* 340 U.S. at 477, 71 S.Ct. at 458, should have been determinative of the issue that the dealers expected to restrict output by limiting hours of operation. 15 U.S.C. § 45(c).

In the end, the majority, while "not agree[ing] in all respects with the Commission's rationale," grudgingly admits that there was no error "in the Commission's conclusion that hours of operation in this business is a means of competition, and that such limitation may be an unreasonable restraint of trade." Because common sense, economic theory, and the record support the FTC's conclusion that the dealers' agreement to restrict their hours of operation was an inherently suspect limitation on output, I disagree with the majority's rejection of that conclusion as well as their unnecessary resort to a rule of reason analysis.

IV.

My final area of disagreement involves part IV of the majority opinion, where it is "suggested" that the FTC "consider giving dealers an option to maintain showroom hours for at least an *average* of ten and a half hours a day during weekdays, coupled with operation on Saturdays for some minimum additional time" and "consider further whether 30 days is sufficient time to investigate a complaint, have a minimal hearing, and record the findings before expelling a purported violator."

The courts of appeals are permitted to "affirm, enforce, modify, or set aside orders of the Commission...." 15 U.S.C. § 45(d). In examining an FTC remedy, however, a court's review is limited and "extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy." *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 612, 66 S.Ct. 758, 759, 90 L.Ed. 888 (1946). "[T]he courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* at 613, 66 S.Ct. at 760.

In my view, the FTC's order that the dealers stay open for sixty-four hours per week for a one-year period is "reasonably related" to the unlawful hours of operation agreement. The sixty-four hours per week requirement arose from the FTC's effort not to burden the respondents with inflexible and inefficient requirements, such as complaint counsel's recommendation of specified mandatory hours of operation, while addressing complaint counsel's concerns that without affirmative relief,

> there is no realistic prospect of restoring showroom hours competition to the Detroit market. Dealers individually will decide to remain closed for fear of reprisals if they try to extend hours. Only if many dealers are open at the same time, making enforcement of the restriction difficult or impossible, will the fear of being singled out for enforcement be overcome.

The FTC's order governed only the total number of hours, "restoring the benefits the market would provide consumers absent the respondents' restraint of trade—more convenient shopping and additional leisure time—without forcing dealers to remain open at specifically-mandated hours that may be less beneficial to them than other currently unused hours." The choice of sixty-four hours is reasonable as that figure reflects the average of weekly hours in other Midwestern metropolitan areas where free competition exists.

After observing that the courts will not interfere with an agency-ordered remedy except where the remedy selected has no reasonable relation to the unlawful practices found to exist, the majority promptly interferes with the FTC's hours-of-operation remedy, asking the FTC to consider another proposed option. The problem is that while the majority "questions" whether the FTC's chosen remedy is reasonably related to the dealers' agreement to restrict hours, it fails to find any error requiring this court to modify or set aside the order.

The cases cited by the majority to support the ordered remand involve overly broad or vague Commission orders in matters of false advertising or deceptive trade practices and do not support its intrusion on the proper province of the FTC in this case. The court in *Porter & Dietsch, Inc. v. FTC,* 605 F.2d 294, 308 (7th Cir.1979), *cert. denied,* 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980), addressed the faulty application of a remedy to the facts of a case; *Trans World Accounts, Inc. v. FTC,* 594 F.2d 212, 216–17 (9th Cir.1979), involved a failure by the FTC to fashion a clear and precise remedy; and in *Beneficial Corp. v. FTC,* 542 F.2d 611, 618–20 (3d Cir.1976), *cert. denied,* 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977), the court was concerned with an overly broad prior restraint of speech violative of the first amendment. None of those concerns is present in this case. Moreover, in each of these cases the court found specific errors in the FTC order and, therefore, remedied the erroneous portion of the order or remanded the case for clarification or other specific action by the Commission.

The majority opinion, on the other hand, finds no error, factual or legal, in the FTC order requiring the maintenance of sixty-four hours of showroom operation per week and merely suggests an alternative approach for the Commission to "consider" on remand. There is no warrant for disagreeing with the FTC on this issue when no finding is made that the Commission's decision or order was erroneous. To the extent that the majority finds no fault with the Commission's findings, but nevertheless remands this matter for reconsideration of the ordered remedies with the suggestion that the court has a better idea, it acts beyond its judicial authority.

For these same reasons, I also disagree with the majority's direction to the FTC to consider whether thirty days is sufficient time to investigate a complaint and conduct a hearing. Again, there is no finding of error, no finding of abuse of discretion, and no finding of the lack of substantial evidence. The FTC apparently found thirty days to be sufficient time for these matters. We have no authority—as distinguished from "power"—to question the FTC's decision in this regard or to direct the Commission to "rethink" this matter. It is not the task of this court to instruct the FTC on how to carry out its mission. We sit for the limited purpose of reviewing the legality of the Commission's actions, not to advise it on "fairer" results or procedures. For these reasons, I strongly but respectfully dissent from part IV of the majority opinion.

V.

In conclusion, I would enforce the FTC's order in its entirety because the Commission's findings of fact are supported by substantial evidence and its conclusions of law are not erroneous.

UNITED STATES of America, Plaintiff–Appellee,

v.

Benjamin Barry KRAMER, Randy Thomas Lanier, Eugene Albert Fischer, and Kay Dee Bell, Jr., Defendants–Appellants.

Nos. 88–3444 to 88–3446, 89–1025 and 89–2752.

United States Court of Appeals, Seventh Circuit.

Argued April 20, 1990.

Decided Jan. 30, 1992.

As Amended Feb. 4, 1992.

As Amended on Denial of Rehearing and Rehearing En Banc April 14, 1992.

Defendants were convicted by jury in the United States District Court for the Southern District of Illinois, James L. Foreman, Chief Judge, of conspiring to distribute marijuana, participating as principal administrators, organizers, or leaders of continuing criminal enterprise, and conspiring to defraud the United States by impeding it in its assessment and collection of revenue. Defendants appealed. The Court of Appeals, Kanne, Circuit Judge, held that: (1)

OPINION

DOJ Antitrust Division: Popular ends should not justify anti-competitive collusion

Makan Delrahim, Opinion contributor Published 7:31 p m ET Sept 12, 2019

The loftiest of purported motivations do not excuse anti-competitive collusion among rivals. That's long-standing antitrust law.

The law recognizes that when companies compete, consumers win. It deems competition to be intrinsically good, because rivalry, particularly in the form of free markets, benefits consumers by offering them both better prices and products. In turn, antitrust law negatively views conduct that harms competition.

Indeed, the Supreme Court has made it clear that in seeking to cultivate competition, antitrust laws should not render judgment on the "moral" aspirations behind the conduct.

While companies are free to make any individual public commitments or set any sales or technical limits for themselves, when competitors agree with each other on how they should act in the marketplace, antitrust law enforcers have stepped in and taken a good, hard look. Anti-competitive agreements among competitors — regardless of the purported beneficial goal — are outlawed because they reduce the incentives for companies to compete vigorously, which in turn can raise prices, reduce innovation and ultimately harm consumers.

Indeed, in multiple instances, the Supreme Court has struck down collective efforts by engineers to enhance "public safety" as well as a collective effort by criminal defense lawyers with the goal of improving quality of representation for "indigent criminal defendants." Even laudable ends do not justify collusive means in our chosen system of laws.

This is why the nonpartisan nature of antitrust enforcement remains of utmost importance. Antitrust enforcement must prioritize protecting competition. And we do so.

The Antitrust Division's decisions to look into an industry are based on whether the underlying conduct has the potential to harm competition. It does not look into industries because of political objectives, nor can it refrain from examining possible anti-competitive conduct because it would be politically unpopular.

Nevertheless, media personalities and politicians recently have levied the charge of "politicization" of antitrust in light of enforcement scrutiny that may not align with their political objectives. Fortunately for all Americans, the Department of Justice's sole consideration is the law.

No goal, well-intentioned or otherwise, is an excuse for collusion or other anti-competitive behavior that runs afoul of the antitrust laws. Those who criticize even the prospect of an antitrust investigation should know that, when it comes to antitrust, politically popular ends should not justify turning a blind eye to the competition laws.

rations with no other connections to the United States. We expressly stated in *Verlinden* that the FSIA permits "a foreign plaintiff to sue a foreign sovereign in the courts of the United States, provided the substantive requirements of the Act are satisfied," 461 U.S., at 489, 103 S.Ct., at 1969.

[10] Finally, Argentina argues that a finding of jurisdiction in this case would violate the Due Process Clause of the Fifth Amendment, and that, in order to avoid this difficulty, we must construe the "direct effect" requirement as embodying the "minimum contacts" test of *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).[2] Assuming, without deciding, that a foreign state is a "person" for purposes of the Due Process Clause, cf. *South Carolina v. Katzenbach,* 383 U.S. 301, 323–324, 86 S.Ct. 803, 815–816, 15 L.Ed.2d 769 (1966) (States of the Union are not "persons" for purposes of the Due Process Clause), we find that Argentina possessed "minimum contacts" that would satisfy the constitutional test. By issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that ⌊620city, Argentina "'purposefully avail[ed] itself of the privilege of conducting activities within the [United States].'" *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985), quoting *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958).

* * *

We conclude that Argentina's issuance of the Bonods was a "commercial activity" under the FSIA; that its rescheduling of the maturity dates on those instruments was taken in connection with that commercial activity and had a "direct effect" in the United States; and that the District Court therefore properly asserted jurisdiction, under the FSIA, over the breach-of-contract claim based on that rescheduling. Accordingly, the judgment of the Court of Appeals is

Affirmed.

504 U.S. 621, 119 L.Ed.2d 410

⌊621FEDERAL TRADE COMMISSION, Petitioner,

v.

TICOR TITLE INSURANCE COMPANY, et al.

No. 91–72.

Argued Jan. 13, 1992.

Decided June 12, 1992.

Federal Trade Commission (FTC) filed administrative complaint charging title insurance companies with horizontal price fixing and setting fees for title searches and examinations, in violation of the Federal Trade Commission Act. The FTC determined that companies engaged in unfair methods of competition in Connecticut, Wisconsin, Arizona, and Montana, and companies petitioned for review. The Court of Appeals for the Third Circuit, 922 F.2d 1122, reversed, and FTC petitioned for certiorari. The Supreme Court, Justice Kennedy, held that state action immunity was not available under regulatory schemes in Wisconsin and Montana.

Reversed and remanded.

Justice Scalia filed a concurring opinion.

Chief Justice Rehnquist filed a dissenting opinion, in which Justice O'Connor and Justice Thomas joined.

2. Argentina concedes that this issue "is before the Court only as an aid in interpreting the direct effect requirement of the Act" and that "[w]hether there is a constitutional basis for personal jurisdiction over [Argentina] is not before the Court as an independent question." Brief for Petitioners 36, n. 33.

Justice O'Connor filed a dissenting opinion, in which Justice Thomas joined.

1. Monopolies ⚷12(1), 17(1.12)

Preservation of free market and of system of free enterprise without price fixing or cartels is essential to economic freedom; national policy of such pervasive and fundamental character is essential part of economic and legal system within which the separate states administer their own laws for protection and advancement of their people.

2. Monopolies ⚷12(15.6)

Continued enforcement of national antitrust policy grants states more freedom, not less, in deciding whether to subject discrete parts of economy to additional regulations and controls.

3. Monopolies ⚷12(15.6)

For state law or regulatory scheme to be basis for antitrust immunity, state must have articulated clear and affirmative policy to allow anticompetitive conduct, and state must provide active supervision of anticompetitive conduct undertaken by private actors.

4. Monopolies ⚷12(15.6)

While state may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if displacement is both intended by state and implemented in specific details; actual state involvement, not deference to private price fixing arrangements under general auspices of state law, is precondition for immunity from federal law.

5. Monopolies ⚷12(15.6)

Purpose of active supervision inquiry in state antitrust immunity analysis is not to determine whether state has met some normative standard, such as efficiency, in its regulatory practice, but is to determine whether state has exercised sufficient independent judgment and control so that details of rates or prices have been established as product of deliberate state intervention, not simply by agreement among private parties; analysis asks whether state has played substantial role in determining specifics of economic policy.

6. Monopolies ⚷12(15.6)

Principles of federalism do not justify broad interpretation of state-action immunity, requiring only articulation by state of clear affirmative policy, without regard to whether state provides active supervision of anticompetitive conduct, for neither federalism nor political responsibility is well served by rule that essential national policies are displaced by state regulations intended to achieve more limited ends; for states which do choose to displace free market with regulation, insistence on real compliance with both parts of state-action immunity test will serve to make clear that state is responsible for price fixing it has sanctioned and undertaken to control.

7. Monopolies ⚷12(15.6)

Where prices or rates are set as initial matter by private parties, subject only to veto if state chooses to exercise it, party claiming immunity must show that state officials have undertaken necessary steps to determine specifics of price-fixing or rate setting scheme; mere potential for state supervision is not adequate substitute for decision by state.

8. Monopolies ⚷12(15.6)

There was insufficient state participation in title insurance companies' rate setting schemes for title search and title examination fees in Wisconsin and Montana for schemes, alleged to violate Federal Trade Commission Act provision prohibiting unfair methods of competition in or affecting commerce, to come within state action immunity doctrine, though both states adopted procedures whereby rating bureaus filed rates with state agencies and rates would become effective unless rejected within set time, in view of detailed administrative findings demonstrating that potential state supervision was not realized in fact. Federal Trade Commission Act, § 5(a)(1), 15 U.S.C.A. § 45(a)(1).

*Syllabus**

Petitioner Federal Trade Commission filed an administrative complaint charging respondent title insurance companies with horizontal price fixing in setting fees for title searches and examinations in violation of § 5(a)(1) of the Federal Trade Commission Act. In each of the four States at issue—Connecticut, Wisconsin, Arizona, and Montana—uniform rates were established by a rating bureau licensed by the State and authorized to establish joint rates for its members. Rate filings were made to the state insurance office and became effective unless the State rejected them within a specified period. The Administrative Law Judge held, *inter alia*, that the rates had been fixed in all four States, but that, in Wisconsin and Montana, respondents' anticompetitive activities were entitled to state-action immunity, as contemplated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, and its progeny. Under this doctrine, a state law or regulatory scheme can be the basis for antitrust immunity if the State (1) has articulated a clear and affirmative policy to allow the anticompetitive conduct and (2) provides active supervision of anticompetitive conduct undertaken by private actors. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233. The Commission, which conceded that the first part of the test was met, held on review that none of the States had conducted sufficient supervision to warrant immunity. The Court of Appeals reversed, holding that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the active supervision requirement. Thus, it concluded, respondents' conduct in all the States was entitled to state-action immunity.

Held:

1. State-action immunity is not available under the regulatory schemes in Montana and Wisconsin. Pp. 2176–2180.

(a) Principles of federalism require that federal antitrust laws be subject to supersession by state regulatory programs. *Parker, supra*, 317 U.S., at 350–352, 63 S.Ct., at 312–14; *Midcal, supra; Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83. *Midcal*'s two-part test confirms that States may not confer antitrust immunity on private persons by fiat. Actual state involvement is the precondition for immunity, which is conferred out of respect for the State's ongoing [622]regulation, not the economics of price restraint. The purpose of the active supervision inquiry is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention. Although this immunity doctrine was developed in actions brought under the Sherman Act, the issue whether it applies to Commission action under the Federal Trade Commission Act need not be determined, since the Commission does not assert any superior preemption authority here. Pp. 2176–2178.

(b) Wisconsin, Montana, and 34 other States correctly contend that a broad interpretation of state-action immunity would not serve their best interests. The doctrine would impede, rather than advance, the States' freedom of action if it required them to act in the shadow of such immunity whenever they entered the realm of economic regulation. Insistence on real compliance with both parts of the *Midcal* test serves to make clear that the States are responsible for only the price fixing they have sanctioned and undertaken to control. Respondents' contention that such concerns are better addressed by the first part of the *Midcal* test misapprehends the close relation between

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Midcal's two elements, which are both directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. A clear policy statement ensures only that the State did not act through inadvertence, not that the State approved the anticompetitive conduct. Sole reliance on the clear articulation requirement would not allow the States sufficient regulatory flexibility. P. 2178.

(c) Where prices or rates are initially set by private parties, subject to veto only if the State chooses, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for the State's decision. Thus, the standard relied on by the Court of Appeals in this case is insufficient to establish the requisite level of active supervision. The Commission's findings of fact demonstrate that the potential for state supervision was not realized in either Wisconsin or Montana. While most rate filings were checked for mathematical accuracy, some were unchecked altogether. Moreover, one rate filing became effective in Montana despite the rating bureau's failure to provide requested information, and additional information was provided in Wisconsin after seven years, during which time another rate filing remained in effect. Absent active supervision, there can be no state-action immunity for what were otherwise private price-fixing arrangements. And state judicial review cannot fill the void. See *Patrick, supra,* 486 U.S., at 103–105, 108 S.Ct., at 1664–65. This Court's decision in *Southern Motor Carriers Rate Con|623ference, Inc. v. United States,* 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36, which involved a similar negative option regime, is not to the contrary, since it involved the question whether the first part of the *Midcal* test was met. This case involves horizontal price fixing under a vague *imprimatur* in form and agency inaction in fact, and it should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. Pp. 2178–2180.

2. The Court of Appeals should have the opportunity to reexamine its determinations with respect to Connecticut and Arizona in order to address whether it accorded proper deference to the Commission's factual findings as to the extent of state supervision in those States. P. 2180.

922 F.2d 1122 (CA3 1991), reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, SCALIA, and SOUTER, JJ., joined. SCALIA, J., filed a concurring opinion, *post,* p. 2180. REHNQUIST, C.J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined, *post,* p. 2181. O'CONNOR, J., filed a dissenting opinion, in which THOMAS, J., joined, *post,* p. 2183.

Lawrence G. Wallace, Washington, D.C., argued, for petitioner.

John C. Christie, Jr., Washington, D.C., argued, for respondents.

|624Justice KENNEDY delivered the opinion of the Court.

The Federal Trade Commission filed an administrative complaint against six of the Nation's largest title insurance |625companies, alleging horizontal price fixing in their fees for title searches and title examinations. One company settled by consent decree, while five other firms continue to contest the matter. The Commission charged the title companies with violating § 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. § 45(a)(1), which prohibits "[u]nfair methods of competition in or affecting commerce." One of the principal defenses the companies assert is state-action immunity from antitrust prosecution, as contemplated in the line of cases beginning with *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The Commission rejected this defense, *In re Ticor Title Ins. Co.,* 112 F.T.C. 344 (1989), and the firms sought review in the United States Court of Appeals for the Third Circuit. Ruling that state-action immunity was available under the state regulatory schemes in question, the Court of Appeals reversed. 922 F.2d 1122 (1991). We granted certiorari. 502 U.S. 807, 112 S.Ct. 47, 116 L.Ed.2d 25 (1991).

I

Title insurance is the business of insuring the record title of real property for persons with some interest in the estate, including owners, occupiers, and lenders. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers. Before issuing a title insurance ⌊626policy, the insurance company or one of its agents performs a title search and examination. The search produces a chronological list of the public documents in the chain of title to the real property. The examination is a critical analysis or interpretation of the condition of title revealed by the documents disclosed through this search.

The title search and examination are major components of the insurance company's services. There are certain variances from State to State and from policy to policy, but a brief summary of the functions performed by the title companies can be given. The insurance companies exclude from coverage defects uncovered during the search; that is, the insurers conduct searches in order to inform the insured and to reduce their own liability by identifying and excluding known risks. The insured is protected from some losses resulting from title defects not discoverable from a search of the public records, such as forgery, missing heirs, previous marriages, impersonation, or confusion in names. They are protected also against errors or mistakes in the search and examination. Negligence need not be proved in order to recover. Title insurance also includes the obligation to defend in the event that an insured is sued by reason of some defect within the scope of the policy's guarantee.

The title insurance industry earned $1.35 billion in gross revenues in 1982, and respondents accounted for 57 percent of that amount. Four of respondents are the nation's largest title insurance companies: Ticor Title Insurance Co., with 16.5 percent of the market; Chicago Title Insurance Co., with 12.8 percent; Lawyers Title Insurance Co., with 12 percent; and SAFECO Title Insurance Co. (now operating under the name Security Union Title Insurance Co.), with 10.3 percent. Stewart Title Guarantee Co., with 5.4 percent of the market, is the country's eighth largest title insurer, with a strong position in the West and Southwest. App. to Pet. for Cert. 145a.

⌊627The Commission issued an administrative complaint in 1985. Horizontal price fixing was alleged in these terms:

> " 'Respondents have agreed on the prices to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the respondents have fixed prices with other respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming.' " 112 F.T.C., at 346.

The Commission did not challenge the insurers' practice of setting uniform rates for insurance against the risk of loss from defective titles, but only the practice of setting uniform rates for the title search, examination, and settlement, aspects of the business which, the Commission alleges, do not involve insurance.

Before the Administrative Law Judge (ALJ), respondents defended against liability on three related grounds. First, they maintained that the challenged conduct is exempt from antitrust scrutiny under the McCarran–Ferguson Act, 59 Stat. 34, 15 U.S.C. § 1012(b), which confers antitrust immunity over the "business of insurance" to the extent regulated by state law. Second, they argued that their collective ratemaking activities are exempt under the *Noerr–Pennington* doctrine, which places certain "[j]oint efforts to influence public officials" beyond the reach of the antitrust laws. *Mine Workers v. Pennington,* 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 136, 81 S.Ct. 523, 529, 5 L.Ed.2d 464 (1961). Third, respondents contended their activities are entitled to state-action immunity, which permits anticompetitive conduct if authorized and supervised by state officials. See *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 ⌊628U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). App. to Pet. for Cert. 218a. As to one State, Ohio, respondents contended that the rates for title search, examination, and settlement had not been set by a rating bureau.

Title insurance company rates and practices in 13 States were the subject of the initial complaint. Before the matter was decided by the ALJ, the Commission declined to pursue its complaint with regard to fees in five of these States: Louisiana, New Mexico, New York, Oregon, and Wyoming. Upon the recommendation of the ALJ, the Commission did not pursue its complaint with regard to fees in two additional States, Idaho and Ohio. This left six States in which the Commission found antitrust violations, but in two of these States, New Jersey and Pennsylvania, the Commission conceded the issue on which certiorari was sought here, so the regulatory regimes in these two States are not before us. Four States remain in which violations were alleged: Connecticut, Wisconsin, Arizona, and Montana.

The ALJ held that the rates for search and examination services had been fixed in these four States. For reasons we need not pause to examine, the ALJ rejected the McCarran–Ferguson and *Noerr–Pennington* defenses. The ALJ then turned his attention to the question of state-action immunity. A summary of the ALJ's extensive findings on this point is necessary for a full understanding of the decisions reached at each level of the proceedings in the case.

Rating bureaus are private entities organized by title insurance companies to establish uniform rates for their members. The ALJ found no evidence that the collective setting of title insurance rates through rating bureaus is a way of pooling risk information. Indeed, he found no evidence that any title insurer sets rates according to actuarial loss experience. Instead, the ALJ found that the usual practice is for rating bureaus to set rates according to profitability studies that focus on the costs of conducting searches and examinations. Uniform rates are set notwithstanding differences in ⌊629efficiencies and costs among individual members. App. to Pet. for Cert. 183a–184a.

The ALJ described the regulatory regimes for title insurance rates in the four States still at issue. In each one, the title insurance rating bureau was licensed by the State and authorized to establish joint rates for its members. Each of the four States used what has come to be called a "negative option" system to approve rate filings by the bureaus. Under a negative option system, the rating bureau filed rates for title searches and title examinations with the state insurance office. The rates became effective unless the State rejected them within a specified period, such as 30 days. Although the negative option system provided a theoretical mechanism for substantive review, the ALJ determined, after making detailed findings regarding the operation of each regulatory regime, that the rate filings were subject to minimal scrutiny by state regulators.

In Connecticut the State Insurance Department has the authority to audit the rating bureau and hold hearings regarding rates, but it has not done so. The Connecticut rating bureau filed only two major rate increases, in 1966 and in 1981. The circumstances behind the 1966 rate increase are somewhat obscure. The ALJ found that the Insurance Department asked the rating bureau to submit additional information justifying the increase, and later approved the rate increase although there is no evidence the additional information was provided. In 1981 the Connecticut rating bureau filed for a 20 percent rate increase. The factual background for this rate increase is better developed though the testimony was somewhat inconsistent. A state insurance official testified that he reviewed the rate increase with care and discussed various components of the increase with the rating bureau. The same official testified, however, that he lacked the authority to question certain expense data he considered quite high. *Id.,* at 189a–195a.

⌊630In Wisconsin the State Insurance Commissioner is required to examine the rating bureau at regular intervals and authorized to reject rates through a process of hearings. Neither has been done. The Wisconsin rating bureau made major rate filings in 1971, 1981, and 1982. The 1971 rate filing was approved in 1971 although supporting justification, which had been requested by the State Insurance Commissioner, was not provided until 1978. The 1981 rate filing requested an 11 percent rate increase. The increase was approved after the office of the Insurance Commissioner checked the supporting data for accuracy. No one in the agency inquired into insurer expenses, though an official testified that substantive scrutiny would not be possible without that inquiry. The 1982 rate increase received but a cursory reading at the office of the Insurance Commissioner. The supporting materials were not checked for accuracy, though in the absence of an objection by the agency, the rate increase went into effect. *Id.,* at 196a–200a.

In Arizona the Insurance Director was required to examine the rating bureau at least once every five years. It was not done. In 1980 the State Insurance Department announced a comprehensive investigation of the rating bureau. It was not conducted. The rating bureau spent most of its time justifying its escrow rates. Following conclusion in 1981 of a federal civil suit challenging the joint fixing of escrow rates, the rating bureau went out of business without having made any major rate filings, though it had proposed minor rate adjustments. *Id.,* at 200a–205a.

In Montana the rating bureau made its only major rate filing in 1983. In connection with it, a representative of the rating bureau met with officials of the State Insurance Department. He was told that the filed rates could go into immediate effect though further profit data would have to be provided. The ALJ found no evidence that the additional data were furnished. *Id.,* at 211a–214a.

⌊631To complete the background, the ALJ observed that none of the rating bureaus are now active. The respondents abandoned them between 1981 and 1985 in response to numerous private treble-damages suits, so by the time the Commission filed its formal complaint in 1985, the rating bureaus had been dismantled. *Id.,* at 195a, 200a, 205a, 208a. The ALJ held that the case is not moot, though, because nothing would preclude respondents from resuming the conduct challenged by the Commission. *Id.,* at 246a–247a. See *United States v. W.T. Grant Co.,* 345 U.S. 629, 632–633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

These factual determinations established, the ALJ addressed the two-part test that must be satisfied for state-action immunity under the antitrust laws, the test we set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors. *Id.,* at 105, 100 S.Ct., at 943. The Commission having conceded that the first part of the test was satisfied in the four States still at issue, the immunity question, beginning with the hearings before the ALJ and in all later proceedings, has turned upon the proper interpretation and application of *Midcal*'s active supervision requirement. The ALJ found the active supervision test was met in Arizona and Montana but not in Connecticut or Wisconsin. App. to Pet. for Cert. 248a.

On review of the ALJ's decision, the Commission held that none of the four States had conducted sufficient supervision, so that the title companies were not entitled to immunity in any of those jurisdictions. *Id.,* at 47a. The Court of Appeals for the Third Circuit disagreed with the Commission, adopting the approach of the First Circuit in *New England Motor Rate Bureau, Inc. v. FTC,* 908 F.2d 1064 (1990), which ⊥632 had held that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the requirement of active supervision. *Id.,* at 1071. Under this standard, the Court of Appeals for the Third Circuit ruled that the active state supervision requirement was met in all four States and held that the respondents' conduct was entitled to state-action immunity in each of them. 922 F.2d, at 1140.

We granted certiorari to consider two questions: First, whether the Third Circuit was correct in its statement of the law and in its application of law to fact, and second, whether the Third Circuit exceeded its authority by departing from the factual findings entered by the ALJ and adopted by the Commission. Before this Court, the parties have confined their briefing on the first of these questions to the regulatory regimes of Wisconsin and Montana, and focused on the regulatory regimes of Connecticut and Arizona in briefing on the second question. We now reverse the Court of Appeals under the first question and remand for further proceedings under the second.

II

[1, 2] The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972). A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people. Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls. Against this background, in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), we upheld a state-supervised, market sharing scheme against a Sherman Act challenge. We announced the doctrine that federal antitrust laws are subject to supersession by state regulatory ⊥633 programs. Our decision was grounded in principles of federalism. *Id.,* at 350–352, 63 S.Ct., at 312–13.

[3, 4] The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine in our decisions in *Midcal, supra,* and *Patrick v. Burget,* 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). In *Midcal* we invalidated a California statute forbidding licensees in the wine trade to sell below prices set by the producer. There we announced the two-part test applicable to instances where private parties participate in a price-fixing regime. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." 445 U.S., at 105, 100 S.Ct., at 943, (internal quotation marks omitted). *Midcal* confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private pricefixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint. In *Midcal* we found that the intent to restrain prices was expressed with sufficient precision so that the first part of the test was met, but that the absence of state participation in the mechanics of the price posting was so apparent that the requirement of active supervision had not been met. *Ibid.*

The rationale was further elaborated in *Patrick v. Burget.* In *Patrick* it had been alleged that private physicians participated in the State's peer review system in order to injure or destroy competition by denying hospital privileges to a physician who had begun a competing clinic. We referred to the purpose of preserving the State's own administrative ⌊634policies, as distinct from allowing private parties to foreclose competition, in the following passage:

> "The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.... The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct.... The mere presence of some state involvement or monitoring does not suffice.... The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." 486 U.S., at 100–101, 108 S.Ct., at 1663 (internal quotation marks and citations omitted).

Because the particular anticompetitive conduct at issue in *Patrick* had not been supervised by governmental actors, we decided that the actions of the peer review committee were not entitled to state-action immunity. *Id.,* 486 U.S., at 106, 108 S.Ct., at 1666.

[5] Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not ⌊635simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

Although the point bears but brief mention, we observe that our prior cases considered state-action immunity against actions brought under the Sherman Act, and this case arises under the Federal Trade Commission Act. The Commission has argued at other times that state-action immunity does not apply to Commission action under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. See U.S. Bureau of Consumer Protection, Staff Report to the Federal Trade Commission on Prescription Drug Price Disclosures, Chs. VI(B) and (C) (1975); see also Note, The State Action Exemption and Antitrust Enforcement under the Federal Trade Commission Act, 89 Harv.L.Rev. 715 (1976). A leading treatise has expressed its skepticism of this view. See 1 P. Areeda & D. Turner, Antitrust Law ¶ 218 (1978). We need not determine whether the antitrust statutes can be distinguished on this basis, because the Commission does not assert any superior pre-emption authority in the instant matter. We apply our prior cases to the one before us.

[6] Respondents contend that principles of federalism justify a broad interpretation of state-action immunity, but there is a powerful refutation of their viewpoint in the briefs that were filed in this case. The State of Wisconsin, joined by Montana and 34 other States, has filed a brief as *amici curiae* on the precise point. These States deny that respondents' broad immunity rule would serve the States' best interests. We are in agreement with the *amici* submission.

If the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it. The fact of the matter is that the States regulate [636] their economies in many ways not inconsistent with the antitrust laws. For example, Oregon may provide for peer review by its physicians without approving anticompetitive conduct by them. See *Patrick,* 486 U.S., at 105, 108 S.Ct., at 1665. Or Michigan may regulate its public utilities without authorizing monopolization in the market for electric light bulbs. See *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 596, 96 S.Ct. 3110, 3120, 49 L.Ed.2d 1141 (1976). So we have held that state-action immunity is disfavored, much as are repeals by implication. *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 398–399, 98 S.Ct. 1123, 1129, 55 L.Ed.2d 364 (1978). By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility.

States must accept political responsibility for actions they intend to undertake. It is quite a different matter, however, for federal law to compel a result that the States do not intend but for which they are held to account. Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Respondents contend that these concerns are better addressed by the requirement that the States articulate a clear policy to displace the antitrust laws with their own forms of economic regulation. This contention misapprehends the close relation between *Midcal's* two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. See *Patrick, supra,* 486 U.S., at 100, 108 S.Ct., at 1662. In the usual case, *Midcal's* requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence; [637] it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State. It seems plain, moreover, in light of the *amici curiae* brief to which we have referred, that sole reliance on the requirement of clear articulation will not allow the regulatory flexibility that these States deem necessary. For States whose object it is to benefit their citizens through regulation, a broad doctrine of state-action immunity may serve as nothing more than an attractive nuisance in the economic sphere. To oppose these pressures, sole reliance on the requirement of clear articulation could become a rather meaningless formal constraint.

III

In the case before us, the Court of Appeals relied upon a formulation of the active supervision requirement articulated by the First Circuit:

"'Where ... the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.'" 922 F.2d, at 1136, quoting *New England Motor Rate Bureau, Inc. v. FTC,* 908 F.2d, at 1071.

Based on this standard, the Third Circuit ruled that the active supervision requirement was met in all four States, and held that the respondents' conduct was entitled to state-action immunity from antitrust liability. 922 F.2d, at 1140.

[7, 8] While in theory the standard articulated by the First Circuit might be applied in a manner consistent with our precedents, it seems to us insufficient to establish the requisite level of active supervision. The criteria set forth by the First Circuit may have some relevance as the beginning ⌊638point of the active state supervision inquiry, but the analysis cannot end there. Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State. Under these standards, we must conclude that there was no active supervision in either Wisconsin or Montana.

Respondents point out that in Wisconsin and Montana the rating bureaus filed rates with state agencies and that in both States the so-called negative option rule prevailed. The rates became effective unless they were rejected within a set time. It is said that as a matter of law in those States inaction signified substantive approval. This proposition cannot be reconciled, however, with the detailed findings, entered by the ALJ and adopted by the Commission, which demonstrate that the potential for state supervision was not realized in fact. The ALJ found, and the Commission agreed, that at most the rate filings were checked for mathematical accuracy. Some were unchecked altogether. In Montana, a rate filing became effective despite the failure of the rating bureau to provide additional requested information. In Wisconsin, additional information was provided after a lapse of seven years, during which time the rate filing remained in effect. These findings are fatal to respondents' attempts to portray the state regulatory regimes as providing the necessary component of active supervision. The findings demonstrate that, whatever the potential for state regulatory review in Wisconsin and Montana, active state supervision did not occur. In the absence of active supervision in fact, there can be no state-action immunity for what were otherwise private price-fixing arrangements. And as in *Patrick,* the availability of state judicial review could not fill the void. Because of the state agencies' limited role and⌊639participation, state judicial review was likewise limited. See *Patrick,* 486 U.S., at 103–105, 108 S.Ct., at 1664–65.

Our decision in *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), though it too involved a negative option regime, is not to the contrary. The question there was whether the first part of the *Midcal* test was met, the Government's contention being that a pricing policy is not an articulated one unless the practice is compelled. We rejected that assertion and undertook no real examination of the active supervision aspect of the case, for the Government conceded that the second part of the test had been met. *Id.,* at 62, 66, 105 S.Ct., at 1729, 1731. The concession was against the background of a District Court determination that, although submitted rates could go into effect without further state activity, the State had ordered and held ratemaking hearings on a consistent basis, using the industry submissions as the beginning point. See *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471, 476–477 (ND Ga.1979). In the case before us, of course, the Commission concedes the first part of the *Midcal* requirement and litigates the second; and there is no finding of substantial state participation in the rate-setting scheme.

This case involves horizontal price fixing under a vague *imprimatur* in form and agency inaction in fact. No antitrust offense is more pernicious than price fixing. *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 434, n. 16, 110 S.Ct. 768, 781, n. 16, 107 L.Ed.2d 851 (1990). In this context, we decline to formulate a rule that would lead to a finding of active state supervision where in fact there was none. Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices. Cf. *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) (city billboard zoning ordinance entitled to state-action immunity). We do ⌊640not have before us a case in which governmental actors made unilateral decisions without participation by private actors. Cf. *Fisher v. Berkeley*, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986) (private actors not liable without private action). And we do not here call into question a regulatory regime in which sampling techniques or a specified rate of return allow state regulators to provide comprehensive supervision without complete control, or in which there was an infrequent lapse of state supervision. Cf. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344, n. 6, 107 S.Ct. 720, 725, n. 6, 93 L.Ed.2d 667 (1987) (a statute specifying the margin between wholesale and retail prices may satisfy the active supervision requirement). In the circumstances of this case, however, we conclude that the acts of respondents in the States of Montana and Wisconsin are not immune from antitrust liability.

IV

In granting certiorari we undertook to review the further contention by the Commission that the Court of Appeals was incorrect in disregarding the Commission's findings as to the extent of state supervision. The parties have focused their briefing on this question on the regulatory schemes of Connecticut and Arizona. We think the Court of Appeals should have the opportunity to reexamine its determinations with respect to these latter two States in light of the views we have expressed.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring.

The Court's standard is in my view faithful to what our cases have said about "active supervision." On the other hand, I think THE CHIEF JUSTICE and Justice O'CONNOR are correct that this standard will be a fertile source of uncertainty and (hence) litigation, and will produce total aban⌊641donment of some state programs because private individuals will not take the chance of participating in them. That is true, moreover, not just in the "negative option" context, but even in a context such as that involved in *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988): Private physicians invited to participate in a state-supervised hospital peer review system may not know until after their participation has occurred (and indeed until after their trial has been completed) whether the State's supervision will be "active" enough.

I am willing to accept these consequences because I see no alternative within the constraints of our "active supervision" doctrine, which has not been challenged here; and because I am skeptical about the *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), exemption for state-programmed private collusion in the first place.

Chief Justice REHNQUIST, with whom Justice O'CONNOR and Justice THOMAS join, dissenting.

The Court holds today that to satisfy the "active supervision" requirement of state-action immunity from antitrust liability, private parties acting pursuant to a regulatory scheme enacted by a state legislature must prove that "the State has played a substantial role in determining the specifics of the economic policy." *Ante,* at 2177. Because this standard is neither supported by our prior precedent nor sound as a matter of policy, I dissent.

Immunity from antitrust liability under the state-action doctrine was first established in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). As noted by the majority, in *Parker,* we relied on principles of federalism in concluding that the Sherman Act did not apply to state officials administering a regulatory program enacted by the state legislature. We concluded that state action is exempt from antitrust liability, because in the Sherman Act Congress evidences no intent to "restrain state action or official action directed by a state." *Id.,* ⌊642at 351, 63 S.Ct., at 312.[1] "The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 56, 105 S.Ct. 1721, 1726, 85 L.Ed.2d 36 (1985) (footnote omitted).

We developed our present analysis for state-action immunity for private actors in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). We held in *Midcal* that our prior precedent had granted state-action immunity from antitrust liability to conduct by private actors where a program was "clearly articulated and affirmatively expressed as state policy [and] the policy [was] actively supervised by the State itself." *Id.,* at 105, 100 S.Ct., at 943 (internal quotation marks and citation omitted). In *Midcal,* we found the active supervision requirement was not met because under the California statute at issue, which required liquor retailers to charge a certain percentage above a price "posted" by area wholesalers, "[t]he State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers." *Id.,* at 100, 100 S.Ct., at 940. We noted that the state-action defense does not allow the States to authorize what is nothing more than private price fixing. *Id.,* at 105, 100 S.Ct., at 943.

In each instance since *Midcal* in which we have concluded that the active supervision requirement for state-action immunity was not met, the state regulators lacked authority, under state law, to review or reject the rates or action taken ⌊643by the private actors facing antitrust liability.[2] Our most recent formulation of the "active supervision" re-

1. The Court states that "[c]ontinued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls," *ante,* at 2176. However, in *Parker,* we held that the Sherman Act simply does not apply to conduct regulated by the State. The enforcement of the national antitrust policy, as embodied in the antitrust laws, may grant individuals more freedom to compete in our free market system, but it does not implicate the freedom of the States in deciding whether to regulate.

2. In *324 Liquor Corp. v. Duffy,* 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987), we held that a New York statute failed to shelter private actors from antitrust liability because the state legislation required retailers to charge 112% of the price "posted" by wholesalers. The New York statute, like the California statute at issue in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), gave no power to the state agency to review or establish the reasonableness of the price schedules "posted" by the wholesal-

quirement was announced in *Patrick v. Burget,* 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), where we concluded that to satisfy the "active supervision" requirement, "state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.,* at 101, 108 S.Ct., at 1663. Until today, therefore, we have never had occasion to determine whether a state regulatory program which gave state officials authority—"power"—to review and regulate prices or conduct, might still fail to meet the requirement for active state supervision because the State's regulation was not sufficiently detailed or rigorous.

Addressing this question, the Court of Appeals in this case used the following analysis:

> " 'Where, as here, the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.' " 922 F.2d 1122, 1136 (CA3 1991), quoting *New England Motor Rate Bureau, Inc. v. FTC,* 908 F.2d 1064, 1071 (CA1 1990).

The Court likens this test to doing away all together with the active supervision requirement for immunity based on state action. But the test used by the Court of Appeals is ⌊644much more closely attuned to our "have and exercise power" formulation in *Patrick v. Burget* than is the rule adopted by the Court today. The Court simply does not say just how active a State's regulators must be before the "active supervision" requirement will be satisfied. The only guidance it gives is that the inquiry should be one akin to causation in a negligence case; does the State play "a substantial role in determining the specifics of the economic policy." *Ante,* at 2177. Any other formulation, we are told, will remove the active supervision requirement altogether as a practical matter.

I do not believe this to be the case.[3] In the States at issue here, the particular conduct was approved by a state agency. The agency manifested this approval by raising no objection to a required rate filing by the entity subject to regulation. This is quite consistent with our statement that the active supervision requirement serves mainly an "evidentiary function" as "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie v. Eau Claire,* 471 U.S. 34, 46, 105 S.Ct. 1713, 1720, 85 L.Ed.2d 24 (1985).

The Court insists that its newly required "active supervision" will "increase the States' regulatory flexibility." *Ante,* at 2178. But if private actors who participate, through a joint rate filing, in a State's "negative option" regulatory scheme may be liable for treble damages if they cannot prove that the State approved the specifics of a filing, the Court makes it highly unlikely that private actors will choose to participate in such a joint filing. This in turn *lessens* the States' regulatory flexibility, because as we have noted before, joint rate filings can improve the regulatory process by ensuring that the state agency has fewer filings to consider, allowing more resources to be expended on each filing. ⌊645*Southern Motor Carriers Rate Conference, Inc. v. United States, supra,* 471 U.S., at 51, 105 S.Ct. at 1723. The view advanced by the Court of Appeals does not sanction price fixing in areas regulated by a State "not inconsistent with the antitrust laws." *Ante,* at 2178. A State must establish, staff, and fund a program to approve

ers. *324 Liquor, supra,* 479 U.S., at 345, 107 S.Ct., at 726.

3. The state regulatory programs in *Midcal, supra, Patrick v. Burget,* 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), and *324 Liquor, supra,* would all fail to provide immunity for lack of active supervision under the test adopted by the Court of Appeals.

jointly set rates or prices in order for any activity undertaken by private individuals under that program to be immune under the antitrust laws.[4]

The Court rejects the test adopted by the Court of Appeals, stating that it cannot be the end of the inquiry. Instead, the party seeking immunity must "show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme." *Ante,* at 2179.[5] Such an inquiry necessarily puts the federal court in the position of determining the efficacy of a particular State's regulatory scheme, in order to determine whether the State has met the "requisite level of active supervision." *Ante,* at 2179. The Court maintains that the proper state-action inquiry does not determine whether a State has met some "normative standard" in its regulatory practices. *Ante,* at 2177. But the Court's focus on the actions taken by state regulators, *i.e.,* the way the State regulates, necessarily requires a judgment as to whether the State is sufficiently active—surely a normative judgment.

⌊646 The Court of Appeals found—properly, in my view—that while the States at issue here did not regulate respondents' rates with the vigor petitioner would have liked, the States' supervision of respondents' conduct was active enough so as to provide for immunity from antitrust liability. The Court of Appeals, having concluded that the Federal Trade Commission applied an incorrect legal standard, reviewed the facts found by the Commission in light of the correct standard and reached a different conclusion. This does not constitute a rejection of the Commission's factual findings.

I would therefore affirm the judgment below.

Justice O'CONNOR, with whom Justice THOMAS joins, dissenting.

Notwithstanding its assertions to the contrary, the Court has diminished the States' regulatory flexibility by creating an impossible situation for those subject to state regulation. Even when a State has a "clearly articulated policy" authorizing anticompetitive behavior—which the Federal Trade Commission concedes was the case here—and even when the State establishes a system to supervise the implementation of that policy, the majority holds that a federal court may later find that the State's supervision was not sufficiently "substantial" in its "specifics" to insulate the anticompetitive behavior from antitrust liability. *Ante,* at 2177. Given the threat of treble damages, regulated entities that have the option of heeding the State's anticompetitive policy would be foolhardy to do so; those that are compelled to comply are less fortunate. The practical effect of today's decision will likely be to eliminate so-called "negative option" regulation from the universe of schemes available to a State that seeks to regulate without exposing certain conduct to federal antitrust liability.

The Court does not dispute that each of the States at issue in this case *could have* supervised respondents' joint ratemaking; rather, it argues that "the potential for state super⌊647vision was not realized in fact." *Ante,* at 2179. Such an after-the-fact evaluation of a State's exercise of its supervisory

4. In neither of the examples cited by the majority as instances of state regulation not intended to authorize anticompetitive conduct would application of a less detailed active supervision test change the result. In *Patrick v. Burget, supra,* we concluded there was no immunity because the State did not have the authority to review the anticompetitive action undertaken by the peer review committee; in *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), it is unlikely that the clear articulation requirement under our current jurisprudence would be met with respect to the market for light bulbs.

5. It is not clear, from the Court's formulation, whether this is a separate test applicable only to negative option regulatory schemes, or whether it applies more generally to issues of immunity under the state-action doctrine.

powers is extremely unfair to regulated parties. Liability under the antitrust laws should not turn on how enthusiastically a state official carried out his or her statutory duties. The regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that its filings may receive. Thus, a party could engage in exactly the same conduct in two States, each of which had exactly the same policy of allowing anticompetitive behavior and exactly the same regulatory structure, and discover afterward that its actions in one State were immune from antitrust prosecution, but that its actions in the other resulted in treble-damages liability.

Moreover, even if a regulated entity could assure itself that the State will undertake to actively supervise its rate filings, the majority does not offer any guidance as to what level of supervision will suffice. It declares only that the State must "pla[y] a substantial role in determining the specifics of the economic policy." *Ante,* at 2177. That standard is not only ambiguous, but also runs the risk of being counterproductive. The more reasonable a filed rate, the less likely that a State will have to play any role other than simply reviewing the rate for compliance with statutory criteria. Such a vague and retrospective standard, combined with the threat of treble damages if that standard is not satisfied, makes "negative option" regulation an unattractive option for both States and the parties they regulate.

Finally, it is important to remember that antitrust actions can be brought by private parties as well as by government prosecutors. The resources of state regulators are strained enough without adding the extra burden of asking them to serve as witnesses in civil litigation and respond to allegations that they did not do their job.

For these reasons, as well as those given by THE CHIEF JUSTICE, I dissent.

WEST KEY NUMBER SYSTEM

504 U.S. 648, 119 L.Ed.2d 432

|648 BURLINGTON NORTHERN RAILROAD COMPANY, Petitioner,

v.

William D. FORD and Thomas L. Johnson.

No. 91–779.

Argued April 20, 1992.

Decided June 12, 1992.

Railroad employees brought suits against railroad under Federal Employers' Liability Act (FELA). The District Court, Thirteenth Judicial District, Yellowstone County, Russell K. Fillner and William J. Speare, JJ., denied employer's motion to change of venue to county where railroad claimed to have its principal place of business in the state. Employer brought interlocutory appeals. The Supreme Court of Montana, 819 P.2d 169, consolidated cases and affirmed, and certiorari was granted. The Supreme Court, Justice Souter, held that Montana's venue rules, permitting plaintiff to sue corporation incorporated in that state only in county of its principal place of business, but permitting suit in any county against corporation incorporated elsewhere, does not offend equal protection clause.

Affirmed.

Constitutional Law 🔑249(2)

Corporations 🔑500

Montana's venue rules, permitting plaintiff to sue corporation incorporated in that state only in county of its principal place of business, but permitting suit in any county against corporation incorporated elsewhere, do not offend equal protection clause; rules further legitimate state interest in adjustment of disparate interests of parties to law-

476 U.S. 447, 90 L.Ed.2d 445

⌊447FEDERAL TRADE COMMISSION, Petitioner

v.

INDIANA FEDERATION OF DENTISTS.

No. 84–1809.

Argued March 25, 1986.

Decided June 2, 1986.

Federal Trade Commission found that dental association rule forbidding members to submit x-rays to dental insurers in connection with claims forms constituted an unreasonable restraint of trade, and association sought judicial review. The Court of Appeals for the Seventh Circuit, 745 F.Supp. 1124, vacated Commission's order. Certiorari was granted. The Supreme Court, Justice White, held that: (1) policy was tested under the Rule of Reason analysis; (2) the policy, a form of horizontal agreement to withhold a particular service desired by customers, was an unreasonable restraint; and (3) restraint was not justified on basis of noncompetitive "quality of care" considerations or as consistent with supposed state policy against evaluation of dental x-rays by lay employees of insurers.

Reversed.

1. Administrative Law and Procedure ⟹788

Trade Regulation ⟹841

Federal Trade Commission's factual findings on issue of whether challenged conduct constitutes unfair method of competition under Federal Trade Commission Act are "conclusive," within meaning of review provision, if they are supported by such relevant evidence as reasonable mind might accept as adequate to support conclusion. Federal Trade Commission Act, §§ 5, 5(c), as amended, 15 U.S.C.A. §§ 45, 45(c).

See publication Words and Phrases for other judicial constructions and definitions.

2. Administrative Law and Procedure ⟹796

Trade Regulation ⟹834

Legal issues, that is, identification of governing legal standards and their application to facts found, are resolved by court reviewing Federal Trade Commission's finding of unfair competition, although courts are to give some deference to Commission's informed judgment that particular commercial practice is to be condemned as unfair. Federal Trade Commission Act, §§ 5, 5(c), as amended, 15 U.S.C.A. §§ 45, 45(c).

3. Trade Regulation ⟹761

Standard of "unfairness" of a commercial practice under the Federal Trade Commission Act is, by necessity, an exclusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons. Federal Trade Commission Act, § 5, as amended, 15 U.S.C.A. § 45.

4. Trade Regulation ⟹835

Once Federal Trade Commission has chosen particular legal rationale for holding certain commercial practice to be unfair, its decision must stand or fall on that basis and reviewing court may not consider other reasons why practice might be deemed unfair. Federal Trade Commission Act, §§ 5, 5(c), as amended, 15 U.S.C.A. §§ 45, 45(c).

5. Trade Regulation ⟹804

Evidence supported Federal Trade Commission's finding that members of dental association conspired among themselves to withhold x-rays requested by dental insurers for use in evaluating claims for benefits, conspiracy which allegedly unreasonably restrain trade, in that one of the primary, if not the primary, reason for association's existence was promulgation and enforcement of the so-called "work rule" against submission of x-rays in conjunction with insurance claim forms. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

6. Trade Regulation ⚩761

Federal Trade Commission may rely on common sense and economic theory in finding that a challenged business practice is an unfair method of competition under section 5 of the Federal Trade Commission Act. Federal Trade Commission Act, § 5, as amended, 15 U.S.C.A. § 45.

7. Trade Regulation ⚩806

Federal Trade Commission finding that, absent dental association rule, challenged as unreasonable restraint of trade, prohibiting member dentists from submitting x-rays in connection with insurance claims forms, individual dentists would have been subject to market forces of competition to cooperate with requests for information by their patients' insurers found support not only in common sense and economic theory but also in dental newsletters revealing that dentists themselves perceived that unrestrained competition tended to lead their colleagues to comply with insurer requests for x-rays. Federal Trade Commission Act, §§ 5, 5(c), as amended, 15 U.S.C.A. §§ 45, 45(c).

8. Trade Regulation ⚩804

Record supported Federal Trade Commission's finding that competition between dentists regarding compliance with request of patients' insurers for x-rays was diminished by dental association rule prohibiting furnishing of x-rays in conjunction with insurance claims forms, in that in area where association membership was most significant insurers were unable to obtain compliance with request for x-rays and were forced to resort to other, more costly, means of reviewing diagnosis for purposes of benefit determination. Federal Trade Commission Act, §§ 5, 5(c), as amended, 15 U.S.C.A. §§ 45, 45(c).

9. Monopolies ⚩18

Dental association policy requiring members to withhold x-rays from dental insurers in connection with evaluating plaintiffs' claims for benefit was tested under the Sherman Act Rule of Reason, rather than the per se analysis, notwithstanding that policy resembled a group boycott which are unlawful per se. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

10. Monopolies ⚩12(1.14)

Category of restraints classed as group boycotts is not to be expanded indiscriminately, and the per se approach is generally limited to cases in which firms with market power boycotts suppliers or customers in order to discourage them from doing business with a competitor. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

11. Monopolies ⚩12(18)

Court should be slow to condemn rules adopted by professional associations as unreasonable per se and to extend per se analysis to restraints imposed in the context of business relationships where economic impact of certain practices is not immediately obvious. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

12. Monopolies ⚩12(18)

Dental organization's policy requiring members to refuse to submit x-rays to dental insurers for use in benefits determinations constituted an unreasonable restraint of trade; policy took form of a horizontal agreement among members to withhold from their patients a particular service desired by the patients and there were no countervailing procompetitive virtues. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

13. Monopolies ⚩12(1.10)

Under Sherman Act restraint of trade analysis a refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them; absent some countervailing procompetitive virtue, such as creation of efficiencies in operation of a market or the provision of goods or services, such an agreement limiting consumer choice by impeding the ordinary give and take of the market place cannot be sustained under the Rule of Reason. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

14. Trade Regulation ⚖814

Even if the restriction placed on competition among dentists with respect to cooperation with insurer request for patient x-rays, as imposed by dental association policy of refusal to submit x-rays to insurer, was not sufficiently "naked" to call into play principle that absence of proof of market power does not justify naked restriction on price or output, Federal Trade Commission's failure to engage in detailed market analysis was not fatal to its finding of a violation of the Rule of Reason in view of showing of actual, sustained adverse effects of competition in those areas of the state where member dentists predominated and in view of fact that markets for dental services tend to be relatively localized. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

15. Trade Regulation ⚖814

Finding that conspiracy among members of dentist association to refuse to submit x-rays to dental insurers for use in benefits determinations constituted unreasonable restraint of trade was not precluded by Federal Trade Commission's failure to make any finding that the challenged policy resulted in provision of dentist services that were more costly than those that the patients and insurers would have chosen were they able to evaluate x-rays in conjunction with the claims forms, regardless of whether x-rays were completely useless to insurers and their patients in making an informed choice regarding the least costly adequate course of treatment; association could not preempt working of the market by deciding for itself that its customers did not need that which they demanded. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

16. Monopolies ⚖17(1.3)

A concerted and effective effort to withhold or make more costly information desired by consumers for the purpose of determining whether a particular purchase is cost-justified is likely enough to disrupt the proper function of the price-setting mechanism of the market that it may be condemned under the Rule of Reason analysis, even absent proof that it resulted in higher prices or the purchase of higher-priced services than would occur in its absence. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

17. Monopolies ⚖12(18)

Noncompetitive "quality of care" considerations did not justify dental association's "work rule" prohibiting member dentists from refusing to submit x-rays to dental insurers for use in benefits determinations; premises that provision of x-rays will have too great an impact and that it will lead to reduction of costs through selection of inadequate treatment amounts to nothing less than a frontal assault on basic policy of the Sherman Act and, in any event, there was no particular reason to believe that provision of information will be more harmful to consumers in the market for dental services than in other markets or that insurers who sacrificed quality in return for cost saving and, in fact, Federal Trade Commission, in finding an unreasonable restraint of trade, considered quality of care justification for withholding x-rays. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

18. Monopolies ⚖12(15.5)

That a particular practice may be unlawful is not, in itself, sufficient justification for collusion among competitors to prevent it; anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the state. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

19. Monopolies ⚷12(15.5)

Conspiracy among dentists, as embodied in association rule, to refuse to submit x-rays to insurers for use in benefits determinations was not immune from antitrust liability by virtue of state policy against the evaluation of dental x-rays by lay employees of insurers where there was no suggestion of any active supervision by the state. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1.

Syllabus *

Respondent organization of dentists in Indiana promulgated a policy requiring its members to withhold x rays from dental insurers in connection with evaluating patients' claims for benefits. The Federal Trade Commission (FTC) issued a cease-and-desist order, ruling that the policy constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act, since it amounted to a conspiratorial restraint of trade in violation of § 1 of the Sherman Act. The Court of Appeals vacated the FTC's order on the ground that it was not supported by substantial evidence, holding that the FTC's findings that respondent's x-ray policy was anticompetitive were erroneous; that the findings were inadequate because of the FTC's failure to define the market in which respondent allegedly restrained competition and to establish that respondent had the power to restrain competition in that market; and that the FTC erred in not determining whether the alleged restraint on competition among dentists had actually resulted in higher dental costs to patients and insurers.

Held:

1. The FTC's factual findings regarding respondent's x-ray policy are supported by substantial evidence. There is no dispute that respondent's members conspired among themselves to withhold x rays, and the FTC's finding that competition among dentists with respect to cooperation with insurers' requests for x rays was diminished where respondent held sway also finds adequate support in the record. Pp. 2016–2017.

2. Evaluated under the Rule of Reason, the FTC's factual findings are sufficient as a matter of law to establish a violation of § 1 of the Sherman Act, *i.e.*, an unreasonable restraint of trade, and hence a violation of § 5 of the FTC Act. Respondent's x-ray policy takes the form of a horizontal agreement among its members to withhold from their customers a particular service that they desire. Absent some countervailing procompetitive virtue, such an agreement cannot be sustained under the Rule of Reason. This conclusion is not precluded by the absence of specific findings as to the market in which respondent allegedly restrained competition or as to the power of respondent's members in that market or by the FTC's failure to find that respondent's x-ray policy resulted in ⊥448 more costly dental services than the patients and insurers would have chosen if they were able to evaluate x rays in conjunction with claim forms. Nor do alleged noncompetitive "quality of care" considerations justify respondent's x-ray policy. And whether or not respondent's policy is consistent with Indiana's supposed policy against submission of x rays to insurers, it is not immunized from antitrust scrutiny. Anticompetitive collusion among private actors, even when consistent with state policy, acquires antitrust immunity only when it is actually supervised by the State, and there is no suggestion of such supervision here. Pp. 2017–2021.

745 F.2d 1124 (CA7 1984), reversed.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

WHITE, J., delivered the opinion for a unanimous Court.

Marcy J.K. Tiffany, for petitioner.

Bruce W. Graham, Lafayette, Ind., for respondents.

Justice WHITE delivered the opinion of the Court.

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

I

Since the 1970's, dental health insurers, responding to the demands of their policyholders, have attempted to contain the cost of dental treatment by, among other devices, limiting payment of benefits to the cost of the "least expensive yet adequate treatment" suitable to the needs of individual patients. Implementation of such cost-containment measures, known as "alternative benefits" plans, requires evaluation by the insurer of the diagnosis and recommendation of the treating dentist, either in advance of or following the provision of care. In order to carry out such evaluation, insurers frequently request dentists to submit, along with insurance claim forms requesting payment of benefits, any dental x rays that have been used by the dentist in examining the patient as well as other information concerning their diagnoses and treatment recommendations. Typically, claim forms and accompanying x rays are reviewed by lay claims examiners, who either approve payment of claims or, if the materials submitted raise a question whether the recommended course of treatment is in fact necessary, refer claims to dental consultants, who are licensed dentists, for further review. On the basis of the materials available, supplemented where appropriate by further diagnostic aids, the dental consultant may recommend that the insurer approve a claim, deny it, or pay only for a less expensive course of treatment.

Such review of diagnostic and treatment decisions has been viewed by some dentists as a threat to their professional independence and economic well-being. In the early 1970's, the Indiana Dental Association, a professional organization comprising some 85% of practicing dentists in the State of Indiana, initiated an aggressive effort to hinder insurers' ⌊450efforts to implement alternative benefits plans by enlisting member dentists to pledge not to submit x rays in conjunction with claim forms.[1] The Association's efforts met considerable suc-

1. A presentation made in 1974 by Dr. David McClure, an Association official and later one of the founders of respondent Indiana Federation of Dentists, is revealing as to the motives underlying the dentists' resistance to the provision of x rays for use by insurers in making alternative benefits determinations:

"The problems associated with third party programs are many, but I believe the 'Indiana Plan' [*i.e.*, the policy of refusing to submit x rays] to be sound and if we work together, we can win this battle. We are fighting an economic war where the very survival of our profession is at stake.

"How long can some of the leaders of dentistry in other states be so complacent and willing to fall into the trap that is being set for us. If only they would take the time, to see from whence come the arrows that are heading in our direction. The Delta Dental Plans have bedded down with the unions and have been a party to setting up the greatest controls that any profession has ever known in a free society....

"The name of the game is money. The government and labor are determined to reduce the cost of the dental health dollar at the expense of the dentist. There is no way a dental service can be rendered cheaper when the third party has to have its share of the dollar.

"Already we are locked into a fee freeze that could completely control the quality of dental care, if left on long enough." FTC Complaint Counsel's Trial Exhibit CX 372A, F, App. 104.

cess: large numbers of dentists signed the pledge, and insurers operating in Indiana found it difficult to obtain compliance with their requests for x rays and accordingly had to choose either to employ more expensive means of making alternative benefits determinations (for example, visiting the office of the treating dentist or conducting an independent oral examination) or to abandon such efforts altogether.

By the mid-1970's, fears of possible antitrust liability had dampened the Association's enthusiasm for opposing the submission of x rays to insurers. In 1979, the Association and a number of its constituent societies consented to a Federal Trade Commission order requiring them to cease and desist from further efforts to prevent member dentists from sub⊥451mitting x rays. *In re Indiana Dental Assn.*, 93 F.T.C. 392. Not all Indiana dentists were content to leave the matter of submitting x rays to the individual dentist. In 1976, a group of such dentists formed the Indiana Federation of Dentists, respondent in this case, in order to continue to pursue the Association's policy of resisting insurers' requests for x rays. The Federation, which styled itself a "union" in the belief that this label would stave off antitrust liability,[2] immediately promulgated a "work rule" forbidding its members to submit x rays to dental insurers in conjunction with claim forms. Although the Federation's membership was small, numbering less than 100, its members were highly concentrated in and around three Indiana communities: Anderson, Lafayette, and Fort Wayne. The Federation succeeded in enlisting nearly 100% of the dental specialists in the Anderson area, and approximately 67% of the dentists in and around Lafayette. In the areas of its strength, the Federation was successful in continuing to enforce the Association's prior policy of refusal to submit x rays to dental insurers.

In 1978, the Federal Trade Commission issued a complaint against the Federation, alleging in substance that its efforts to prevent its members from complying with insurers' requests for x rays constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act. Following lengthy proceedings including a full evidentiary hearing before an Administrative Law Judge, the Commission ruled that the Federation's policy constituted a violation of § 5 and issued an order requiring the Federation to cease and desist from further efforts to organize dentists to refuse to submit x rays to insurers. *In re Indiana Federation of Dentists*, 101 F.T.C. 57 (1983). The Commission based its ruling on the conclusion that the Federation's policy of requiring its members to withhold x rays amounted to a conspiracy in restraint of trade that was unreasonable and hence ⊥452unlawful under the standards for judging such restraints developed in this Court's precedents interpreting § 1 of the Sherman Act. *E.g., Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). The Commission found that the Federation had conspired both with the Indiana Dental Association and with its own members to withhold cooperation with dental insurers' requests for x rays; that absent such a restraint, competition among dentists for patients would have tended to lead dentists to compete with respect to their policies in dealing with patients' insurers; and that in those areas where the Federation's membership was strong, the Federation's policy had had the actual effect of eliminating such competition among dentists and preventing insurers from obtaining access to x rays in the desired manner. These findings of anticompetitive effect, the Commission concluded, were sufficient to establish that the restraint was unreasonable even absent

2. Respondent no longer makes any pretense of arguing that it is immune from antitrust liability as a labor organization.

proof that the Federation's policy had resulted in higher costs to the insurers and patients than would have occurred had the x rays been provided. Further, the Commission rejected the Federation's argument that its policy of withholding x rays was reasonable because the provision of x rays might lead the insurers to make inaccurate determinations of the proper level of care and thus injure the health of the insured patients: the Commission found no evidence that use of x rays by insurance companies in evaluating claims would result in inadequate dental care. Finally, the Commission rejected the Federation's contention that its actions were exempt from antitrust scrutiny because the withholding of x rays was consistent with the law and policy of the State of Indiana against the use of x rays in benefit determination by insurance companies. The Commission concluded that no such policy existed, and that in any event the existence of such a policy would not have justified the dentists' private and unsupervised conspiracy in restraint of trade.

⊥453The Federation sought judicial review of the Commission's order in the United States Court of Appeals for the Seventh Circuit, which vacated the order on the ground that it was not supported by substantial evidence. 745 F.2d 1124 (1984). Accepting the Federation's characterization of its rule against submission of x rays as merely an ethical and moral policy designed to enhance the welfare of dental patients, the majority concluded that the Commission's findings that the policy was anticompetitive were erroneous. According to the majority, the evidence did not support the finding that in the absence of restraint dentists would compete for patients by offering cooperation with the requests of the patients' insurers, nor, even accepting that finding, was there evidence that the Federation's efforts had prevented such competition. Further, the court held that the Commission's findings were inadequate because of its failure both to offer a precise definition of the market in which the Federation was alleged to have restrained competition and to establish that the Federation had the power to restrain competition in that market. Finally, the majority faulted the Commission for not finding that the alleged restraint on competition among dentists had actually resulted in higher dental costs to patients and insurers. The third member of the Court of Appeals panel concurred in the judgment solely on the ground that there was insufficient proof that cooperation with insurers was an element of dental services as to which dentists would tend to compete.

We granted certiorari, 474 U.S. 900, 106 S.Ct. 225, 88 L.Ed.2d 224 (1985), in order to consider the Commission's claim that in vacating the Commission's order the Court of Appeals misconstrued applicable principles of antitrust law and " 'misapprehended or grossly misapplied' the substantial evidence test," *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 523, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) (citation omitted). We now reverse.

⊥454II

[1] The issue is whether the Commission erred in holding that the Federation's policy of refusal to submit x rays to dental insurers for use in benefits determinations constituted an "unfair method of competition," unlawful under § 5 of the Federal Trade Commission Act. The question involves review of both factual and legal determinations. As to the former, our review is governed by 15 U.S.C. § 45(c), which provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." The statute forbids a court to "make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73, 54 S.Ct. 315, 318, 78 L.Ed. 655 (1934). Rather, as under the essentially identical "substantial evidence" standard for review of agency factfinding, the court must accept the Commission's findings of fact if they are supported by "such rele-

vant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951); see also *Beneficial Corp. v. FTC,* 542 F.2d 611, 616 (CA3 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977).

[2–4] The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are, by contrast, for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as "unfair." See *FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972); *Atlantic Refining Co. v. FTC,* 381 U.S. 357, 367–368, 85 S.Ct. 1498, 1505, 14 L.Ed.2d 443 (1965); *FTC v. Cement Institute,* 333 U.S. 683, 720, 68 S.Ct. 793, 812, 92 L.Ed. 1010 (1948). The standard of "unfairness" under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, see *FTC v. Cement Institute, supra,* at 689–695, 68 S.Ct., at 797–800, but also practices that the Commission determines are against public policy for other reasons, see *FTC v. Sperry & Hutchinson,* 405 ⌊455 U.S., at 244, 92 S.Ct., at 905. Once the Commission has chosen a particular legal rationale for holding a practice to be unfair, however, familiar principles of administrative law dictate that its decision must stand or fall on that basis, and a reviewing court may not consider other reasons why the practice might be deemed unfair. See *id.,* at 245–250, 92 S.Ct., at 906–08; cf. *SEC v. Chenery Corp.,* 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943). In the case now before us, the sole basis of the FTC's finding of an unfair method of competition was the Commission's conclusion that the Federation's collective decision to withhold x rays from insurers was an unreasonable and conspiratorial restraint of trade in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1. Accordingly, the legal question before us is whether the Commission's factual findings, if supported by evidence, make out a violation of Sherman Act § 1.

III

[5] The relevant factual findings are that the members of the Federation conspired among themselves to withhold x rays requested by dental insurers for use in evaluating claims for benefits, and that this conspiracy had the effect of suppressing competition among dentists with respect to cooperation with the requests of the insurance companies. As to the first of these findings there can be no serious dispute: abundant evidence in the record reveals that one of the primary reasons—if not *the* primary reason—for the Federation's existence was the promulgation and enforcement of the so-called "work rule" against submission of x rays in conjunction with insurance claim forms.

[6, 7] As for the second crucial finding —that competition was actually suppressed—the Seventh Circuit held it to be unsupported by the evidence, on two theories. First, the court stated that the evidence did not establish that cooperation with requests for information by patients' insurance companies was an aspect of the provision of dental services with respect to which dentists would, in the absence of some ⌊456 restraint, compete. Second, the court found that even assuming that dentists would otherwise compete with respect to policies of cooperating or not cooperating with insurance companies, the Federation's policy did not impair that competition, for the member dentists continued to allow insurance companies to use other means of evaluating their diagnoses when reviewing claims for benefits: specifically, "the IFD member dentists allowed insurers to visit the dental office to review and examine the patient's x rays along with all of the other diagnostic and clinical aids used in formulating a proper course of dental treatment." 745 F.2d, at 1143.

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

[8] ⌊457The Commission's finding that such competition was actually diminished where the Federation held sway also finds adequate support in the record. The Commission found that in the areas where Federation membership among dentists was most significant (that is, in the vicinity of Anderson and Lafayette) insurance companies were unable to obtain compliance with their requests for submission of x rays in conjunction with claim forms and were forced to resort to other, more costly, means of reviewing diagnoses for the purpose of benefit determination. Neither the opinion of the Court of Appeals nor the brief of respondent identifies any evidence suggesting that the Commission's finding that the Federation's policy had an actual impact on the ability of insurers to obtain the x rays they requested was incorrect. The lower court's conclusion that this evidence is to be discounted because Federation members continued to cooperate with insurers by allowing them to use more costly—indeed, prohibitively costly—methods of reviewing treatment decisions is unpersuasive. The fact remains that the dentists' customers (that is, the patients and their insurers) sought a particular service: cooperation with the insurers' pretreatment review through the forwarding of x rays in conjunction with claim forms. The Federation's collective activities resulted in the denial of the information the customers requested in the form that they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. To this extent, at least, competition among dentists with respect to cooperation with the requests of insurers was restrained.

IV

The question remains whether these findings are legally sufficient to establish a violation of § 1 of the Sherman Act—that is, whether the Federation's collective refusal to cooperate with insurers' requests for x rays constitutes an "unreasonable" restraint of trade. Under our precedents, a ⌊458restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be *"per se"* unreasonable, or because it violates what has come to be known as the "Rule of Reason," under which the "test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade v. United States*, 246 U.S., at 238, 38 S.Ct. at 244.

[9–11] The policy of the Federation with respect to its members' dealings with third-party insurers resembles practices that have been labeled "group boycotts": the policy constitutes a concerted refusal to deal on particular terms with patients covered by group dental insurance. Cf. *St. Paul Fire & Marine Insurance Co. v. Barry,* 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978); *Paramount Famous Lasky Corp. v. United States,* 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930). Although this Court has in the past stated that group boycotts are unlawful *per se,* see *United States v. General Motors Corp.,* 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), we decline to resolve this case by forcing the Federation's policy into the "boycott" pigeonhole and invoking the *per se* rule. As we observed last Term in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,* 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985), the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor—a situation obviously not present here. Moreover, we have been slow to condemn rules adopted by professional associations as unreasonable *per se,* see *National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), and, in general, to extend *per se* analysis to restraints imposed in the context ⊥459 of business relationships where the economic impact of certain practices is not immediately obvious, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979). Thus, as did the FTC, we evaluate the restraint at issue in this case under the Rule of Reason rather than a rule of *per se* illegality.

[12, 13] Application of the Rule of Reason to these facts is not a matter of any great difficulty. The Federation's policy takes the form of a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire—the forwarding of x rays to insurance companies along with claim forms. "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *National Society of Professional Engineers, supra,* 435 U.S. at 692, 98 S.Ct., at 1365. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., supra; Chicago Board of Trade, supra;* cf. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984)—such an agreement limiting consumer choice by impeding the "ordinary give and take of the market place," *National Society of Professional Engineers, supra,* 435 U.S. at 692, 98 S.Ct., at 1365, cannot be sustained under the Rule of Reason. No credible argument has been advanced for the proposition that making it more costly for the insurers and patients who are the dentists' customers to obtain information needed for evaluating the dentists' diagnoses has any such procompetitive effect.

[14] ⊥460 The Federation advances three principal arguments for the proposition that, notwithstanding its lack of competitive virtue, the Federation's policy of withholding x rays should not be deemed an unreasonable restraint of trade. First, as did the Court of Appeals, the Federation suggests that in the absence of specific findings by the Commission concerning the definition of the market in which the Federation allegedly restrained trade and the power of the Federation's members in that market, the conclusion that the Federation unreasonably restrained trade is erroneous as a matter of law, regardless of whether the challenged practices might be impermissibly anticompetitive if engaged in by persons who together possessed power in a specifically defined market. This contention, however, runs counter to the Court's holding in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., supra,* that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output," and that such a restriction "requires some competitive justification even in the absence of a detailed market analysis." *Id.*, 468 U.S., at 109–110, 104 S.Ct., at 2965. Moreover, even if the restriction imposed by the Federation is not sufficiently "naked" to call this principle into play, the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason. The Commission found that in two localities in the State of Indiana (the Anderson and Lafayette areas), Federation dentists constituted heavy majorities of the practicing dentists and that as a result of the efforts of the Federation, insurers in those areas were, over a period of years, actually unable to obtain compliance with their requests for submission of x rays. Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can ⌊461obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." 7 P. Areeda, Antitrust Law ¶ 1511, p. 429 (1986). In this case, we conclude that the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.[3]

[15, 16] Second, the Federation, again following the lead of the Court of Appeals, argues that a holding that its policy of withholding x rays constituted an unreasonable restraint of trade is precluded by the Commission's failure to make any finding that the policy resulted in the provision of dental services that were more costly than those that the patients and their insurers would have chosen were they able to evaluate x rays in conjunction with claim forms. This argument, too, is unpersuasive. Although it is true that the goal of the insurers in seeking submission of x rays for use in their review of benefits claims was to minimize costs by choosing the least expensive adequate course of dental treatment, a showing that this goal was actually achieved through the means chosen is not an essential step in establishing that the dentists' attempt to thwart its achievement by collectively refusing to supply the requested information was an unreasonable restraint of trade. A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the ⌊462market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence. *National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978).

3. Because we find that the Commission's findings can be sustained on this basis, we do not address the Commission's contention that the Federation's activities can be condemned regardless of market power or actual effect merely because they constitute a continuation of the restraints formerly imposed by the Indiana Dental Association, which allegedly had market power throughout the State of Indiana.

Moreover, even if the desired information were in fact completely useless to the insurers and their patients in making an informed choice regarding the least costly adequate course of treatment—or, to put it another way, if the costs of evaluating the information were far greater than the cost savings resulting from its use—the Federation would still not be justified in deciding on behalf of its members' customers that they did not need the information: presumably, if that were the case, the discipline of the market would itself soon result in the insurers' abandoning their requests for x rays. The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.

[17] Third, the Federation complains that the Commission erred in failing to consider, as relevant to its Rule of Reason analysis, noncompetitive "quality of care" justifications for the prohibition on provision of x rays to insurers in conjunction with claim forms. This claim reflects the Court of Appeals' repeated characterization of the Federation's policy as a "legal, moral, and ethical policy of quality dental care, requiring that insurers examine and review all diagnostic and clinical aids before formulating a proper course of dental treatment." 745 F.2d, at 1144. The gist of the claim is that x rays, standing alone, are not adequate bases for diagnosis of dental problems or for the formulation of an acceptable course of treatment. Accordingly, if insurance companies are permitted to determine whether they will pay a claim for dental treatment on the basis of x rays as opposed to a full examination of all the diagnostic aids available to the examining dentist, there is a danger that they will erroneously decline to pay for treatment that is in fact in the interest of ⊥463 the patient, and that the patient will as a result be deprived of fully adequate care.

The Federation's argument is flawed both legally and factually. The premise of the argument is that, far from having no effect on the cost of dental services chosen by patients and their insurers, the provision of x rays will have too great an impact: it will lead to the reduction of costs through the selection of inadequate treatment. Precisely such a justification for withholding information from customers was rejected as illegitimate in the *National Society of Professional Engineers* case. The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Society of Professional Engineers, supra,* 435 U.S. at 695, 98 S.Ct. at 1367. Moreover, there is no particular reason to believe that the provision of information will be more harmful to consumers in the market for dental services than in other markets. Insurers deciding what level of care to pay for are not themselves the recipients of those services, but it is by no means clear that they lack incentives to consider the welfare of the patient as well as the minimization of costs. They are themselves in competition for the patronage of the patients—or, in most cases, the unions or businesses that contract on their behalf for group insurance coverage—and must satisfy their potential customers not only that they will provide coverage at a reasonable cost, but also that that coverage will be adequate to meet their customers' dental needs. There is thus no more reason to expect dental insurance companies to sacrifice quality in return for cost savings than to believe this of consumers in, say, the market for engineering services. Accordingly, if noncompetitive quality-of-service justifications are inadmissible to justify the denial of information to consumers ⊥464 in the latter market, there is little reason to credit such justifications here.

In any event, the Commission did not, as the Federation suggests, refuse even to consider the quality-of-care justification for the withholding of x rays. Rather, the

Commission held that the Federation had failed to introduce sufficient evidence to establish such a justification: "IFD has not pointed to any evidence—or even argued—that any consumers have in fact been harmed by alternative benefits determinations, or that actual determinations have been medically erroneous." 101 F.T.C., at 177. The evidence before the Administrative Law Judge on this issue appears to have consisted entirely of expert opinion testimony, with the Federation's experts arguing that x rays generally provide an insufficient basis, standing alone, for dental diagnosis, and the Commission's experts testifying that x rays may be useful in assessing diagnosis of and appropriate treatment for a variety of dental complaints. *Id.*, 384 U.S. at 128–132, 86 S.Ct., at 1322–23. The Commission was amply justified in concluding on the basis of this conflicting evidence that even if concern for the quality of patient care could under some circumstances serve as a justification for a restraint of the sort imposed here, the evidence did not support a finding that the careful use of x rays as a basis for evaluating insurance claims is in fact destructive of proper standards of dental care.[4]

[18, 19] ⊥465In addition to arguing that its conspiracy did not effect an unreasonable restraint of trade, the Federation appears to renew its argument, pressed before both the Commission and the Court of Appeals, that the conspiracy to withhold x rays is immunized from antitrust scrutiny by virtue of a supposed policy of the State of Indiana against the evaluation of dental x rays by lay employees of insurance companies. See Brief for Respondent 25–26, and n. 10. Allegedly, such use of x rays by insurance companies—even where no claim was actually denied without examination of an x ray by a licensed dentist—would constitute unauthorized practice of dentistry by the insurance company and its employees. The Commission found that this claim had no basis in any authoritative source of Indiana law, see 101 F.T.C., at 181–183, and the Federation has not identified any adequate reason for rejecting the Commission's conclusion. Even if the Commission were incorrect in its reading of the law, however, the Federation's claim of immunity would fail. That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. See *Fashion Originators' Guild of America, Inc. v. FTC,* 312 U.S. 457, 468, 61 S.Ct. 703, 708, 85 L.Ed. 949 (1941). Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the State. See *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 57, 105 S.Ct. 1721, 1727, 85 L.Ed.2d 36 (1985). There is no suggestion of any such active supervision here; accordingly, whether or not the policy the Federation has taken upon itself to advance is consistent with the policy of the State of Indiana, the Federation's activities are subject to Sherman Act condemnation.

V

The factual findings of the Commission regarding the effect of the Federation's policy of withholding x rays are supported⊥466 by substantial evidence, and those

4. It is undisputed that lay claims examiners employed by insurance companies have no authority to deny claims on the basis of examination of x rays; rather, initial screening of x rays serves only as a means of identifying cases that merit further scrutiny by the licensed dentists serving as consultants to the insurers. Any recommendation that benefits be denied or a less expensive course of treatment be pursued is based on the professional judgment of a licensed dentist that the materials available to him—x rays, claim forms, and whatever further diagnostic aids he chooses to consult—are sufficient to indicate that the treating dentist's recommendation is not necessary to the health of the patient. There is little basis for concluding that, where such a divergence of professional judgment exists, the treatment recommendation made by the patient's dentist should be assumed to be the one that in fact represents the best interests of the patient.

findings are sufficient as a matter of law to establish a violation of § 1 of the Sherman Act, and, hence, § 5 of the Federal Trade Commission Act. Since there has been no suggestion that the cease-and-desist order entered by the Commission to remedy this violation is itself improper for any reason distinct from the claimed impropriety of the finding of a violation, the Commission's order must be sustained. The judgment of the Court of Appeals is accordingly

Reversed.

476 U.S. 467, 90 L.Ed.2d 462

⌊467Otis R. BOWEN, Secretary of Health and Human Services, et al., Petitioners

v.

CITY OF NEW YORK et al.

No. 84–1923.

Argued Feb. 26, 1986.

Decided June 2, 1986.

On challenge to procedure utilized by Social Security Administration in determination of original and continuing eligibility of claimants for disability benefits, the United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, 578 F.Supp. 1109, invalidated procedure used. On appeal, the Court of Appeals, 742 F.2d 729 affirmed. Petition for rehearing was denied, 755 F.2d 31. Secretary of Health and Human Services sought writ of certiorari. The Supreme Court, Justice Powell, held that: (1) equitable tolling of 60–day period for seeking judicial review of denial of claim by Secretary was proper, and (2) waiver of exhaustion of administrative remedies requirements as to those claimants whose time to pursue further administrative appeals had lapsed, as well as those claimants who still had time to seek review at time suit was filed was warranted.

Affirmed.

1. Administrative Law and Procedure 🔑722

Social Security and Public Welfare 🔑146, 175.5

Provision of Social Security Act requiring claimant for social security benefits or supplemental security income to bring court action within 60 days of final decision of Secretary of Health and Human Services denying claim is not jurisdictional, but rather, constitutes period of limitations. Social Security Act, § 205(g), as amended, 42 U.S.C.A. § 405(g).

2. Administrative Law and Procedure 🔑722

Social Security and Public Welfare 🔑146, 175.25

The 60–day limit under which claimant denied social security disability benefits or supplemental security income benefits must bring court action is condition on waiver of sovereign immunity which must be strictly construed. Social Security Act, § 205(g), as amended, 42 U.S.C.A. § 405(g).

3. Limitation of Actions 🔑104½

When application of doctrine of equitable tolling is consistent with Congress' intent in enacting particular statutory scheme, no justification exists for limiting doctrine to cases that do not involve monetary relief.

4. Administrative Law and Procedure 🔑722

Social Security and Public Welfare 🔑146, 175.25

Equitable tolling of 60–day requirement for seeking judicial review of decision of Secretary of Health and Human Services denying social security disability or supplemental security income benefits is consistent with Congress' intent in enacting provi-

U.S. DEPARTMENT OF JUSTICE
Antitrust Division

MAKAN DELRAHIM
Assistant Attorney General

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401 / (202) 616-2645 (Fax)

August 28, 2019

[redacted]

Re: Reported Agreement Regarding Emissions Standards

Dear [redacted]:

The Antitrust Division of the U.S. Department of Justice has learned through recent media reports that [redacted], and its competitors [redacted], may have entered into an agreement with each other in relation to certain standards of the California Air Resource Board. Although we have reached no conclusions, based on what has been reported, we are concerned that [redacted] agreement with the other three automobile companies may violate federal antitrust laws. In order to help us determine whether that is a possibility and what are the appropriate next steps we should take, we invite [redacted] to meet with us and to provide us with more information regarding the formation of that agreement, its context, and [redacted] communications with [redacted] regarding the agreement.

Thank you for your consideration and expected cooperation. Please contact my office at 202-514-2401 for scheduling purposes or should you have any questions.

Sincerely,

Makan Delrahim

by law". The court orally expressed the desire not to prevent plaintiff from filing under the saving clause contained in 38 U.S.C.A. § 445, if any such right existed, but this proviso was not incorporated in the final entry. Thereafter, on November 21, 1939, and within a year after the judgment of dismissal in the former case, Helen Hevenor Derrin, personally and as executrix of the estate of Harold Goodrich Derrin, deceased, filed the present action.

The question arises as to whether the present action has been filed within the time provided by 38 U.S.C.A. § 445. It is conceded that it was not filed in time, unless it falls within the saving clause, which reads as follows: "If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has elapsed."

[1] Since the court did not grant the government's motion to remove the former case from the operation of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, the proceedings were subject, thereto by force of Rule 86. The question is whether the dismissal cf the former action was a judgment "not affecting the merits". Rule 41(b) provides as to the involuntary dismissal in part, "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits".

[2] The court did not otherwise specify in its order for dismissal and, therefore, by force of the rule, the dismissal operated as an adjudication upon the merits. The case of Dumas v. United States, 10 Cir., 103 F.2d 676, and two other cases included in the same opinion are in a different situation. In none of these was the dismissal covered by Rule 41(b). The judgment in the instant case was, then, a judgment on the merits.

[3, 4] However, there were other reasons why the judgment should be given this effect. Under the decisions of the Supreme Court of the United States, failure to press claim for War Risk Insurance for a long period of time has been considered a circumstance of great weight in determining validity. Derrin allowed his policy to lapse in June, 1919, and filed suit thereon October 28, 1932, after a lapse of over thirteen years. No move was made after the judgment was set aside in November, 1933, to substitute the plaintiff here until July 26, 1938, a period of about five years, notwithstanding the United States in the meantime had moved for dismissal upon that ground. Plaintiff did not file the present suit until almost a year after the dismissal of the former case, and has never asked for the amendment of the former judgment. Over 22 years have gone by since the lapse of the policy.

On trial of the case, the evidence did not warrant submission of the question of permanent and total disability to the jury, and a verdict should have been directed. Upon review of the record the court so decided and set the verdict aside and granted a new trial on account of the error. The cause has not been brought to trial since. The lapse of almost five years between the granting of the order for new trial and the motion of the present plaintiff for substitution was sufficient ground to dismiss. Under the circumstances, dismissal upon the ground of a failure to substitute the present plaintiff with due diligence went to the merits. The present claim, therefore, was not filed within the time limited by the statute.

Order of dismissal will enter.

MANAKA v. MONTEREY SARDINE INDUSTRIES, Inc., et al.

No. 21772.

District Court, N. D. California, S. D.

Oct. 20, 1941.

1. Monopolies ⚷17(1)

Closing the market and thus interfering with transportation of considerable quantities of fish from the high seas into the state of California by vessels which intermingle while fishing with ships of foreign nations would be a direct restraint on "foreign commerce". 15 U.S.C.A. §§ 521, 522.

See Words and Phrases, Permanent Edition, for all other definitions of "Foreign Commerce".

2. Monopolies ⚩17(1)

Though associations authorized to do business as marketing agencies of aquatic products are not in themselves illegal combinations under statute, the mere fact that the Secretary of Commerce has not acted under the provisions of the statute permitting him to control monopoly does not indicate that a combination may not actually exist in violation of the statute. 15 U.S.C.A. §§ 521, 522.

3. Monopolies ⚩17(1)

A cooperative association of boat owners is not freed from the restrictive provisions of the Anti-Trust Act because it professes, in the interest of the conservation of important food fish, to regulate the price and the manner of taking fish unauthorized by legislation and uncontrolled by proper authority. 15 U.S.C.A. §§ 521, 522.

4. Monopolies ⚩17(1)

Where plaintiff, though he had a contract with canning company, was not permitted to fish in the vicinity of Monterey, California, and to market fish there because boat which he had chartered was not "assigned" to company in accordance with practice of cooperative boat owners' association which reserved the right to "assign" to each canning company a limited number of specified vessels, and plaintiff suffered loss as a direct result, association was engaged in an unlawful "combination in restraint of trade", and it was not absolved from liability to plaintiff even if a union innocently or by design assisted accomplishment of its purpose. 15 U.S.C.A. §§ 521, 522.

See Words and Phrases, Permanent Edition, for all other definitions of "Combination in Restraint of Trade".

Action by Frank Manaka, for himself and on behalf of the owner and crew of the fishing vessel Ocean Gift, against Monterey Sardine Industries, Inc., and its officers and directors, both personally and in their representative capacity, and others to recover triple damages because of an alleged conspiracy to restrain plaintiff from fishing and marketing his products.

Order for plaintiff in accordance with opinion.

Single, Bryant, Cook and Hays, of San Francisco, Cal., for plaintiff.

Hudson, Martin & Ferrante and Webster Street, all of Monterey, Cal., for defendants other than Del Mar Canning Co.

John Milton Thompson, of Monterey, Cal., for defendant Del Mar Canning Co.

Russell Zaches, of Monterey, Cal., for third party defendant, Seine & Line Fishermen's Union et al.

JAMES ALGER FEE, District Judge.

This case is brought by Frank Manaka against the Monterey Sardine Industries, Inc., certain members thereof as officers and individuals, and the Del Mar Canning Company, to recover triple damages, because of an alleged conspiracy to restrain him from fishing and marketing his products so obtained at Monterey, California. An outline of pertinent facts in evidence follows:

Frank Manaka, an American citizen of Japanese extraction, made a contract to fish for the Del Mar Canning Company at Monterey for the season of 1940. The name of the boat was left blank in the contract which was dated February 20, 1940. The reason for this omission was that Manaka intended to obtain a boat later. The first boat chartered by him was the "Zephyr", which became useless by reason of an explosion. He then obtained the "New Ambassador", which was later requisitioned by the United States. Finally, Manaka chartered the "Ocean Gift" from her owner at San Pedro, and brought her into the harbor at Monterey in accordance with his contract with the canner. He was not permitted to fish there during that season, although one boatload of fish which he caught was finally disposed of after a series of complications. He made an earnest effort by negotiations with members of the association and the canning company, personally and by his attorney, to have his contract recognized. Manaka returned to San Pedro harbor and fished there during the balance of the season, with the expressed purpose of minimizing damages. Action was then brought.

The Monterey Sardine Industries, Inc., moved to have the Seine and Line Fishermen's Union, Monterey Branch, joined as a third party defendant in the action. This was done, and the Union answered. At the beginning of the trial, however, plaintiff disclaimed any desire to ask relief against that defendant so impleaded, as did Monterey Sardine Industries, Inc., and Del Mar Canning Company. Thereupon, on motion of the Union asking dismissal of the action as to it, the court dismissed the Union from the case.

It was agreed at the preliminary conference that the sole question for trial was, as to who, if anyone, prevented Manaka from fishing in the vicinity of Monterey and marketing the fish there.

In this type of case, the scenery either conceals or gives character to the action. A combination to restrain commerce between the states or with foreign nations is not usually evidenced by contracts under seal. The existence thereof must be discovered by an inspection of the surrounding circumstances.

It should be determined, first, what the nature of the business is; second, what if any control is exercised by the Monterey Sardine Industries, Inc., and finally, whether such control of the business is lawful.

The historic Bay of Monterey on the coast of California has always been famous for its fisheries, which in recent years have been developed into an industry of considerable proportions. There have been erected on the Bay a number of canneries. Formerly, these plants operated without regulation. For some years, however, the State of California has, by legislation, exercised supervision and control over the canneries and reduction plants in order to conserve this important food supply. Although the constitutionality of such regulation was hotly contested, it is now settled that these measures of control do not constitute an interference with interstate commerce.[1] The canneries and reduction plants, therefore, operate under license and strict supervision.

The evidence shows that the bulk of fish canned and the products of the reduction plants at Monterey go into interstate commerce. These canning or reduction plants at Monterey process practically all the fish caught in California waters and on the high seas adjacent to Monterey. It may be also concluded that no other market is practicable or available for such fresh fish in quantities.

Fish are caught where they are found. Thus, a considerable proportion of the fish processed at Monterey come from the high seas. When a fishing boat goes out on the high seas from Monterey and fishes thereon, she commingles with the vessels and is subject to the laws established by agreement of the commercial nations of the world. When she brings these products into the territorial waters of the United States, she is engaged in commerce with foreign nations.[2]

[1] No purely local situation, such as the regulation of canning or reduction of fish at Monterey in California, is thus involved. The transportation by vessels, which intermingle while fishing with ships of foreign nations, of considerable quantities of fish from the high seas into the State of California is the gist of the controversy.[3] Even though fishing in coastal waters might be likewise restrained, an interference with this transportation from the high seas by closing the market would be a direct restraint upon foreign commerce.[4]

Second, the Monterey Sardine Industries, Inc., is a co-operative association of owners of boats which fish in the vicinity of the Bay.[5] The association markets all of the fish caught by its members and others which come into the Port of Monterey. By negotiations with the canners and the unions, the association sets the price at which the fish are to be sold. Furthermore, the association has a series of contracts with each canning or reduction plant at Monterey or vicinity. Such contracts cover the relations for a series of years and outline in great detail the dealing between the association and the individual canner. The terms of such contracts vest the control of the industry in the boat owners association,

1 Van Camp Sea Food Co. v. Department of Natural Resources, D.C., 30 F.2d 111; Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772.

2 Lord v. Goodall, N. & P. Steamship Co., 102 U.S. 541, 26 L.Ed. 224; The Abby Dodge v. United States, 223 U.S. 166, 32 S.Ct. 310, 56 L.Ed. 390.

3 United States v. Brims, 272 U.S. 549, 552, 553, 47 S.Ct. 169, 170, 71 L.Ed. 403. "It is a matter of no consequence that the purpose was to shut out non-union millwork made within Illinois, as well as that made without."

4 See C. E. Stevens Co. v. Foster & Kleiser Co., 311 U.S. 255, 61 S.Ct. 210, 85 L.Ed. 173.

5 See Title 15 U.S.C.A. § 521.

owing to the provision in all of these agreements to the effect that the canners agree to purchase all sardines from this defendant and from no one else. The evidence indicates that by virtue of these contracts and its relations with the unions, the organization does exercise effective monopolistic control over the business and over all fish caught in the Bay of Monterey and in coastal waters and the high seas in the vicinity.

The avowed purpose of the association is to limit the right to fish as far as possible to local boat owners, to assure each of them a profit and to maintain the price of fish.

The boat owners association does not sell the fish in bulk to the canners, but reserves the right to "assign" to each canning company a limited number of vessels specified by name in the yearly renewal agreements, which vessels are to supply that particular cannery with fish during a season. But the association does not agree that such vessels will catch a sufficient quantity of fish to keep the cannery in operation. The interest of the canner, therefore, is to obtain as many boats in the hands of competent fishermen as possible in order that the cannery may operate at capacity. The interest of the boat owners is that as few boats as possible fish, but particularly that boats owned by members of the association supply the fish to the canners. Vessels not locally owned are called "outside" boats. It is clear that the more "outside" boats there are fishing, the fewer local boats will be employed. The canners, on account of their interest, suggest and sometimes battle for their choice of boats and apparently, at times, try to have "outside" boats which are handled by competent fishermen. To this end the canner makes contracts with the masters or persons in charge of boats early in the year in order to secure the use of such boats for the next season. But the boat owners association finally "assigns" the vessels, and if the canner should have out too many contracts, the association could refuse to permit certain boats already under contract with the canner to operate, because the canner is bound to buy fish from no one but the association.

[2] Third, the associations authorized to do business as marketing agencies of aquatic products[6] are not in themselves illegal combinations, but the mere fact that the Secretary of Commerce has not acted under the provisions of the statute permitting him to control monopoly does not indicate that a combination may not actually exist in violation of the statute.[7]

[3] Such an association as that of the boat owners is not freed from the restrictive provisions of the anti-trust act, because they profess in the interest of the conservation of important food fish to regulate the price and the manner of taking such fish "unauthorized by legislation and uncontrolled by proper authority". "Surely reasonable men will agree that the public's interest in an important item of food supply should not be put in such jeopardy. If an exclusive and monopolistic arrangement * * * can be legally made as to fish, it can be made as to milk, as to meat, and as to other necessities of life", as my colleague, Judge McColloch, has so well said in the case of Columbia River Packers Ass'n v. Hinton, D.C., 34 F.Supp. 970, 975.

[4] This brings up the ultimate question of whether defendants did prevent Manaka from fishing and marketing the fish.

Manaka unquestionably desired to fish in the harbor of Monterey. His conduct in entering the contract with the Del Mar Canning Company early in the season and in hiring three vessels, one after the other, indicates that. He offered to pay back dues of his father, who was a former member of the association, and sought both personally and through his attorney to obtain permission to fish. It is probable that if Manaka had been on the ground at the time that the final contract was signed between Del Mar Canning Company and the Monterey Sardine Industries, Inc., wherein the boats were assigned to that cannery, the "Ocean Gift" would have been mentioned therein and the cannery could have forced his employment, but probably would have been required to make other concessions. As it was, Mr. David, President of the Del Mar Canning Company, in order, apparently, to get sufficient capacity for his cannery, insisted on fishing his own

6 15 U.S.C.A. § 522.

7 United States v. Borden Company, 308 U.S. 188, 206, 60 S.Ct. 182, 80 L.Ed. 181.

vessel, the "Santa Rosalia", which was also an "outside" boat. But Manaka did not arrive at Monterey until October eleventh, five days after this contract was signed. The Del Mar Canning Company professed to be willing to recognize the Manaka contract and to permit Manaka to fish for it, in accordance therewith, and did designate the "Ocean Gift" as one of its vessels, but this designation was never formally and directly made to the Monterey Sardine Industries, Inc. It is obvious that Del Mar Canning Company was under pressure and feared that if the "Ocean Gift" were directly designated that the boat owners would punish Del Mar Canning Company by taking away one of the other boats and refusing to permit it to fish. On the other hand, Del Mar Canning Company could not buy fish from Manaka without an "assignment" of the "Ocean Gift" to that cannery by the association. The contract bound the cannery to buy fish from the association and no one else. The only method by which fish were bought from the association was by accepting them from one of the "assigned" vessels. The real reason that Manaka could not fish was because the "Ocean Gift" was not "assigned" to Del Mar Canning Company. This was not by mere inaction upon the part of the association, but was positive action by the "assignment" of vessels under the monopolistic system of contracts, and the failure to include Manaka therein. The association was under no obligation to get employment for Manaka and his boat with Del Mar Canning Company, but he already had a contract with that company. His "assignment" would have given the Del Mar Canning Company eleven boats, however, and lessened the control by the association, while some boats owned by members of the association were "on the beach".

The net result was that Manaka could not fish at Monterey. The negotiations point the finger directly at the members of the association as the cause. Eventually, arrangements were made so that Manaka could unload and sell one boatload of fish, but not even this, at the Del Mar plant. The tacit understanding seems to have been that if these fish were cleared Manaka would leave Monterey, which he did. After he had gone to San Pedro, the association (without admitting liability!) offered to let him come back to fish after one of the "assigned" boats had been disabled.

Manaka suffered loss as a direct result of these acts.

There was a persistent attempt to bring the case in the category of a "labor dispute". Although the court dismissed the action against the Union because no other party claimed relief against it, the conduct of Mr. Alioto, its manager, should be considered in determining whether the Union was the cause of the denial of the right to fish to Manaka.

Mr. Alioto played a prominent part in preventing the unloading of the one boatload of fish caught by Manaka. The reason assigned was that the crew of the "Ocean Gift" had not been cleared by the Union before going fishing. But the members of Manaka's crew could have been properly certified because they carried a certificate from the local at San Pedro, or other members of the Monterey local could have been put in their places. The crucial objection according to Alioto was that the boat did not have a "job", and that there were other locally owned boats which were not fishing. Thus, if the "Ocean Gift" had been "assigned" to Del Mar Canning Company by the association, all essentials would have been satisfied and no objection, upon meeting of proper formal requirements, would have been made. If the Union did actually prevent Manaka from fishing, and there seems to have been no action by the Union in its meetings, it is strange there was no mention of such a condition when the Monterey Sardine Industries, Inc., offered to allow him to fish later. But if the Union authorized the action of Alioto, the insistence upon a "job" for the "Ocean Gift" as a condition precedent indicates an entente cordiale between the manager of the Union and the association to the end that Manaka be restrained from fishing until "assigned".

The situation is thus entirely different from that which existed in Hinton v. Columbia River Packers Association, 9 Cir., 117 F.2d 310, where the contest was between the packers of and dealers in fish and the Pacific Coast Fishermen's Union, which was a labor organization. The court held that the controversy was a labor dispute and the court had no jurisdiction to grant an injunction. Here, even if the Union had some part in preventing Manaka from fishing, the evidence clearly shows that the action was taken because of the attitude of Monterey Sardine Industries, Inc. Clearly, then, the action of the Union cannot assist defendants, because if the Union was acting in co-operation, the situation falls squarely within the principle laid down in United States v. Brims, supra, where the agreement of manufacturers of mill work, building contractors and union carpenters to check competition from non-union-made mill work coming in part from other states, was held to be conspiracy to restrain interstate commerce, notwithstanding the incidental inclusion of intrastate commerce as well. In United States v. Hutcheson, 312 U.S. 219, 233, 61 S.Ct. 463, 467, 85 L.Ed. 788, it is said: "Clearly, then, the facts here charged constitute lawful conduct under the Clayton Act unless the defendants cannot invoke that Act because outsiders to the immediate dispute also shared in the conduct." Here the point of attack was the combination of the members of the boat owners association against Manaka. Whether the Union innocently or by design assisted the accomplishment of the purpose of the members of the boat owners association, the fact cannot avail to absolve the latter.

The court finds for plaintiff on this issue. An appropriate order may be prepared according to stipulation, to refer the assessment of damages to a master, to be agreed upon by the parties, subject to the approval of the court.

GUANTANAMO SUGAR CO. v. UNITED STATES.

No. 43851.

Court of Claims.

Nov. 3, 1941.

Internal revenue ⚷2063

Where corporate taxpayer's payment by credit of income and profits tax overassessment was made after the filing of a petition with the Board of Tax Appeals for redetermination of taxes, the limitation provision of 1932 Revenue Act requiring as condition of recovery, where overpayment is found by the Board of Tax Appeals, that the tax be paid within two years of the filing of the petition, was not applicable and did not operate to bar recovery of the overpayment by the taxpayer. Revenue Act 1932, § 322(d), 26 U.S.C.A. Int.Rev.Acts, page 572.

On motion for new trial.

Prior judgment vacated and judgment entered for plaintiff in accordance with opinion.

For former opinion, see 38 F.Supp. 252.

This case comes before the court on plaintiff's motion for a new trial and amendment of findings; and on consideration thereof it is ordered this 3rd day of November, 1941, that said motion be and the same is allowed in part and overruled in part. Finding 28 of the findings of fact filed herein April 7, 1941, is withdrawn and a new finding substituted in lieu thereof reading as follows: "28. June 14, 1937, the Commissioner issued to plaintiff a certificate of overassessment for the fiscal year ending September 30, 1918, showing an overassessment of $20,562.59 and stating that $18,414.64 thereof was barred by the statute of limitations and that $2,147.95, with interest of $1,129.08, was allowable. The item of $2,147.95 represented a duplicate assessment of that amount made in November 1934, and was allowable for abatement."

It is further ordered that the opinion filed on April 7, 1941, be amended by striking out the first full paragraph on page 12 (38 F.Supp. 258, column 2, second paragraph) and substituting in lieu thereof the following: "June 14, 1937, the Commissioner issued to plaintiff a certificate of overassessment showing an overassessment of $20,562.59 for the year 1918, $18,414.64 of which was stated to be barred by the statute of limitations and $2,147.95 of which was allowable with interest of $1,129.08. This item represented a duplicate assessment by the Commissioner which was allowable for abatement, having never been paid."

The dismissal of the petition is vacated and withdrawn, and judgment is now entouchables." This was a dramatization of certain wholly fictional events supposed to have happened during the lifetime of Capone. The scenes and incidents pertaining to Capone were pure invention and were the product of the imagination of the script writers. The commercial exploitation of the name "Capone" succeeded so well that Desilu produced for broadcast on the American Broadcasting Company a weekly series also entitled "The Untouchables." This weekly broadcast continued for the period of five years. Throughout the series, the name "Capone" was used and, at times, his purported likeness.

Desi Arnaz was president of Desilu. He had been a boyhood friend of Sonny who pleaded with him to refrain from proceeding with the production of "The Untouchables." Arnaz refused to discuss the matter with Sonny. Apparently the profit motive outweighed any concern about injury to innocent people.

Another full-scale exploitation of the name, likeness and personality of Al Capone was created by Desilu in an episode called "The Big Train." This purportedly portrayed a plot by Capone to escape while being transferred from Atlanta prison to Alcatraz. This whole incident was completely fictitious. Nothing like it as far as Al Capone was concerned, ever occurred. In fact, a public protest of this broadcast was made to the Federal Communications Commission by James V. Bennett, Director of the Federal Bureau of Prisons.

Plaintiffs argue that the magnitude of the commercial exploitation of the name, likeness and personality of Capone by Desilu makes this a case of first impression. Plaintiffs point out that Desilu depicted more than one hundred fictitious murders, machine gunnings, beatings and other crimes of violence which were falsely attributed to Al Capone, and that for approximately six years, the widow and son were mentally tortured week after week.

The defendants have been profiting, not from Al Capone's life of crime, but from the commercial exploitation of publicity values inherent in his name, likeness and personality as portrayed in the telecasting of a series of wholly fictional crimes.

I think the right of privacy of Mae Capone and Sonny Capone was invaded by Desilu and other defendants whose conduct as hereinbefore described is, in my mind, reprehensible. Their fictitious products overstepped the bounds of decency. But the question is—do the widow and son have a claim for invasion of privacy under Illinois law?

Several of the cases relied on by defendants and, to some extent, in the majority opinion, deal with a specific crime or crimes which had been committed and which were a matter of public record. These cases should be distinguished from the situation where wholly fictitious crimes were depicted as exploiting the name of Capone.

However, in this diversity case, we must decide whether Illinois courts would hold that a remedy exists under Illinois law for the violation of the privacy of the widow and son of Capone. I conclude they would not. I must, therefore, concur in the result reached by the majority.

NATIONAL MACARONI MANUFACTURERS ASSOCIATION, et al., Petitioners,

v.

FEDERAL TRADE COMMISSION, Respondent.

No. 14713.

United States Court of Appeals
Seventh Circuit.
April 13, 1965.

Proceedings on petition for a review of an order of the Federal Trade Commission. The Court of Appeals, Hastings, Chief Judge, held that where all or the dominant firms in a market combine to fix composition of their product with design and result of depressing price of essential raw material, they violate rule against price fixing agreements.

Order accordingly.

1. Trade Regulation ⟹805

Evidence sustained finding that macaroni manufacturers' association, its officers and members had acted collectively to suppress competition in manufacture, sale and distribution of macaroni and spaghetti products and to fix prices of durum wheat, semolina and durum flour. Federal Trade Commission Act, § 5(a) (1), 15 U.S.C.A. § 45(a) (1).

2. Trade Regulation ⟹771

Where all or the dominant firms in a market combine to fix composition of their product with design and result of depressing price of essential raw material, they violate rule against price fixing agreements. Federal Trade Commission Act, § 5, 15 U.S.C.A. § 45.

3. Trade Regulation ⟹841

Findings of fact by Federal Trade Commission, including whether petitioners engaged in price fixing agreement, are conclusive on court if supported by substantial evidence. Federal Trade Commission Act, § 5, 15 U.S.C.A. § 45.

4. Trade Regulation ⟹840

Weight to be given to facts and circumstances, as well as inferences reasonably to be drawn therefrom, is for Federal Trade Commission. Federal Trade Commission Act, § 5, 15 U.S.C.A. § 45.

5. Trade Regulation ⟹804

Existence of conspiracy or proscribed agreement need not be established by direct evidence, and agreement may be inferred from acts and conduct of parties, as well as from surrounding circumstances.

6. Trade Regulation ⟹799, 841

Possibility of drawing either of two inconsistent inferences from evidence does not prevent Federal Trade Commission from drawing one, and if such an inference or finding is supported by substantial evidence, court is not free to set it aside even though court might have drawn a different inference.

Edward H. Hatton, Howard R. Barron, Sidney G. Saltz, Chicago, Ill., for petitioners. Raymond, Mayer, Jenner & Block, Chicago, Ill., of counsel.

J. B. Truly, Asst. Gen. Counsel, Alvin L. Berman, Atty., Federal Trade Commission, Washington, D. C., James McI. Henderson, Gen. Counsel, J. Richard Carr, Atty., for the Federal Trade Commission.

Before HASTINGS, Chief Judge, and SCHNACKENBERG and KNOCH, Circuit Judges.

HASTINGS, Chief Judge.

This case is before us on petition of National Macaroni Manufacturers Association (Association), its officers and member manufacturers of macaroni [1] and spaghetti products (petitioners), to review an order of Federal Trade Commission (Commission), respondent.

The order under review requires petitioners, in or in connection with the manufacture, sale or distribution, in commerce, of macaroni and related products, to cease and desist from entering into or carrying out any planned common course of action, understanding or agreement between any two or more of said petitioners (respondents below) or between anyone or more of said petitioners and others not parties hereto, to do or perform any of the following acts or things:

> "Fix or establish the kinds or proportions of ingredients to be used in producing macaroni and related products, or take any other concert-

1. The term "macaroni" or "macaroni products" refers to and includes macaroni, spaghetti, noodles and related products.

ed action, for the purpose of fixing or manipulating the price of such ingredients."

It is undisputed that the goods in question moved in commerce as "commerce" is defined in the Federal Trade Commission Act.

The complaint in this proceeding was issued by Commission on August 2, 1962. It charged Association, its officers and member manufacturers of macaroni and spaghetti products, with having acted collectively to suppress, lessen and eliminate competition in the manufacture, sale and distribution of such products and to fix or rig the prices of durum wheat, semolina and durum flour, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45(a)(1).[2]

The complaint charges, in essence, that the principal domestic manufacturers of macaroni products, acting through Association, entered into and carried out agreements and understandings to fix and determine the quality of macaroni products to the end that durum millers would offer a blend of durum and other types of wheat rather than 100% durum, and that the macaroni manufacturers would use this blend.

It was further charged that petitioners did so for the purpose of depressing the price of durum wheat and preventing its price from being established in the open market by free competition, the effect being to eliminate quality competition in macaroni products.

Petitioners generally denied the allegations of the complaint.

After full evidentiary hearings, the hearing examiner rendered his initial decision upholding the complaint and entering an order to cease and desist. On appeal, Commission concluded that the findings of fact and conclusions of law entered by the hearing examiner were correct, but modified his cease and desist order in minor respects. Commission filed a brief memorandum opinion in support of its order.

On this review, petitioners urge that Commission erred in holding that they had the design or purpose to depress the price of their basic raw materials (durum wheat); that petitioners' response to a shortage in the durum wheat crop was a reasonable attempt to cope with the shortage; and that Commission erred in holding their action to be an agreement, rather than a mere suggestion for voluntary action.

[1] In short, the critical question before us is whether the findings of Commission are supported by substantial evidence in the record.

From the record before us, the facts set out in the following narrative appear to be clearly established.

Association is a not-for-profit Illinois corporation. Its active membership consists of 84 of the 125 commercially important domestic manufacturers of macaroni and macaroni products. These 84 active members annually produce and sell macaroni products valued in excess of $100,000,000—70% of all such products sold in the United States.

The purpose of Association is to encourage the production of quality macaroni products. It gathers and disseminates information of importance to its members. It encourages the production and use of raw materials, particularly durum wheat, indispensable to high quality macaroni products.

It employs a full-time secretary, a research director and the services of a laboratory. It publishes a trade magazine, The Macaroni Journal. It organized and operates a separate corporation, National Macaroni Institute, to develop product promotion and consumer education. It set up a variety of committees to promote and improve the growth of durum wheat and to fight crop disease. It established a Standards Committee and a Trade Practices Rules Committee to work with

2. "(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

appropriate government agencies, including Federal Trade Commission.

Association holds meetings to exchange views on common problems of the industry, some of which are attended by durum wheat growers and the miller-suppliers of the active members. It is the only trade organization representing the industry.

Association's active members are in active competition with others competitive in the industry,[3] with others who produce and sell competitive products and with each other.

Macaroni products are manufactured from dry dough made from semolina (middlings of durum wheat in granulated form with a tolerance of 3% flour), durum flour (powder form of durum wheat), farina flour (powder form of any hard wheat other than durum) or any combination of these.

The highest quality macaroni products are made from 100% semolina and such products have the best consumer acceptance of all macaroni products. Manufacturers in the industry prefer to use 100% durum because it is easier to work with and results in a higher quality product with superior cooking tolerances and color. To reduce the durum content of a macaroni product results in an inferior product of lower quality. However, at times macaroni manufacturers engage in some blending and others use farina regularly.

Durum wheat is largely grown in parts of the states of North Dakota, South Dakota, Minnesota and Montana. Also, in western Canada and certain European countries. It commands a premium price over other classes of wheat. It is a spring crop harvested in the latter part of August. It is traded on the Minneapolis Grain Exchange, where supply and demand factors operate to establish price levels.

Growers of durum wheat and grain merchants who buy from growers constitute the supply factor. Manufacturers, millers and exporters constitute the demand factor. Nearly all of the durum wheat ground in this country is ground by seven mills in the Minneapolis, Minnesota area. These mills are associate members of Association.

Over the past ten years the demand for durum has stemmed almost entirely from domestic manufacturers in the industry, except in the years 1956–57, 1960–61 and 1961–62, when there was an export demand. It is estimated that Association members buy about 70% of the output of the durum mills.

There was a crop shortage of durum in 1953 as the result of crop damage. At an industry durum conference in Chicago, Illinois on August 13, 1953, sponsored by Association, the members adopted a resolution to the effect that durum millers would not make 100% semolina available to any buyer after August 14 (except to fulfill existing contracts), but would offer instead a 50-50 blend of semolina and farina (hard wheat). Some manufacturers objected on the ground that blending durum wheat should be their own prerogative.

Following this resolution, 100% semolina went off the market in 1953 and the 50-50 blend became the best product available. This situation continued until June, 1956, when another Association sponsored conference, because of improved crop conditions, resolved to discontinue the use of blends.

The reports of industry policy in The Macaroni Journal during the 1953–56 interval made clear that exporters had entered the open market and purchased durum supplies at prices higher than American millers were willing to pay; that there was a limit to how much premium the industry manufacturers could and would pay for durum; that if

3. Important manufacturers of macaroni and macaroni products, not members of Association, include Quaker Maid Division of Great Atlantic & Pacific Tea Company, Grocery Store Products, Kraft Foods, Campbell's Soup, H. J. Heinz, Butoni Macaroni Company and Vimco.

Association members had not taken such action the prices of durum would have skyrocketed; that the members thought a uniform product from the durum mills (50-50 blend) would give the industry greater stability in quality and price; and that the industry would revert back to the use of 100% durum when durum wheat would sell at not too great a premium over breadwheats.

After the June, 1956 Association sponsored industry conference, the industry went back to the 100% durum standard and continued thereon until August, 1961.

In the spring of 1961, it became apparent that a lack of moisture was leading to a drought situation and that there would be a short crop of durum wheat in the 1961–62 harvest. Similar crop shortages were experienced in foreign countries.

The Journal reported in January, 1961 that Italy had purchased substantial amounts of American and Canadian wheat. The May, 1961 Journal reported substantial sales in March to France and Germany. The June, 1961 Journal reported the export sale of 2,000,000 bushels, as well as the complete sellout of Canadian durum from the 1960–61 crop. In June 1961, exporters bought 6,000,000 bushels of durum wheat from the Commodity Credit Corporation.

At Association's July, 1961 annual meeting, the shortage of durum was discussed and the importation of some 5,000,000 bushels of Canadian durum from the 1961–62 crop was considered. (This wheat was not imported.) A resolution was adopted asking the Secretary of Agriculture to curtail further exports of durum, stating that the domestic market might "be forced to use wheats of inferior quality other than durum, thereby placing the domestic macaroni industry at a competitive disadvantage to imported products made with 100% durum semolina."

The Secretary of Agriculture rejected this resolution explaining that this request "would unnecessarily discriminate against the producers of durum wheat and adversely affect their markets."

At the July, 1961 meeting, it was agreed that an industry meeting of growers, millers and manufacturers would be held in August. The Journal reported this meeting would be held in Minneapolis "after final harvest information is available to determine the course of industry action."

The Association sponsored meeting was held on August 15, 1961. It was attended by millers, growers, manufacturers and others interested in the industry. The crop situation, the July, 1961 durum carry over, additional current sales for export and the probable available supply of durum in the 1961–62 crop year were discussed.

A milling company official, a Mr. Von Blon, outlined several alternatives in view of the prospective crop shortage. The millers and manufacturers could continue to use 100% durum which would gradually deplete the available supplies and lead to the payment of "astronomical prices." They could cease using durum altogether with a resulting sales loss because of consumer prejudice against inferior products. Finally, the industry could switch to a 50-50 durum and hard wheat blend, which would "provide the best products available to macaroni manufacturers this year, but will minimize price fluctuations for raw materials." He said, "The more we can spread out the buying of durum wheat, the better the possibility that the fluctuation in the price of durum wheat will be held within reasonable limits." He concluded by requesting the macaroni manufacturers present to provide the millers with an "expression of opinion."

The manufacturer-members of Association then met separately and adopted a resolution that:

> "Effective September 1, durum millers should offer a blend of 50% durum and 50% other types of wheat whose characteristics most closely resemble durum and that macaroni manufacturers should use this 50-50

blend to maintain the highest quality possible to best utilize the available supply of durum during the current crop year."

Thereafter, most of the manufacturers followed the course outlined in the foregoing resolution, although a few did not. The amount of 100% semolina sold domestically after August, 1961 was negligible. Some semolina was available in October, 1961, but little was sold because of the high price.

During the crop year 1961–62, approximately 14,000,000 bushels of durum were milled for domestic use, a drop of some 9,000,000 bushels from the preceding crop year. Total purchases of durum by exporters during 1961–62 approximated 16,000,000 bushels. At the end of crop year, June 30, 1962, there was a domestic durum carry over of 5,000,000 bushels. Thus, by failure to use the carry over and to compete in the export market, the mills failed to use about 21,000,000 bushels of available durum wheat during the 1961–62 crop year.

From all of this the Commission found that with the background of petitioners' arrangements and activities in 1953, followed by their course of action taken in 1961, the action taken in fixing the composition of macaroni products was clearly the result of agreement. It found that the agreement was intended to ward off price competition for durum wheat in short supply by lowering total industry demand to the level of the available supply. It found that since the macaroni industry is the only market for durum, and since the parties to this agreement dominate the domestic macaroni industry, that the agreement actually affected in a substantial degree the price of durum wheat during the period the agreement was in effect.

[2] Commission concluded that "where all or the dominant firms in a market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material, they violate the rule against price-fixing agreements as it has been laid down by the Supreme Court." We agree.

We have carefully examined the record which further supplements the foregoing narrative and the findings of the hearing examiner as accepted by Commission. We need not further detail the facts here.

The standards governing a judicial review of Commission's decision are well established and limit the scope of our review in this and similar cases. We find no unusual circumstances in the instant matter to sanction any departure therefrom.

[3] Findings of fact by Commission, including whether petitioners engaged in a price-fixing agreement, if supported by substantial evidence, are conclusive. National Lead Company v. Federal Trade Commission, 7 Cir., 227 F.2d 825, 832–833 (1955), rev'd on other grounds, 352 U.S. 419, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957); Fort Howard Paper Co. v. Federal Trade Comm., 7 Cir., 156 F.2d 899, 906–907 (1946), cert. den. 329 U.S. 795, 67 S.Ct. 481, 91 L.Ed. 680; Phelps Dodge Refining Corp. v. Federal Trade Comm., 2 Cir., 139 F.2d 393, 395 (1943).

[4] The weight to be given to the facts and circumstances, as well as the inferences reasonably to be drawn therefrom, is for Commission. Federal Trade Comm. v. Pacific States Paper Ass'n, 273 U.S. 52, 63, 47 S.Ct. 255, 71 L.Ed. 534 (1927); Independent Grocers Alliance Dist. Co. v. Federal Trade Comm., 7 Cir., 203 F.2d 941, 945 (1953); Fort Howard Paper Co. v. Federal Trade Comm., supra, 156 F.2d at 907.

[5] Existence of a conspiracy or proscribed agreement need not be established by direct evidence. The agreement may be inferred or implied from the acts and conduct of the parties, as well as from the surrounding circumstances. National Lead Company v. Federal Trade Commission, supra, 227 F.2d at 832–833; Triangle Conduit & Cable Co. v. Federal Trade Comm., 7 Cir., 168 F.2d 175, 179–180 (1948), affirmed sub nom. Clayton Mark & Co. v. Federal Trade Commission, 336 U.S. 956, 69 S.Ct. 888, 93 L.Ed.

1110 (1949); Fort Howard Paper Co. v. Federal Trade Comm., supra, 156 F.2d at 905; United States Maltsters Ass'n v. Federal Trade Comm, 7 Cir., 152 F.2d 161, 162 (1945).

[6] We reject the contention of petitioners, as did Commission, that the 1961 action they took was not an agreement but was merely a suggestion to Association members. It is well settled that the possibility of drawing either of two inconsistent inferences from the evidence does not prevent Commission from drawing one of them. If such an inference or finding is supported by substantial evidence, we are not free to set it aside even though we might have drawn a different inference. National Labor Relations Board v. Southern Bell Co., 319 U.S. 50, 60, 63 S.Ct. 905, 87 L.Ed. 1250 (1943); National Labor Relations Board v. Nevada Consol. Copper Co., 316 U.S. 105, 106–107, 62 S.Ct. 960, 86 L.Ed. 1305 (1942).

The Supreme Court has held "that price fixing is contrary to the policy of competition underlying the Sherman Act [4] and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices." United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309–310, 76 S.Ct. 937, 940, 100 L.Ed. 1209 (1956). The combination found in the instant case is illegal per se. Id. at 310, 76 S.Ct. 937; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221–222, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

We hold that under the record as a whole there is substantial support for the findings of Commission that the course of industry action entered into by petitioners, in combination, to unlawfully fix prices constituted a *per se* violation of Section 5 of the Federal Trade Commission Act.

In view of this holding, it would serve no useful purpose to further consider and cite additional authorities relating to variations or extensions of the rule laid down in United States v. McKesson & Robbins, Inc. supra.

It seems appropriate to note here that, in the instant case, Commission did not hold "that all efforts at product standardization, or all buying agencies or other cooperative buying arrangements, or all attempts to cope with scarcity or other conditions of economic dislocation, are unlawful under the antitrust laws."

It follows, therefore, that Commission's order under review will be approved and enforced. It is so ordered.

Order enforced.

4. Violations of the Sherman Act constitute violations of Section 5 of the Federal Trade Commission Act. Federal Trade Comm. v. Cement Institute, 333 U.S. 683, 690, 68 S.Ct. 793, 92 L.Ed. 1010 (1948).

Alphonse KANTON, Movant-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.
No. 14860.

United States Court of Appeals
Seventh Circuit.
April 21, 1965.

Proceeding on defendant's motion to correct that part of sentence which he claimed was illegal. The United States District Court for the Northern District of Illinois, Eastern Division, Michael L.

and will try to make the punishment fit the crime. Still and all, I tend to think, for the reasons the plurality gives, that § 1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion. And I'd go further: In those ways, § 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.

But whatever the wisdom or folly of § 1519, this Court does not get to rewrite the law. "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress." *Rodgers,* 466 U.S., at 484, 104 S.Ct. 1942. If judges disagree with Congress's choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute Congress enacted with an alternative of our own design.

I respectfully dissent.

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, Petitioner

v.

FEDERAL TRADE COMMISSION.

No. 13–534.

Argued Oct. 14, 2014.

Decided Feb. 25, 2015.

Background: North Carolina State Board of Dental Examiners petitioned for review of an order of the Federal Trade Commission (FTC), 2011 WL 11798463, which prohibited board from directing non-dentists to stop providing teeth whitening services or products, discouraging or barring the provision of those goods and services, or communicating to certain third parties that non-dentist teeth whitening goods or services violated state's Dental Practice Act. The United States Court of Appeals for the Fourth Circuit, Shedd, Circuit Judge, 717 F.3d 359, denied petition. Board's petition for writ of certiorari was granted.

Holding: The Supreme Court, Justice Kennedy, held that board was nonsovereign entity controlled by active market participants that did not receive active supervision by state, and thus board's anticompetitive actions were not entitled to *Parker* state-action immunity from federal antitrust law.

Affirmed.

Justice Alito, filed dissenting opinion in which Justices Scalia and Thomas joined.

1. Antitrust and Trade Regulation ⚷902

Nonsovereign actor controlled by active market participants enjoys *Parker* state-action immunity from federal antitrust liability for anticompetitive conduct only if: (1) challenged restraint imposed by nonsovereign actor is one clearly articulated and affirmatively expressed as state policy; and (2) that policy is actively supervised by the state. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

2. Antitrust and Trade Regulation ⚷902

Statutes ⚷1499

Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, *Parker* state-action immunity from federal antitrust liability is disfavored, much as are repeals by implication.

Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

3. Antitrust and Trade Regulation ⚷902

Entity may not invoke *Parker* state-action immunity from federal antitrust liability unless the entity's actions in question are an exercise of the state's sovereign power. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

4. Antitrust and Trade Regulation ⚷902

State legislation and decisions of a state supreme court, acting legislatively rather than judicially, are ipso facto exempt from the operation of federal antitrust laws under the *Parker* state-action immunity doctrine because such actions by a state legislature or supreme court are an undoubted exercise of state sovereign authority. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5. Antitrust and Trade Regulation ⚷902

"Nonsovereign actor" that is not always entitled to *Parker* state-action immunity from federal antitrust liability is an actor whose conduct does not automatically qualify as that of the sovereign state itself. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

6. Antitrust and Trade Regulation ⚷902

State agencies are not simply by their governmental character sovereign actors entitled to *Parker* state-action immunity from federal antitrust liability, rather, *Parker* immunity for state agencies requires more than a mere facade of state involvement to ensure the states accept political accountability for anticompetitive conduct they permit and control. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

7. Antitrust and Trade Regulation ⚷902

Under *Parker* state-action immunity doctrine and the Supremacy Clause, the states' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations of regulatory power over a market to active market participants. U.S.C.A. Const. Art. 6, cl. 2; Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

8. Antitrust and Trade Regulation ⚷902

Parker state-action immunity from federal antitrust liability for nonsovereign actors requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the state to regulate their own profession, result from procedures that suffice to make the conduct the state's own. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

9. Antitrust and Trade Regulation ⚷902

Whether *Parker* state-action immunity from federal antitrust liability extends to anticompetitive conduct of nonsovereign actors requires a determination not as to whether the challenged conduct is efficient, well-functioning, or wise, but rather whether the anticompetitive conduct engaged in by the nonsovereign actors should be deemed state action and thus shielded from the antitrust laws. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

10. Antitrust and Trade Regulation ⚷902

To meet "clear articulation" requirement for extending *Parker* state-action immunity from federal antitrust liability to anticompetitive conduct of nonsovereign actor, displacement of competition must be the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature to the nonsovereign actor. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

11. Antitrust and Trade Regulation ⚷902

To meet "active supervision" requirement for extending *Parker* state-action immunity from federal antitrust liability to anticompetitive conduct of a nonsovereign actor, state officials must have and exercise power to review particular anticompetitive acts of the nonsovereign actor and disapprove those acts that fail to accord with state policy. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

12. Antitrust and Trade Regulation ⚷902, 903, 904

Active supervision by the state is an essential prerequisite of extending *Parker* state-action immunity from federal antitrust liability to anticompetitive conduct of any nonsovereign entity, public or private, controlled by active market participants in the market affected by the challenged conduct. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

13. Antitrust and Trade Regulation ⚷904

North Carolina State Board of Dental Examiners was nonsovereign entity controlled by active market participants that did not receive active supervision by state when interpreting state Dental Practice Act (Act) as covering teeth whitening and issuing cease-and-desist letters to nondentist teeth whiteners, and thus board's anticompetitive actions were not entitled to *Parker* state-action immunity from federal antitrust law; state delegated board to regulate dentistry but majority of board members were dentists who may have been pursuing private interests when they engaged in challenged conduct. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; West's N.C.G.S.A. § 90–22(a, b).

14. Antitrust and Trade Regulation ⚷904

State board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must be subject to active supervision by the state in order for the board to invoke *Parker* state-action antitrust immunity from federal antitrust liability for the board's anticompetitive conduct. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

15. Antitrust and Trade Regulation ⚷902

In determining whether *Parker* state-action immunity from federal antitrust liability extends to anticompetitive conduct of nonsovereign entity, requisite active supervision of entity by state need not entail day-to-day involvement in entity's operations or micromanagement of its every decision, rather, the question is whether state's review mechanisms provide realistic assurance that nonsovereign entity's anticompetitive conduct promotes state policy, rather than merely the entity's individual interests. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

16. Antitrust and Trade Regulation ⚷902

To meet active supervision requirement for extending *Parker* state-action immunity from federal antitrust liability to anticompetitive conduct of any nonsovereign entity, state supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, state supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, and state supervisor may not itself be an active market participant in the market affected by the anticompetitive conduct. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Syllabus *

North Carolina's Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." The Board's principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is "the practice of dentistry." Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board's motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in all respects.

Held: Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 1109 – 1117.

(a) Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 1109 – 1110.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if " 'the challenged restraint ... [is] clearly articulated and

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

affirmatively expressed as state policy,' and . . . 'the policy . . . [is] actively supervised by the State.' " *FTC v. Phoebe Putney Health System, Inc.,* 568 U.S. ——, ——, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (quoting *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233). Here, the Board did not receive active supervision of its anticompetitive conduct. Pp. 1110 – 1116.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 374, 111 S.Ct. 1344, 113 L.Ed.2d 382. Thus, where a State delegates control over a market to a nonsovereign actor the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal* 's two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 1110 – 1112.

(2) There are instances in which an actor can be excused from *Midcal* 's active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See *Hallie v. Eau Claire,* 471 U.S. 34, 35, 105 S.Ct. 1713, 85 L.Ed.2d 24. That *Hallie* excused municipalities from *Midcal* 's supervision rule for these reasons, however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni* 's holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, 499 U.S., at 374, 111 S.Ct. 1344, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 633, 112 S.Ct. 2169, 119 L.Ed.2d 410, and *Phoebe Putney, supra,* at ——, 133 S.Ct. 1003. The clear lesson of precedent is that *Midcal* 's active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 1112 – 1114.

(3) The Board's argument that entities designated by the States as agencies are exempt from *Midcal* 's second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal* 's supervi-

sion requirement was created to address. See *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 791, 95 S.Ct. 2004, 44 L.Ed.2d 572. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U.S., at 46, n. 10, 105 S.Ct. 1713, the entity there was more like prototypical state agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal*'s active supervision standard. 445 U.S., at 105–106, 100 S.Ct. 937. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra,* at 39, 105 S.Ct. 1713. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus, the Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity. Pp. 1113–1115.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick v. Burget,* 486 U.S. 94, 105–106, 108 S.Ct. 1658, 100 L.Ed.2d 83, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. Pp. 1114–1116.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board's actions against the nondentists. P. 1116.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick,* 486 U.S., at 100–101, 108 S.Ct. 1658. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id.*, at 102–103, 108 S.Ct. 1658; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state supervision is not an adequate substitute for a decision by the State," *Ticor, supra,* at 638, 112 S.Ct. 2169. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 1116 – 1117.

717 F.3d 359, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

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For U.S. Supreme Court briefs, see

2014 WL 4351538 (Reply.Brief)

2014 WL 3749509 (Reply.Brief)

2014 WL 2212529 (Pet.Brief)

Justice KENNEDY delivered the opinion of the Court.

This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board's members are engaged in the active practice of the profession it regulates. The question is whether the board's actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court's decisions beginning with *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

I

A

In its Dental Practice Act (Act), North Carolina has declared the practice of dentistry to be a matter of public concern requiring regulation. N.C. Gen.Stat. Ann. § 90–22(a) (2013). Under the Act, the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." § 90–22(b).

The Board's principal duty is to create, administer, and enforce a licensing system for dentists. See §§ 90–29 to 90–41. To perform that function it has broad authority over licensees. See § 90–41. The Board's authority with respect to unlicensed persons, however, is more restricted: like "any resident citizen," the Board may file suit to "perpetually enjoin any person from . . . unlawfully practicing dentistry." § 90–40.1.

The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. § 90–22. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. *Ibid.* The seventh member must be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. *Ibid.* The final member is referred to by the Act as a "consumer" and is appointed by the Governor. *Ibid.* All members serve 3–year terms, and no person may serve more than two consecutive terms. *Ibid.* The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See *ibid.*

Board members swear an oath of office, § 138A–22(a), and the Board must comply with the State's Administrative Procedure Act, § 150B–1 *et seq.,* Public Records Act, § 132–1 *et seq.,* and open-meetings law, § 143–318.9 *et seq.* The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See §§ 90–48, 143B–30.1, 150B–21.9(a).

B

In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board's hygienist member nor its consumer member participated in this undertaking. The Board's chief operations officer remarked that the Board was "going forth to do battle" with nondentists. App. to Pet. for Cert. 103a. The Board's concern did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is "the practice of dentistry."

Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease "all activity constituting the practice of dentistry"; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes "the practice of dentistry." App. 13, 15. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the Dental Practice Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.

C

In 2010, the Federal Trade Commission (FTC) filed an administrative complaint charging the Board with violating § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a "public/private hybrid" that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. The FTC further concluded the Board could not make that showing.

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the Board had unreasonably restrained trade in violation of antitrust law. On appeal, the FTC again sustained the ALJ. The FTC rejected the Board's public safety justification, noting, *inter alia,* "a wealth of evidence . . . suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.,* at 123a.

The FTC ordered the Board to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the Board to issue notices to all earlier recipients of the Board's cease-and-desist orders advising them of the Board's proper sphere of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. 717 F.3d 359, 370 (2013). This Court granted certiorari. 571 U.S. ——, 134 S.Ct. 1491, 188 L.Ed.2d 375 (2014).

II

Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.,* serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 632, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While "the States regulate their economies in many ways not inconsistent with the antitrust laws," *id.,* at 635–636, 112 S.Ct. 2169, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. See *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 133, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); see also Easterbrook, Antitrust and the Economics of Federalism, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, the Court in *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U.S., at 350–351, 63 S.Ct. 307. That ruling recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Community Communications Co. v. Boulder,* 455 U.S. 40, 53, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). Since 1943, the Court has reaffirmed the importance of *Parker* 's central holding. See, *e.g., Ticor, supra,* at 632–637, 112 S.Ct. 2169; *Hoover v. Ronwin,* 466 U.S. 558, 568, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984); *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 394–400, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

III

[1] In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's actions are cloaked with *Parker* immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements: "first that 'the challenged restraint ... be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy ... be actively supervised by the State.'" *FTC v. Phoebe Putney Health System, Inc.,* 568 U.S. ––––, ––––, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (2013) (quoting *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

[2] Although state-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'" *Phoebe Putney, supra,* at ––––, 133 S.Ct., at 1010 (quoting *Ticor, supra,* at 636, 112 S.Ct. 2169).

[3, 4] An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 374, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991). State legislation and "decision[s] of a state supreme court, acting legislatively rather than judicially," will satisfy this standard, and "*ipso facto* are exempt from the operation of the antitrust laws" because they are an undoubted exercise of state sovereign authority. *Hoover, supra,* at 567–568, 104 S.Ct. 1989.

[5, 6] But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor. See *Parker, supra,* at 351, 63 S.Ct. 307

("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"). For purposes of *Parker,* a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See *Hoover, supra,* at 567–568, 104 S.Ct. 1989. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 791, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) ("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"). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of *Parker* 's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. See *Ticor,* 504 U.S., at 636, 112 S.Ct. 2169.

[7] Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal, supra,* at 106, 100 S.Ct. 937 ("The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement"). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, *e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 501, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988); *Hoover, supra,* at 584, 104 S.Ct. 1989 (Stevens, J., dissenting) ("The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of ... our antitrust jurisprudence"); see also Elhauge, The Scope of Antitrust Process, 104 Harv. L.Rev. 667, 672 (1991). So it follows that, under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L.J. 486, 500 (1986).

[8, 9] *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. See *Goldfarb, supra,* at 790, 95 S.Ct. 2004; see also 1A P. Areeda & H. Hovencamp, Antitrust Law ¶ 226, p. 180 (4th ed. 2013) (Areeda & Hovencamp). The question is not whether the challenged conduct is efficient, well-functioning, or wise. See *Ticor, supra,* at 634–635, 112 S.Ct. 2169. Rather, it is "whether anticompetitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws." *Patrick v. Burget,* 486 U.S. 94, 100, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233, a case arising from California's delegation of price-fixing authority to wine merchants. Under *Midcal,* "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." *Ticor, supra,* at 631, 112 S.Ct. 2169 (citing *Midcal, supra,* at 105, 100 S.Ct. 937).

[10, 11] *Midcal* 's clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney,* 568 U.S., at ––––, 133 S.Ct., at 1013. The active supervision requirement demands, *inter alia,* "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick, supra,* 486 U.S., at 101, 108 S.Ct. 1658.

The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor, supra,* at 636–637, 112 S.Ct. 2169. Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Midcal 's supervision rule "stems from the recognition that '[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.' " *Patrick, supra,* at 100, 108 S.Ct. 1658. Concern about the private incentives of active market participants animates *Midcal* 's supervision mandate, which demands "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick, supra,* at 101, 108 S.Ct. 1658.

B

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, there are instances in which an actor can be excused from *Midcal* 's active supervision requirement. In *Hallie v. Eau Claire,* 471 U.S. 34, 45, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), the Court held municipalities are subject exclusively to *Midcal* 's " 'clear articulation' " requirement. That rule, the Court observed, is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that "[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals." 471 U.S., at 47, 105 S.Ct. 1713. *Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See *id.,* at 45, n. 9, 105 S.Ct. 1713. Critically, the municipality in *Hallie* exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See 471 U.S., at 45, 105 S.Ct. 1713.

Following *Goldfarb, Midcal,* and *Hallie,* which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign actor, the Court in *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni,* an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. 499 U.S., at 367–368, 111 S.Ct. 1344. The Court disagreed, holding there is no "conspiracy exception" to *Parker*. *Omni, supra,* at 374, 111 S.Ct. 1344.

Omni, like the cases before it, recognized the importance of drawing a line "relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." 499 U.S., at 378, 111 S.Ct. 1344. In the context of a municipal actor which, as in *Hallie,* exercised substantial governmental powers, *Omni* rejected a conspiracy exception for "corruption" as vague and unworkable, since "virtually all regulation benefits some segments of the society and harms others" and may in that sense be seen as " 'corrupt.' " 499 U.S., at 377, 111 S.Ct. 1344. *Omni* also rejected subjective tests for corruption that would force a "deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Ibid.* Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives, *Omni* made clear that recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

[12] *Omni*'s holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court's two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor* the Court affirmed that *Midcal*'s limits on delegation must ensure that "[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." 504 U.S., at 633, 112 S.Ct. 2169. And in *Phoebe Putney* the Court observed that *Midcal*'s active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has "an incentive to pursue [its] own self-interest under the guise of implementing state policies." 568 U.S., at ––––, 133 S.Ct., at 1011 (quoting *Hallie, supra,* at 46–47, 105 S.Ct. 1713). The lesson is clear: *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.

C

[13] The Board argues entities designated by the States as agencies are exempt from *Midcal*'s second requirement.

That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal* 's supervision requirement was created to address. See Areeda & Hovencamp ¶ 227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick,* 486 U.S., at 100–101, 108 S.Ct. 1658.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had "joined in what is essentially a private anticompetitive activity" for "the benefit of its members." 421 U.S., at 791, 792, 95 S.Ct. 2004. This emphasis on the Bar's private interests explains why *Goldfarb,* though it predates *Midcal,* considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U.S., at 791, 95 S.Ct. 2004; see also *Hoover,* 466 U.S., at 569, 104 S.Ct. 1989 (emphasizing lack of active supervision in *Goldfarb*); *Bates v. State Bar of Ariz.,* 433 U.S. 350, 361–362, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (granting the Arizona Bar state-action immunity partly because its "rules are subject to pointed re-examination by the policymaker").

While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U.S., at 46, n. 10, 105 S.Ct. 1713, the entity there, as was later the case in *Omni,* was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market participants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie,* "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube,* 486 U.S., at 500, 108 S.Ct. 1931. For that reason, those associations must satisfy *Midcal* 's active supervision standard. See *Midcal,* 445 U.S., at 105–106, 100 S.Ct. 937.

[14] The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra,* at 39, 105 S.Ct. 1713 (rejecting "purely formalistic" analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See Areeda & Hovencamp ¶ 227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal* 's active supervision requirement in order to invoke state-action antitrust immunity.

D

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory v. Ashcroft,* 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), and may conclude there are substantial benefits to staffing their agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 64, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, The Hippocratic Oath and the Ethics of Medicine (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (2014); R. Baker, Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics Revolution (2013). Dentists are no exception. The American Dental Association, for example, in an exercise of "the privilege and obligation of self-government," has "call[ed] upon dentists to follow high ethical standards," including "honesty, compassion, kindness, integrity, fairness and charity." American Dental Association, Principles of Ethics and Code of Professional Conduct 3–4 (2012). State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky v. Delia,* 566 U.S. ––––, ––––, 132 S.Ct. 1657, 1666, 182 L.Ed.2d 662 (2012) (warning in the context of civil rights suits that the "the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts"). But this case, which does not present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb,* 421 U.S., at 792, n. 22, 95 S.Ct. 2004; see also Brief for Respondent 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

States, furthermore, can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity:

> "[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and

actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own." *Patrick,* 486 U.S. at 105–106, 108 S.Ct. 1658 (footnote omitted).

The reasoning of *Patrick v. Burget* applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. See generally Edlin & Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? 162 U. Pa. L.Rev. 1093 (2014).

E

The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members—some of whom offered whitening services—acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes "the practice of dentistry" and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni,* 499 U.S., at 371–372, 111 S.Ct. 1344, there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists.

IV

[15] The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick, supra,* at 100–101, 108 S.Ct. 1658; see also *Ticor,* 504 U.S., at 639–640, 112 S.Ct. 2169.

[16] The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick,* 486 U.S., at 102–103, 108 S.Ct. 1658; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state supervision is not an adequate substitute for a decision by the State," *Ticor, supra,* at 638, 112 S.Ct. 2169. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

* * *

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

Justice ALITO, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The Court's decision in this case is based on a serious misunderstanding of the doctrine of state-action antitrust immunity that this Court recognized more than 60 years ago in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In *Parker,* the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id.*, at 352, 63 S.Ct. 307. The case now before us involves precisely this type of state regulation—North Carolina's laws governing the practice of dentistry, which are administered by the North Carolina Board of Dental Examiners (Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff them in this way.[1] Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.[2] But that is not what *Parker* immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by *Parker,* and the answer to that question is clear. Under *Parker,* the Sherman Act (and the Federal Trade Commission Act, see *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 635, 112 S.Ct. 2169,

1. S. White, History of Oral and Dental Science in America 197–214 (1876) (detailing earliest American regulations of the practice of dentistry).

2. See, *e.g.*, R. Shrylock, Medical Licensing in America 29 (1967) (Shrylock) (detailing the deterioration of licensing regimes in the mid–19th century, in part out of concerns about restraints on trade); Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L.Rev. 6 (1976); Shepard, Licensing Restrictions and the Cost of Dental Care, 21 J. Law & Econ. 187 (1978).

119 L.Ed.2d 410 (1992)) do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted *Parker*; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

I

In order to understand the nature of *Parker* state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority to regulate "their purely internal affairs." *Leisy v. Hardin,* 135 U.S. 100, 122, 10 S.Ct. 681, 34 L.Ed. 128 (1890). In exercising their police power in this area, the States had long enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade.[3]

The Sherman Act was enacted pursuant to Congress' power to regulate interstate commerce, and in passing the Act, Congress wanted to exercise that power "to the utmost extent." *United States v. South–Eastern Underwriters Assn.,* 322 U.S. 533, 558, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). But in 1890, the understanding of the commerce power was far more limited than it is today. See, *e.g., Kidd v. Pearson,* 128 U.S. 1, 17–18, 9 S.Ct. 6, 32 L.Ed. 346 (1888). As a result, the Act did not pose a threat to traditional state regulatory activity.

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it "exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn,* 317 U.S. 111, 125, 63 S.Ct. 82, 87 L.Ed. 122 (1942). This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 743, n. 2, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) ("[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power"). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question in *Parker.*

In *Parker,* a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) to establish marketing plans for certain agricultural commodities within the State. 317 U.S., at 346–347, 63 S.Ct. 307. Raisins were among the regulated commodities, and so the Commission

3. See Handler, The Current Attack on the *Parker v. Brown* State Action Doctrine, 76 Colum. L.Rev. 1, 4–6 (1976) (collecting cases).

established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. *Id.*, at 347–348, 63 S.Ct. 307. The *Parker* Court assumed that this program would have violated "the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons," and the Court also assumed that Congress could have prohibited a State from creating a program like California's if it had chosen to do so. *Id.*, at 350, 63 S.Ct. 307. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. *Id.*, at 351, 63 S.Ct. 307.

The Court's holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S., at 351, 63 S.Ct. 307. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the *Parker* Court refused to assume that the Act was meant to have such an effect.

When the basis for the *Parker* state-action doctrine is understood, the Court's error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power. By that time, many States had established medical and dental boards, often staffed by doctors or dentists,[4] and had given those boards the authority to confer and revoke licenses.[5] This was quintessential police power legislation, and although state laws were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent v. West Virginia*, 129 U.S. 114, 128, 9 S.Ct. 231, 32 L.Ed. 623 (1889), this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate from the state board of health attesting to their qualifications. And in *Hawker v. New York*, 170 U.S. 189, 192, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), the Court reiterated that a law specifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the North Carolina statutes establishing and specifying the powers of the State Board of Dental Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

II

As noted above, the only question in this case is whether the North Carolina Board

4. Shrylock 54–55; D. Johnson and H. Chaudry, Medical Licensing and Discipline in America 23–24 (2012).

5. In *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id.*, at 191–193, n. 1, 18 S.Ct. 573. See also *Douglas v. Noble*, 261 U.S. 165, 166, 43 S.Ct. 303, 67 L.Ed. 590 (1923) ("In 1893 the legislature of Washington provided that only licensed persons should practice dentistry" and "vested the authority to license in a board of examiners, consisting of five practicing dentists").

of Dental Examiners is really a state agency, and the answer to that question is clearly yes.

- The North Carolina Legislature determined that the practice of dentistry "affect[s] the public health, safety and welfare" of North Carolina's citizens and that therefore the profession should be "subject to regulation and control in the public interest" in order to ensure "that only qualified persons be permitted to practice dentistry in the State." N.C. Gen.Stat. Ann. § 90–22(a) (2013).
- To further that end, the legislature created the North Carolina State Board of Dental Examiners "as the agency of the State for the regulation of the practice of dentistry in th[e] State." § 90–22(b).
- The legislature specified the membership of the Board. § 90–22(c). It defined the "practice of dentistry," § 90–29(b), and it set out standards for licensing practitioners, § 90–30. The legislature also set out standards under which the Board can initiate disciplinary proceedings against licensees who engage in certain improper acts. § 90–41(a).
- The legislature empowered the Board to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from . . . unlawfully practicing dentistry." § 90–40.1(a). It authorized the Board to conduct investigations and to hire legal counsel, and the legislature made any "notice or statement of charges against any licensee" a public record under state law. §§ 90–41(d)–(g).
- The legislature empowered the Board "to enact rules and regulations governing the practice of dentistry within the State," consistent with relevant statutes. § 90–48. It has required that any such rules be included in the Board's annual report, which the Board must file with the North Carolina secretary of state, the state attorney general, and the legislature's Joint Regulatory Reform Committee. § 93B–2. And if the Board fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid.*

As this regulatory regime demonstrates, North Carolina's Board of Dental Examiners is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government.

The Board is not a private or "nonsovereign" entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not " 'give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' " *Ante,* at 1111 (quoting *Parker,* 317 U.S., at 351, 63 S.Ct. 307). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co. v. United States,* 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679 (1904), to show what it had in mind. In that case, the Court held that a State's act of chartering a corporation did not shield the corporation's monopolizing activities from federal antitrust law. *Id.*, at 344–345, 63 S.Ct. 307. Nothing similar is involved here. North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency* and gave that agency the power to regulate a particular subject affecting public health and safety.

Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are "controlled by active market participants," *ante,* at 1114, must demonstrate active state supervision in order to be immune from federal antitrust law. The Court thus treats these state agencies like private entities. But in *Parker,* the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorate marketing plan under California's law first required the petition of at least 10 producers of the particular commodity. *Parker,* 317 U.S., at 346, 63 S.Ct. 307. If the Commission then agreed that a marketing plan was warranted, the Commission would "select a program committee *from among nominees chosen by the qualified producers*." *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id.*, at 347, 63 S.Ct. 307. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a "sovereign" when it "adopt[ed] and enforc[ed] the prorate program." *Id.*, at 352, 63 S.Ct. 307. This reasoning is irreconcilable with the Court's today.

III

The Court goes astray because it forgets the origin of the *Parker* doctrine and is misdirected by subsequent cases that extended that doctrine (in certain circumstances) to private entities. The Court requires the North Carolina Board to satisfy the two-part test set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), but the party claiming *Parker* immunity in that case was not a state agency but a private trade association. Such an entity is entitled to *Parker* immunity, *Midcal* held, only if the anticompetitive conduct at issue was both " 'clearly articulated' " and " 'actively supervised by the State itself.' " 445 U.S., at 105, 100 S.Ct. 937. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct *by private parties* can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

This case falls into the latter category, and therefore *Midcal* is inapposite. The North Carolina Board is not a private trade association. It is a state agency, created and empowered by the State to regulate an industry affecting public health. It would not exist if the State had not created it. And for purposes of *Parker,* its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina.

Our decision in *Hallie v. Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), which involved Sherman Act claims against a municipality, not a State agency, is similarly inapplicable. In *Hallie,* the plaintiff argued that the two-pronged *Midcal* test should be applied, but the Court disagreed. The Court acknowledged that municipalities "are not themselves sovereign." 471 U.S., at 38, 105 S.Ct. 1713. But recognizing that a municipality is "an arm of the State," *id.*, at 45, 105 S.Ct. 1713, the Court held that a municipality should be required to satisfy only the first prong of the *Midcal* test (requiring a clearly articulated state policy), 471 U.S., at 46, 105 S.Ct. 1713. That municipalities are not sovereign was critical to our analysis in *Hallie,* and thus that decision has no application in a case, like this one, involving a state agency.

Here, however, the Court not only disregards the North Carolina Board's status as a full-fledged state agency; it treats the Board less favorably than a municipality. This is puzzling. States are sovereign, *Northern Ins. Co. of N.Y. v. Chatham County,* 547 U.S. 189, 193, 126 S.Ct. 1689, 164 L.Ed.2d 367 (2006), and California's sovereignty provided the foundation for the decision in *Parker, supra,* at 352, 63 S.Ct. 307. Municipalities are not sovereign. *Jinks v. Richland County,* 538 U.S. 456, 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003). And for this reason, federal law often treats municipalities differently from States. Compare *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ("[N]either a State nor its officials acting it their official capacities are 'persons' under [42 U.S.C.] § 1983"), with *Monell v. City Dept. of Social Servs., New York,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (municipalities liable under § 1983 where "execution of a government's policy or custom . . . inflicts the injury").

The Court recognizes that municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state-action immunity than private entities. Yet under the Court's approach, the North Carolina Board of Dental Examiners, a full-fledged state agency, is treated like a private actor and must demonstrate that the State actively supervises its actions.

The Court's analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. *Id.,* at 374, 111 S.Ct. 1344. The Sherman Act, we said, is not an anticorruption or good-government statute. 499 U.S., at 398, 111 S.Ct. 1344. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive behavior of city officials. 499 U.S., at 374–379, 111 S.Ct. 1344. But that is essentially what the Court has done here.

IV

Not only is the Court's decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions. As previously noted, state medical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach. It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.

As a result of today's decision, States may find it necessary to change the composition of medical, dental, and other boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure of the North Carolina Board because "active market participants" constitute "a controlling number of [the] decisionmakers," *ante,* at 1114, but this test raises many questions.

What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an "active market participant"? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person "active" in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court's approach raises a more fundamental question, and that is why the Court's inquiry should stop with an examination of the structure of a state licensing board. When the Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways.[6] So why ask only whether the members of a board are active market participants? The answer may be that determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today's decision.

V

The Court has created a new standard for distinguishing between private and state actors for purposes of federal antitrust immunity. This new standard is not true to the *Parker* doctrine; it diminishes our traditional respect for federalism and state sovereignty; and it will be difficult to apply. I therefore respectfully dissent.

6. See, *e.g.,* R. Noll, Reforming Regulation 40–43, 46 (1971); J. Wilson, The Politics of Regulation 357–394 (1980). Indeed, it has even been charged that the FTC, which brought this case, has been captured by entities over which it has jurisdiction. See E. Cox, "The Nader Report" on the Federal Trade Commission vii-xiv (1969); Posner, Federal Trade Commission, Chi. L.Rev. 47, 82–84 (1969).

310 U.S. 150

UNITED STATES v. SOCONY-VACUUM OIL CO., Inc., et al.

SOCONY-VACUUM OIL CO., Inc., et al. v. UNITED STATES.

Nos. 346, 347.

Argued Feb. 5, 6, 1940.

Decided May 6, 1940.

Rehearing Denied June 3, 1940.

See 310 U.S. 658, 60 S.Ct. 1091, 84 L.Ed. ——.

1. Monopolies ⟹17(1)

Price-fixing agreements are unlawful per se under the Sherman Anti-Trust Act, and no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense in a prosecution for violation of the act. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

2. Monopolies ⟹17(1)

Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable "restraints of trade" within the meaning of the Sherman Anti-Trust Act because they eliminate competition, and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints within the meaning of that act. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Restraints of Trade".

3. Criminal law ⟹1172(7)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by raising and fixing tank car prices in spot markets and thereby increasing tank car and retail prices of gasoline sold in the Mid-Western area, charge to jury that defendants' buying programs must have caused price rise and its continuance was more favorable to defendants than they could have required, since so far as cause and effect were concerned it was sufficient if the buying programs of the combination resulted in a price rise and market stability which but for them would not have happened. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

4. Monopolies ⟹17(1)

Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise, is proof of the actual consummation or execution of an unlawful conspiracy in restraint of trade and commerce. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

5. Monopolies ⟹17(1)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by raising and fixing tank car prices in spot markets and thereby increasing tank car and retail prices of gasoline sold in the Mid-Western area, fact that sales on the spot markets were still governed by some competition was of no consequence, where it was indisputable that that competition was restricted through the removal by defendants of a part of the supply which but for their buying programs would have been a factor in determining the going prices on those markets. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

6. Monopolies ⟹17(1)

The elimination of so-called competitive evils was no legal justification for buying programs removing distress gasoline from the market and could not be relied on as a defense in prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by raising and fixing tank car prices in spot markets and thereby increasing tank car and retail prices of gasoline sold in the Mid-Western area, where elimination of such conditions was sought primarily for its effect on price structures. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

7. Monopolies ⟹17(1)

Any combination which tampers with price structures is engaged in an unlawful activity, and even though the members of the price-fixing group are in no position to control the market to the extent that they raise, lower, or stabilize prices, they would be directly interfering with the free play of market forces in violation of the Sherman Anti-Trust Act. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

8. Constitutional law ⟹70(3)

Congress has not left with the courts the determination of whether particular price-fixing schemes are wise or unwise, healthy or destructive, nor has it permitted ruinous competition and competitive evils to be defenses to price-fixing conspiracies, and, if genuine or fancied competitive abuses and the good intentions of the members of the combination are to be allowed as a legal justification for such schemes, the shift must be made by Congress and not by the courts. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

9. Monopolies 17(1), 31(1, 3)

Whatever may be its peculiar problems and characteristics, the Sherman Anti-Trust Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike, and hence there was no error in refusing to charge that, to convict defendants of engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by increasing tank car and retail prices of gasoline sold in the Mid-Western area, the jury must find that the resultant prices were raised and maintained at high, arbitrary, and noncompetitive levels, and the charge in the indictment to that effect was surplusage. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

10. Monopolies ⇐17(1)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by raising and fixing tank car prices in spot markets and thereby increasing tank car and retail prices of gasoline sold in the Mid-Western area, it was not important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible, since price-fixing condemned by the Sherman Anti-Trust Act includes more than the mere establishment of uniform prices. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

11. Monopolies ⇐17(1)

An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Anti-Trust Act, and so would an agreement to raise or lower prices whatever machinery for price-fixing was used. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

12. Monopolies ⇐17(1)

Prices are "fixed", within the Sherman Anti-Trust Act condemning price-fixing agreements if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulæ they are related to the market prices, and the fact that they are fixed at the fair going market price is immaterial. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixed Prices".

13. Monopolies ⇐17(1)

That purchasing of distress gasoline by major oil companies charged with increasing tank car and retail prices of gasoline sold in the Mid-Western area was lightest during period of market rise in the spring of 1935, and heaviest in the summer and early fall of 1936 when prices declined, and that it decreased later in 1936 when prices rose, did not militate against conclusion that buying programs were a species of price-fixing or manipulation, but those facts were wholly consistent with the maintenance of a floor under the market serving to increase the stability and firmness of market prices. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

14. Monopolies ⇐17(1)

Under the Sherman Anti-Trust Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

15. Monopolies ⇐17(1)

Proof that a combination was formed for the purpose of fixing prices, and that it caused them to be fixed or contributed to that result, is proof of the completion of a price-fixing conspiracy under the Sherman Anti-Trust Act. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

16. Conspiracy ⇐40

A person may be guilty of conspiring although incapable of committing the objective offense.

17. Monopolies ⇐12(1)

Conspiracies under the Sherman Anti-Trust Act are not dependent on any overt act other than the act of conspiring, since it is the contract, combination, or conspiracy in restraint of trade or commerce which the act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand or successful on the other. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

18. **Monopolies** ⚷12(1)

The provision of the Sherman Anti-Trust Act declaring illegal every contract, combination, or conspiracy in restraint of trade or commerce brands as illegal the character of the restraint and not the amount of commerce affected, and hence the amount of interstate or foreign trade involved is not material. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

19. **Monopolies** ⚷17(1)

A conspiracy to fix prices violates the Sherman Anti-Trust Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

20. **Monopolies** ⚷17(1)

The Sherman Anti-Trust Act has a broader application to price-fixing agreements than the common law prohibitions or sanctions. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

21. **Monopolies** ⚷17(1)

All price fixing agreements are banned by the Sherman Anti-Trust Act provisions declaring illegal every contract, combination, or conspiracy in restraint of trade or commerce, and, whatever economic justification particular price fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

22. **Monopolies** ⚷29

The crime under the section of the Sherman Anti-Trust Act declaring illegal every contract, combination, or conspiracy in restraint of trade or commerce is legally distinct from that under the section making it a misdemeanor to monopolize trade or commerce though the two sections overlap in the sense that a monopoly under the second section is a species of restraint of trade under the first. Sherman Anti-Trust Act §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

23. **Monopolies** ⚷31(2)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by raising and fixing tank car prices in spot markets and thereby increasing tank car and retail prices of gasoline sold in the Mid-Western area, evidence supported charge that combination had the purpose and effect of fixing prices, and the existence of power on the part of members of the combination to fix prices was but a conclusion from the finding that their buying programs caused or contributed to the rise and stability of prices. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

24. **Monopolies** ⚷17(1)

That Congress, through utilization of the precise methods employed by defendants charged with engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by raising and fixing tank car prices in spot markets and thereby increasing tank car and retail prices of gasoline sold in the Mid-Western area, could seek to reach the same objectives sought by defendants, does not mean that defendants or any other group may do so without specific Congressional authority. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

25. **Monopolies** ⚷29

Though employees of the government may have known of buying programs carried on by oil companies for the alleged purpose of increasing tank car and retail prices of gasoline sold in the Mid-Western area and winked at them or tacitly approved them, no immunity from prosecution under the Sherman Anti-Trust Act would have been obtained thereby, where Congress had specified the precise manner of securing immunity under the National Industrial Recovery Act, and no approval of programs was obtained thereunder, since none other would suffice. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1; National Industrial Recovery Act § 2(c), 48 Stat. 196.

26. **Monopolies** ⚷29

Even if approval had been obtained under the National Industrial Recovery Act for buying programs carried on by oil companies as part of an alleged combination and conspiracy in restraint of trade and commerce in gasoline, that approval would not have survived expiration of act in June 1935, and where programs continued unabated during balance of 1935 and far into 1936, approval or knowledge and acquiescence of federal authorities before June 1935 could have no relevancy to companies' activities subsequent thereto, since a conspiracy thus continued is in effect renewed during each day of its continuance. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1; National Industrial Recovery Act § 2(c), 48 Stat. 196.

27. Monopolies ⟹17(1)

That buying programs, carried on by oil companies in an allegedly unlawful combination and conspiracy in restraint of trade and commerce in gasoline, may have been consistent with the general objectives and ends sought to be obtained under the National Industrial Recovery Act, was irrelevant to the legality under the Sherman Anti-Trust Act of companies' activities either before or after June 1935, when the National Industrial Recovery Act expired, since price fixing combinations which lack Congressional sanction are illegal per se. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1; National Industrial Recovery Act § 2(c), 48 Stat. 196.

28. Monopolies ⟹31(2)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline, defendants' offers of proof covering background and operation of the National Industrial Recovery Act and the Petroleum Code, the condition of the oil industry, alleged encouragement, co-operation and acquiescence of the Federal Petroleum Administration in their buying programs, and the like, were properly excluded in so far as they bore on the nature of the restraint and the purpose or end sought to be attained, since the reasonableness of the restraint was not properly an issue in the case. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

29. Monopolies ⟹31(2)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by raising and fixing tank car prices in spot markets and thereby increasing tank car and retail prices of gasoline sold in the Mid-Western area, offers of proof to the extent that they were designed to show that defendants by buying distress gasoline had not raised spot market prices to an artificial and noncompetitive level were properly denied as immaterial, since reasonableness of prices and fact that defendants' activities merely removed from the market the depressive effect of distress gasoline were not relevant to the issues. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

30. Monopolies ⟹31(2)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by raising and fixing tank car prices in spot markets and thereby increasing tank car and retail prices of gasoline sold in the Mid-Western area, offers of proof to the extent that they were aimed at establishing and evaluating contributory causes for price rise and market stability during indictment period other than defendants' buying programs were not improperly denied where much of the refused testimony was merely cumulative and another offer, though not wholly irrelevant, was clearly collateral. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

31. Criminal law ⟹661, 675

A trial court has wide discretion in ruling on cumulative testimony and in the exclusion of collateral evidence.

32. Monopolies ⟹31(2)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by price fixing, the district court properly limited inquiry into general economic conditions antedating and during indictment period of 1935 and 1936, and did not abuse its discretion in refusing to admit testimony showing market conditions late in 1934, where that testimony would not have eliminated defendants' buying programs as contributory causes to market rise and stability in 1935 and 1936, and it would have prolonged the inquiry and protracted the trial. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

33. Criminal law ⟹921

Where a great mass of evidence was received by the trial court, the range of inquiry was wide, and factual questions and defendants' activities were intricate and involved, a new trial will not be ordered for alleged errors in exclusion of evidence if matters of substance are not affected.

34. Witnesses ⚷255(9).

The use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge.

35. Witnesses ⚷255(9)

The bald fact that words used to refresh the memory of a witness are found in the records of a grand jury is not a valid objection thereto.

36. Witnesses ⚷256

Normally, grand jury testimony used to refresh the recollection of a witness must be shown to opposing counsel on demand if it is handed to the witness, but no iron-clad rule requires that opposing counsel be shown the grand jury transcript where it is not shown to the witness and some appropriate procedure is adopted to prevent its improper use, but that is a matter which rests in the sound discretion of the court.

37. Grand Jury ⚷41

Grand jury testimony is ordinarily confidential, but, after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.

38. Criminal law ⚷1170½(1)

Where the district court itself examined and thus directly controlled the use of grand jury testimony to refresh the recollection of certain witnesses called by the government, testimony was used simply to refresh recollection on material facts and not as independent affirmative evidence, and it was not used for impeachment purposes, refusal to make it available to counsel for the defense was not per se reversible error.

39. Criminal law ⚷1186(4)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline, the use of grand jury testimony to refresh the recollection of certain witnesses called by the government was not prejudicial where record minus that testimony clearly established all facts necessary for proof of the conspiracy, and no portion of it was dependent on the minor facts concerning which the memory of those witnesses was refreshed, and hence even if there was error in the use of the prior testimony, a new trial could not be ordered, since the substantial rights of defendants were not affected. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1; Jud.Code § 269, 28 U.S.C.A. § 391.

40. Witnesses ⚷255(9)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline, the district court did not abuse its discretion in permitting grand jury testimony to be used to refresh the recollection of certain witnesses called by the government, even though much of the testimony related to events a year or more old, where there was a continuing conspiracy extending at least up to period when witnesses were testifying before grand jury, and in the main those matters were woven into the conspiracy, related to events in which the witness actively participated, concerned regular business matters with which he was familiar, pertained to his regular employment, or constituted admissions against interest. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

41. Witnesses ⚷255(9)

Permitting grand jury testimony to be used to refresh the recollection of witnesses was not an abuse of discretion as against contention that the procedure was bound to inculcate in the minds of the jurors, the feeling that the witnesses were testifying falsely or were concealing the truth, where the district judge was alert to stop impeachment, and most of the witnesses were obviously hostile and evasive.

42. Criminal law ⚷1037(1)

Counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments of the government's counsel to the jury were improper and prejudicial.

43. Criminal law ⚷1048

Appellate courts in the public interest may of their own motion notice errors to which no exception has been taken if the errors are obvious or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

44. Criminal law ⚷713

In a prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in violation of the Sherman Anti-Trust Act, it is not improper for the government's counsel to discuss corporate power, its use and abuse, so long as those statements are relevant to the issues at hand. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

45. Criminal law ⚷723(1)

Appeals by counsel to class prejudice are highly improper and cannot be condoned, and trial courts should ever be alert to prevent them.

46. Criminal law ⚷723(1)

Each case involving the question whether appeals to passion and prejudice by counsel may so poison the minds of jurors, even in a strong case, that accused may be deprived of a fair trial necessarily turns on its own facts.

47. Criminal law ⚷1171(1)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline, though some of the statements of the government's counsel to which defendants objected appealed to class prejudice, were undignified and intemperate, and did not comport with the standards of propriety to be expected of the prosecutor, they did not constitute prejudicial error where the record was convincing that the statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

48. Criminal law ⚷1171(1)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline, where from the beginning of the trial to the end the defense sought to prove official acquiescence or at least condonation in their practices, statements made near the end of the closing arguments by the government's counsel to the effect that it was the wish and desire of the highest officials in the government to have defendants convicted were not prejudicial. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

49. Monopolies ⚷31(2)

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by price fixing, reasonableness of prices fixed was not properly an issue in the case, and testimony concerning the navigability of the Mississippi River was irrelevant, as against contention that it was vitally material as establishing such outside competition as would have prevented defendants from raising prices to artificial and noncompetitive levels. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

50. Criminal law ⚷729, 730(7)

Error, if any, in remark by government counsel of personal knowledge in contradiction of the record for the purpose of discrediting an important defense witness, was cured where counsel withdrew remark when objection was made and the jury was instructed to disregard it.

51. Criminal law ⚷935(1)
Monopolies ⚷29

In prosecution for engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline by price-fixing, the offense charged was proved once it was established that any of the defendants conspired to fix prices through buying programs and that those programs caused or contributed to price rise, power of the combination to fix prices was therefore but a conclusion from fact that combination did fix prices, and finding that programs affected prices was not necessarily dependent on the participation in those programs of all who were convicted, and hence the district court did not commit reversible error in granting new trials to some defendants and denying them to others. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

52. Monopolies ⚷29

The crime of engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline was not indivisible in the sense that the existence of a conspiracy under the Sherman Anti-Trust Act was necessarily dependent on the cooperation of defendants awarded a new trial with those who were denied new trials, and the case against those who were denied new trials did not automatically fall when certain of the other defendants were awarded a new trial. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

53. Monopolies ⇨29

A conspiracy in restraint of trade and commerce under the Sherman Anti-Trust Act may embrace two or more individuals or corporations, conviction of some need not await the apprehension and conviction of all, and the erroneous conviction of one does not necessarily rebut the finding that the others participated. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

54. Criminal law ⇨1156(1), 1176

In a prosecution for engaging in an unlawful conspiracy in restraint of trade and commerce under the Sherman Anti-Trust Act, as in other conspiracy cases, the grant of a new trial to some defendants and its denial to others is not per se reversible error, and, after the jury's verdict has been set aside as respects some of the alleged co-conspirators, the remaining ones cannot seize on that action as grounds for the granting of a new trial to them unless they can establish that such action was no clearly prejudicial to them that the denial of their motions constituted a plain abuse of discretion. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

55. Appeal and error ⇨977(1)
Courts ⇨406(1½)

Neither the United States Supreme Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court.

56. Appeal and error ⇨977(5)

Denial of a motion for a new trial on the ground that the verdict was against the weight of the evidence is not subject to review by the United States Supreme Court.

57. Monopolies ⇨31(1)

Where an indictment charged oil companies with unlawfully conspiring to raise and fix spot market prices of gasoline and thereby to raise and fix prices in the Mid-Western area and also charged certain trade journals with knowingly publishing and circulating as price quotations wrongfully and artificially raised and fixed prices paid by companies in their buying programs, failure of proof of charge against trade journals did not result in a fatal variance, where purpose and effect of buying programs in raising and fixing prices were in no way made dependent on utilization of fraudulent trade journal quotations. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

58. Monopolies ⇨31(1)

Where an indictment charges various means by which a conspiracy in restraint of trade and commerce is effectuated, not all of them need be proved, and a variation between the means charged and the means utilized is not fatal. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

59. Monopolies ⇨12(1)

Conspiracies in restraint of trade and commerce under the Sherman Anti-Trust Act are on a common-law footing and are not dependent on the doing of any act other than the act of conspiring as a condition of liability. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

60. Criminal law ⇨113

Evidence was sufficient for jury to find that conspiracy in restraint of trade and commerce in gasoline did not end with an agreement to make purchases on spot markets, that the chief objective was the raising and maintenance of Mid-Western prices at higher levels, that conspiracy contemplated and embraced sales to jobbers and distributors in the Mid-Western area at enhanced prices, and that some such sales were made within the Western District of Wisconsin, and hence the Federal District Court for the Western District of Wisconsin had jurisdiction of prosecution, since sales by any one of the defendants in the Mid-Western area bound all of them. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

61. Conspiracy ⇨41

A "conspiracy" is a partnership in crime, and an overt act of one partner may be the act of all without any new agreement specifically directed to that act.

See Words and Phrases, Permanent Edition, for all other definitions of "Conspiracy".

62. Criminal law ⇨1159(2)

Where a defendant's motion for a directed verdict at conclusion of conspiracy case was denied by the district court, the Circuit Court of Appeals held that there was no error in denial, and defendant argued before the Supreme Court that there was no substantial evidence that he had any knowledge of and participated in conspiracy and that conviction against him should be reversed and indictment dismissed, a question of law was raised entailing an examination of the record not for purpose of weighing evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict.

Mr. Justice ROBERTS and Mr. Justice McREYNOLDS dissenting.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

The Socony-Vacuum Oil Company, Incorporated, and others, were convicted of engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline under an indictment charging violations of section 1 of the Sherman Anti-Trust Act, 15 U.S.C.A. § 1. United States v. Standard Oil Co., 23 F. Supp. 937. The Circuit Court of Appeals reversed and remanded for a new trial, 105 F.2d 809, and the United States of America brings certiorari and the Socony-Vacuum Oil Company, Incorporated, and others bring a cross-petition for certiorari.

Judgment of the Circuit Court of Appeals reversed and that of the District Court affirmed.

154

Messrs. John Henry Lewin, of Baltimore, Md., and Thurman W. Arnold, Asst. Atty. Gen., for the United States.

158

Messrs. William J. Donovan and Ralstone R. Irvine, both of New York City, and Herbert H. Thomas, of Madison, Wis., for Socony-Vacuum Oil Co., Inc., et al.

165

Mr. Justice DOUGLAS delivered the opinion of the Court.

Respondents [1] were convicted by a jury [2] (United States v. Standard Oil Co., D.C., 23 F.Supp. 937) under an indictment charging violations of § 1 of the Sherman Anti-Trust Act,[3] 26 Stat. 209, 50 Stat. 693.

166

The

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1 The indictment charged 27 corporations and 56 individuals with violations of § 1 of the Sherman Law. There were brought to trial 26 corporations and 46 individuals. Prior to submission of the case to the jury the court discharged, directed verdicts of acquittal, or dismissed the indictment as to 10 of the corporations and 16 of the individuals. The jury returned verdicts of guilty as to the remaining 16 corporations and 30 individuals. Thereafter the trial court ordered new trials as to 3 corporations and 15 individuals and granted judgment non obstante veredicto to one other corporation and 10 other individuals. United States v. Stone, 308 U.S. 519, 60 S.Ct. 177, 84 L.Ed. —. For the opinions of the District Court on that phase of the case see United States v. Standard Oil Co., 23 F.Supp. 937, 938, 939; Id., 24 F. Supp. 575; and for the opinion of the Circuit Court of Appeals, Ex parte United States, 7 Cir., 101 F.2d 870.

The respondents are the remaining 12 corporations and 5 individuals, viz., Socony-Vacuum Oil Company, Inc., Wadhams Oil Company, Empire Oil and Refining Company, Continental Oil Company, The Pure Oil Company, Shell Petroleum Corporation, Sinclair Refining Company, Mid-Continent Petroleum Corporation, Phillips Petroleum Company, Skelly Oil Company, The Globe Oil & Refining Company (Oklahoma), The Globe Oil & Refining Company (Illinois), C. E. Arnott, vice president of Socony-Vacuum, H. T. Ashton, manager of Lubrite Division of Socony-Vacuum, R. H. McElroy, Jr., tank-car sales manager of Pure Oil, P. E. Lakin, general manager of sales of Shell, R. W. McDowell, vice president in charge of sales of Mid-Continent.

2 Each of the corporations was fined $5,000; each individual, $1,000.

3 Sec. 1 provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall

Circuit Court of Appeals reversed and remanded for a new trial. 7 Cir., 105 F.2d 809. The case is here on a petition and cross-petition for certiorari, both of which we granted because of the public importance of the issues raised. 308 U.S. 540, 60 S.Ct. 124, 84 L.Ed. —.

I. *The Indictment.*

The indictment was returned in December 1936 in the United States District Court for the Western District of Wisconsin. It charges that certain major oil companies,[4] selling gasoline in the Mid-Western area[5] (which includes the Western District of Wisconsin), (1) "combined and conspired together for the purpose of artificially raising and fixing the tank car prices of gasoline" in the "spot markets" in the East Texas[6] and Mid-Continent[7] fields; (2) "have artificially raised and fixed said spot market tank car prices of gasoline and have maintained said prices at artificially high and non-competitive levels, and at levels agreed upon among them and have thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold and sold in interstate commerce as aforesaid in the Mid-Western area"; (3) "have arbitrarily", by reason of the provisions of the prevailing form of jobber contracts which made the price to the jobber dependent on the average spot market price, "exacted large sums of money from thousands of jobbers with

167

whom they have had such contracts in said Mid-Western area"; and (4) "in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area."

The *manner* and *means* of effectuating such conspiracy are alleged in substance as follows: Defendants, from February 1935 to December 1936 "have knowingly and unlawfully engaged and participated in two concerted gasoline buying programs" for the purchase "from independent refiners in spot transactions of large quantities of gasoline in the East Texas and Mid-Continent fields at uniform, high, and at times progressively increased prices." The East Texas buying program is alleged to have embraced purchases of gasoline in spot transactions from most of the independent refiners in the East Texas field, who were members of the East Texas Refiners' Marketing Association, formed in February 1935 with the knowledge and approval of some of the defendants "for the purpose of selling and facilitating the sale of gasoline to defendant major oil companies." It is alleged that arrangements were made and carried out for allotting orders for gasoline received from defendants among the members of that association; and that such purchases amounted to more than 50% of all gasoline produced by those independent refiners. The Mid-Continent buying program is alleged to have included "large and increased purchases of gasoline" by defendants from independent refiners located in the Mid-Continent fields pursuant to allotments among themselves. Those purchases, it is charged, were made from independent refiners who were assigned to certain of the defendants at monthly meetings of a group representing defendants. It is alleged that the purchases in this buying program amounted to nearly 50% of all gasoline sold by those independents. As respects both the East Texas and the Mid-Continent buying programs, it is alleged that the purchases of gasoline were in excess of the amounts which defendants would have

168

purchased but for those programs; that at the instance of certain defendants these independent refiners curtailed their production of gasoline.

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be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U.S.C.A. § 1.

4 The major oil companies, in the main, engage in every branch of the business—owning and operating oil wells, pipelines, refineries, bulk storage plants, and service stations. Those engaging in all such branches are major integrated oil companies; those lacking facilities for one or more of those branches are semi-integrated. "Independent refiners" describes companies engaged exclusively in refining.

5 Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, North Dakota, South Dakota, and Wisconsin.

6 Located in the north, eastern part of Texas.

7 Described as including Oklahoma, the northern and western portions of Texas, the southern and eastern portions of Kansas, the southern portion of Arkansas, the northern portion of Louisiana.

The independent refiners selling in these programs were named as co-conspirators, but not as defendants.

Certain market journals—Chicago Journal of Commerce, Platt's Oilgram, National Petroleum News—were made defendants.[8] Their participation in the conspiracy is alleged as follows: that they have been "the chief agencies and instrumentalities" through which the wrongfully raised prices "have affected the prices paid by jobbers, retail dealers, and consumers for gasoline in the Mid-Western area," that they "knowingly published and circulated as such price quotations the wrongfully and artificially raised and fixed prices for gasoline paid by" defendants in these buying programs, while "representing the price quotations published by them" to be gasoline prices "prevailing in spot sales to jobbers in tank car lots" and while "knowing and intending them to be relied on as such by jobbers and to be made the basis of prices to jobbers."

Jurisdiction and *venue* in the Western District of Wisconsin are alleged as follows: that most of defendant major oil companies have sold large quantities of gasoline in tank car lots to jobbers in that district at the "artificially raised and fixed and non-competitive prices"; that they have "solicited and taken contracts and orders" for

169

gasoline in that district; and that they have required retail dealers and consumers therein "to pay artificially increased prices for gasoline" pursuant to the conspiracy.

The methods of marketing and selling gasoline in the Mid-Western area are set forth in the indictment in some detail. Since we hereafter develop the facts concerning them, it will suffice at this point to summarize them briefly. Each defendant major oil company owns, operates or leases retail service stations in this area. It supplies those stations, as well as independent retail stations, with gasoline from its bulk storage plants. All but one sell large quantities of gasoline to jobbers in tank car lots under term contracts. In this area these jobbers exceed 4,000 in number and distribute about 50% of all gasoline distributed to retail service stations therein, the bulk of the jobbers' purchases being made from the defendant companies. The price to the jobbers under those contracts with defendant companies is made dependent on the spot market price, pursuant to a formula hereinafter discussed. And the spot market tank car prices of gasoline directly and substantially influence the retail prices in the area. In sum, it is alleged that defendants by raising and fixing the tank car prices of gasoline in these spot markets could and did increase the tank car prices and the retail prices of gasoline sold in the Mid-Western area. The vulnerability of these spot markets to that type of manipulation or stabilization is emphasized by the allegation that spot market prices published in the journals were the result of spot sales made chiefly by independent refiners of a relatively small amount of the gasoline sold in that area—virtually all gasoline sold in tank car quantities in spot market transactions in the Mid-Western

170

area being sold by independent refiners, such sales amounting to less than 5% of all gasoline marketed therein.

So much for the indictment.

II. *Background of the Alleged Conspiracy.*

Evidence was introduced (or respondents made offers of proof) showing or tending to show the following conditions preceding the commencement of the alleged conspiracy in February 1935. As we shall develop later, these facts were in the main relevant to certain defenses which respondents at the trial unsuccessfully sought to interpose to the indictment.

Beginning about 1926 there commenced a period of production of crude oil in such quantities as seriously to affect crude oil and gasoline markets throughout the United States. Overproduction was wasteful, reduced the productive capacity of the oil fields and drove the price of oil down to levels below the cost of production from

8 Two individuals connected with those journals were also made defendants. One of the individuals was not brought to trial. At the close of the government's case the indictment was dismissed, on motion of the government, as against the other four trade journal defendants.

pumping and stripper[9] wells. When the price falls below such cost, those wells must be abandoned. Once abandoned, subsurface changes make it difficult or impossible to bring those wells back into production. Since such wells constitute about 40% of the country's known oil reserves, conservation requires that the price of crude oil be maintained at a level which will permit such wells to be operated. As Oklahoma and Kansas were attempting to remedy the situation through their proration laws, the largest oil field in history was discovered in East Texas. That was in 1930. The supply of oil from this 171 field was so great that at one time crude oil sank to 10 or 15 cents a barrel, and gasoline was sold in the East Texas field for $2\frac{1}{8}$¢ a gallon. Enforcement by Texas of its proration law was extremely difficult. Orders restricting production were violated, the oil unlawfully produced being known as "hot oil" and the gasoline manufactured therefrom, "hot gasoline". Hot oil sold for substantially lower prices than those posted for legal oil. Hot gasoline therefore cost less and at times could be sold for less than it cost to manufacture legal gasoline. The latter, deprived of its normal outlets, had to be sold at distress prices. The condition of many independent refiners using legal crude oil was precarious. In spite of their unprofitable operations they could not afford to shut down, for if they did so they would be apt to lose their oil connections in the field and their regular customers. Having little storage capacity they had to sell their gasoline as fast as they made it. As a result their gasoline became "distress" gasoline—gasoline which the refiner could not store, for which he had no regular sales outlets and which therefore he had to sell for whatever price it would bring. Such sales drove the market down.

In the spring of 1933 conditions were acute. The wholesale market was below the cost of manufacture. As the market became flooded with cheap gasoline, gasoline was dumped at whatever price it would bring. On June 1, 1933, the price of crude oil was 25¢ a barrel; the tank car price of regular gasoline was $2\frac{5}{8}$¢ a gallon. In June 1933 Congress passed the National Industrial Recovery Act, 48 Stat. 195. Sec. 9(c) of that Act authorized the President to forbid the interstate and foreign shipment of petroleum and its products produced or withdrawn from storage in violation of state laws. By Executive Order the President on July 11, 1933, forbade such shipments. On August 19, 1933, a code of fair competition 172 for the petroleum industry was approved.[10] The Secretary of the Interior was designated as Administrator of that Code. He established a Petroleum Administrative Board to "advise with and make recommendations" to him. A Planning and Coordination Committee was appointed, of which respondent Charles E. Arnott, a vice-president of Socony-Vacuum, was a member, to aid in the administration of the Code. In addressing that Committee in the fall of 1933 the Administrator said: "Our task is to stabilize the oil industry upon a profitable basis." Considerable progress was made. The price of crude oil was a dollar a barrel near the end of September 1933, as a result of the voluntary action of the industry,[11] but, according to respond-

9 Described by one witness as "wells that have gotten down to less than 5 barrels a day, and in some cases down to less than a barrel a day, so that they only have to be pumped, sometimes, an hour or two a day to get all the oil they will produce at that stage of the game."

10 It provided for maximum hours of work and minimum rates of pay; forbade sales below cost; required integrated companies to conduct each branch of their business on a profitable basis; established, within certain limits, the parity between the price of a barrel of crude oil and a gallon of refined gasoline as 18.5 to 1; and authorized the fixing of certain minimum prices.

11 An order of the Administrator fixing minimum prices never became effective. Respondents also made an offer of proof that the Petroleum Administrative Board endeavored, in the fall of 1933, to obtain voluntary action by the larger companies to acquire and hold large stocks of crude oil, said to be overhanging the market and in danger of depressing the price of refined gasoline. The offer of proof indicated that some purchases had been made but did not show the extent. Respondents offered to show, through testimony of the chairman of the Planning & Coordination Committee, that it was the desire of the Administrator that crude oil not fall below $1 a barrel.

ents, in accordance with the Administrator's policy and desire. In April 1934 an amendment to the Code was adopted under which an attempt was made to balance the supply of gasoline with the demand by allocating the amount of crude oil which each refiner could process with the view of creating a firmer condition in the market and thus increasing the

173

price of gasoline.[12] This amendment also authorized the Planning and Coordination Committee, with the approval of the President, to make suitable arrangements for the purchase of gasoline from non-integrated or semi-integrated refiners and the resale of the same through orderly channels. Thereafter four buying programs were approved by the Administrator.[13] These permitted the major companies to purchase distress gasoline from the independent refiners. Standard forms of contract were provided. The evil aimed at was, in part at least, the production of hot oil and hot gasoline. The contracts (to at least one of which the Administrator was a party) were made pursuant to the provisions of the National Industrial Recovery Act and the Code and bound the purchasing company to buy fixed amounts of gasoline at designated prices[14] on condition that the seller

174

should abide by the provisions of the Code. According to the 1935 Annual Report of the Secretary of the Interior, these buying programs were not successful as "the production of gasoline from 'hot oil' continued, stocks of gasoline mounted, wholesale prices for gasoline remained below parity with crude-oil prices, and in the early fall of 1934 the industry approached a serious collapse of the wholesale market."[15] Restoration of the price of gasoline to parity with crude oil at one dollar per barrel was not realized.

The flow of hot oil out of East Texas continued. Refiners in the field could procure such oil for 35¢ or less a barrel and manufacture gasoline from it for 2 or 2½¢ a gallon. This competition of the cheap hot gasoline drove the price of legal gasoline down below the cost of production. The problem of distress gasoline also persisted. The disparity between the price of gasoline and the cost of crude oil which had been at $1 per barrel since September 1933 caused losses to many independent refiners, no matter how efficient they were. In October 1934 the Administrator set up a Federal Tender Board and issued an order making it illegal to ship crude oil or gasoline out of East Texas in interstate or foreign commerce unless it were accompanied by a tender issued by that Board certifying that it had been legally produced or manufactured. Prices rose sharply. But the improvement was only temporary as the enforcement of § 9(c) of the Act was enjoined in a number of suits. On January 7, 1935, this Court held § 9(c) to be unconstitutional. Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446. Following that decision there was a renewed influx of hot gasoline into the Mid-Western area and the tank car market fell.

175

Meanwhile the retail markets had been swept by a series of price wars. These

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12 The testimony of one of respondents' witnesses was that this policy caused the major companies to buy gasoline—in the main from small, non-integrated refiners.

13 June 23, 1934; August 13, 1934; September 8, 1934; November 2, 1934. They apparently were short-lived, their legality having been questioned by the Department of Justice. Late in 1933 the industry proposed the formation of a National Petroleum Agency, of which twenty-three of the larger companies, including most of the corporate respondents, were to be members, "to purchase, hold and, in an orderly way, dispose of surplus gasoline which threatens the stability of the oil price structure." Subscriptions for a pool of nearly $9,000,000 were obtained. The plan was never put into operation. In May 1934 there was another voluntary plan (which was abortive), the Planning & Coordination Committee addressed a resolution to certain major companies calling upon each to purchase an amount of gasoline in May equal to 3% of their sales.

14 Under the November 2, 1934 program the contract provided that the price to be paid for the gasoline purchased should increase ¼¢ per gallon with each 5¢ per barrel increase in the posted price of crude oil and should decrease ¼¢ per gallon with each 5¢ per barrel decrease in crude.

15 P. 37. Excerpts from this report were part of an offer of proof by respondents.

price wars affected all markets—service station, tank wagon, and tank car. Early in 1934 the Petroleum Administrative Board tried to deal with them—by negotiating agreements between marketing companies and persuading individual companies to raise the price level for a period. On July 9, 1934, that Board asked respondent Arnott, chairman of the Planning and Coordination Committee's Marketing Committee,[16] if he would head up a voluntary, cooperative movement to deal with price wars. According to Arnott, he pointed out that in order to stabilize the retail market it was necessary to stabilize the tank car market through elimination of hot oil and distress gasoline.[17] On July 20, 1934, the Administrator wrote Arnott, described the disturbance caused by price wars and said:

"Under Article VII, Section 3 of the Code it is the duty of the Planning and Coordination Committee to cooperate with the Administration as a planning and fair practice agency for the industry. I am, therefore, requesting you, as Chairman of the Marketing Committee of the Planning and Coordination Committee, to take action which we deem necessary to restore markets to their normal conditions in areas where wasteful competition has caused them to become depressed. The number and extent of these situations would make it impractical for the Petroleum Administrative Board acting alone to deal with each specific situation. Therefore, I am requesting

176

and authorizing you, as Chairman of the Marketing Committee, to designate committees for each locality when and as price wars develop, with authority to confer and to negotiate and to hold due public hearings with a view to ascertaining the elements of conflict that are present, and in a cooperative manner to stabilize the price level to conform to that normally prevailing in contiguous areas where marketing conditions are similar. Any activities of your Committee must, of course, be consistent with the requirements of Clause 2 of Sub-section (a) of Section III of the Act, * * *."[18]

177

After receiving that letter Arnott appointed a General Stabilization Committee with headquarters in Washington and a

16 The Marketing Committee had an extensive organization of regional, state, local, or temporary committees, scattered throughout the country and representative of the various marketing elements in the industry.

17 He also testified that the Board said that it could not tell him how to deal with the price wars but that it would authorize him to deal with "the elements [of] that conflict that cause them".

18 Sec. 3(a) of the Act read:

"Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices: Provided further, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared."

Section 5 provided:

"While this title is in effect (or in the case of a license, while section 4(a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States."

regional chairman in each region. Over fifty state and local committees were set up. The Petroleum Administrative Board worked closely with Arnott and the committees until the end of the Code near the middle of 1935. The effort (first local, then state-wide, and finally regional) was to eliminate price wars by negotiation and by persuading suppliers to see to it that those who bought from them sold at a fair price. In the first week of December 1934, Arnott held a meeting of the General Stabilization Committee in Chicago and a series of meetings on the next four or five days attended by hundreds of members of the industry from the middle west. These meetings were said to have been highly successful in elimination of many price wars. Arnott reported the results to members of the Petroleum Administrative Board on December 18, 1934, and stated that he was going to have a follow-up meeting in the near future. It was at that next meeting that the groundwork for the alleged conspiracy was laid.

III. *The Alleged Conspiracy.*

The alleged conspiracy is not to be found in any formal contract or agreement. It is to be pieced together from the testimony of many witnesses and the contents of over 1,000 exhibits, extending through the 3,900 printed pages of the record. What follows is based almost entirely on unequivocal testimony or undisputed contents of exhibits, only occasionally on the irresistible inferences from those facts.

178

A. Formation of the Mid-Continent Buying Program.

The next meeting of the General Stabilization Committee was held in Chicago on January 4, 1935, and was attended by all of the individual respondents, by representatives of the corporate respondents, and by others. Representatives of independent refiners, present at the meeting, complained of the failure of the price of refined gasoline to reach a parity with the crude oil price of $1 a barrel. And complaints by the independents of the depressing effect on the market of hot and distress gasoline were reported. Views were expressed to the effect that "if we were going to have general stabilization in retail markets, we must have some sort of a firm market in the tank car market." As a result of the discussion Arnott appointed a Tank Car Stabilization Committee[19] to study the situation and make a report, or, to use the language of one of those present, "to consider ways and means of establishing and maintaining an active and strong tank car market on gasoline." Three days after this committee was appointed, this Court decided Panama Refining Co. v. Ryan, supra. As we have said, there was evidence that following that decision there was a renewed influx of hot gasoline into the Mid-Western area with a consequent falling off of the tank car market prices.

The first meeting of the Tank Car Committee was held February 5, 1935, and the second on February 11, 1935. At these meetings the alleged conspiracy was formed, the substance of which, so far as it pertained to the Mid-Continent phase, was as follows:

It was estimated that there would be between 600 and 700 tank cars of distress gasoline produced in the Mid-Continent
179
oil field every month by about 17 independent refiners. These refiners, not having regular outlets for the gasoline, would be unable to dispose of it except at distress prices. Accordingly, it was proposed and decided that certain major companies (including the corporate respondents) would purchase gasoline from these refiners. The Committee would assemble each month information as to the quantity and location of this distress gasoline. Each of the major companies was to select one (or more) of the independent refiners having distress gasoline as its "dancing partner",[20] and would assume responsibility for purchas-

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[19] This committee eventually was composed of respondents McDowell, Ashton and Lakin and five former defendants, who were either discharged or granted new trials.

[20] Respondent R. W. McDowell, a vice president of Mid-Continent, testified as follows respecting the origin and meaning of this term:

"The phrase 'dancing partners' came up right there after Mr. Ashton had gone around the room. There were these 7 or 8 small refiners whom no one had mentioned. He said this situation ing its distress supply. In this manner buying power would be coordinated, purchases would be effectively placed, and the results would be much superior to the previous haphazard purchasing. There were to be no formal contractual commitments to purchase this gasoline, either between the major companies or between the majors and the independents. Rather it was an informal gentlemen's agreement or understanding whereby each undertook to perform his share of the joint undertaking.

180

Purchases were to be made at the "fair going market price".

A Mechanical Sub-Committee[21] was appointed to find purchasers for any new distress gasoline which might appear between the monthly meetings of the Tank Car Stabilization Committee and to handle detailed problems arising during these periods. It was agreed that any such attempt to stabilize the tank car market was hopeless until the flow of hot gasoline was stopped. But it was expected that a bill pending before Congress to prohibit interstate shipment of hot gasoline would soon be enacted which would deal effectively with that problem. Accordingly, it was decided not to put any program into operation until this bill had been enacted and became operative. It was left to respondent Arnott to give the signal for putting the program into operation after this had occurred.

The Connally Act, 49 Stat. 30, 15 U.S.C.A. § 715 et seq., became law on February 22, 1935. The enforcement agency under this act was the Federal Tender Board which was appointed about March 1st. It issued its first tenders March 4th. On March 1st respondents Arnott and Ashton explained the buying program to a group of Mid-Continent independent refiners in Kansas City, who expressed a desire to co-operate and who appointed a committee to attend a meeting of the Tank Car Stabilization Committee in St. Louis on March 5th to learn more about the details. This meeting was held with the committee of the independents present at one of the sessions. At a later session that day the final details of the Mid-Continent buying program were worked out, including an assignment

181

of the "dancing partners" among the major companies.[22] On March 6th Ashton telephoned Arnott and told him what had been accomplished at the St. Louis meeting. Later the same day Arnott told Ashton by telephone that the program should be put into operation as soon as possible, since the Federal Tender Board seemed to be cleaning up the hot oil situation in East Texas. Ashton advised McDowell, chairman of the Mechanical Sub-Committee, of Arnott's instructions. And on March 7th that committee went into action. They divided up the major companies; each communicated with those on his list, advised them that the program was launched, and suggested that they get in touch with their respective "dancing partners". Before the month was out all companies alleged to have participated in the program (except one or two) made purchases; 757 tank cars were bought from all but three of the independent refiners who were named in the indictment as sellers.

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reminded him of the dances that he used to go to when he was a young fellow. He said, 'Here we are at a great economic ball.' He said, 'We have these major companies who have to buy gasoline and are buying gasoline, and they are the strong dancers.' And he said, 'They have asked certain people to dance with them. They are the better known independent refiners.' He said, 'Here are 7 or 8 that no one seems to know.' He said, 'They remind me of the wallflowers that always used to be present at those old country dances.' He said, 'I think it is going to be one of the jobs of this Committee to introduce some of these wallflowers to some of the strong dancers, so that everybody can dance.' And from that simile, or whatever you want to call it, the term 'dancing partner' arose."

21 This was a committee of three of which respondent McDowell was chairman.

22 The list of the independent refiners having the distress gasoline was read and the majors made their selections—some on the basis of prior business dealings, some on the basis of personal friendships, some because of location, freight advantages, etc.

B. The Mid-Continent Buying Program in Operation.

No specific term for the buying program was decided upon, beyond the first month. But it was started with the hope of its continuance from month to month. And in fact it did go on for over a year, as we shall see.

The concerted action under this program took the following form:

The Tank Car Stabilization Committee had A. V. Bourque, Secretary of the Western Petroleum Refiners'

182

Association,[23] make a monthly survey, showing the amount of distress gasoline which each independent refiner would have during the month. From March 1935 through February 1936 that Committee met once a month. At these meetings the surveys showing the amount and location of distress gasoline were presented and discussed. They usually revealed that from 600 to 800 tank cars of distress gasoline would become available during the month. Each member of the Committee present would indicate how much his company would buy and from whom. Those companies which were not represented at the meetings were approached by the Mechanical Sub-Committee; "word was gotten to them as to the amount of gasoline that it was felt they could take in that month." Also, as we have stated, the Mechanical Sub-Committee would endeavor to find purchasers for any new distress gasoline which appeared between the meetings of the Tank Car Stabilization Committee. It would report such new surpluses to Bourque. The functions of the Mechanical Sub-Committee were apparently not restricted merely to dissemination of information to the buyers. One of its members testified that he urged the majors to buy more distress gasoline. Throughout, persuasion was apparently used to the end that all distress gasoline would be taken by the majors and so kept from the tank car markets. As the program progressed, most of the major companies continued to buy from the same "dancing partners" with whom they had started.

One of the tasks of the Mechanical Sub-Committee was to keep itself informed as to the current prices of

183

gasoline and to use its persuasion and influence to see to it that the majors paid a fair going market price and did not "chisel" on the small refiners. It did so. At its meetings during the spring of 1935 the question of the fair going market price was discussed. For example, Jacobi, a member of the Sub-Committee, testified that at the meeting of March 14, 1935, "the subcommittee * * * arrived at what we thought was a fair market price for the week following", viz. 3¾¢ and 4¾¢.[24] Jacobi termed these prices arrived at by the Sub-Committee as the "recommended prices". He made it a practice of recommending these prices to the major companies with which he communicated. According to his testimony, those "recommendations" were represented by him to be not the Sub-Committee's but his own idea. McDowell testified that he never made any such price recommendations but if asked would tell the purchasing companies what his own company was paying for gasoline.[25] Up to June 7, 1935, price "recommendations" were made five or seven times, each time the "recommended" prices constituting a price advance of ⅛¢ or ¼¢ over the previous "recommendation". No more price "recommendations" were made in 1935. In January 1936 there was an advance in the price of crude oil. The members of the Sub-Committee discussed the price situation and concluded that an advance of ½¢ a gallon of gasoline

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23 Practically all of the independent refiners named in the indictment were members of this Association. C. M. Boggs, the president of the Association, and A. V. Bourque, its secretary, were named in the indictment as defendants. As to the former, a motion for directed verdict of acquittal was granted; as to the latter, the verdict of the jury was set aside and the indictment dismissed.

24 On March 15, 1935, Jacobi in a letter to his superiors wrote: "The writer has been busy this week on tank car stabilization work, and thus far results are gratifying. Our Committee decided on a price of 3¾¢ for third grade, and 4¾¢ for 'Q' for next week. Purchasing companies, including our own units, are paying these prices today." "Q" gasoline is regular gasoline with an octane rating of 68–70.

25 What the practice of the other member of the Mechanical Sub-Committee was in this respect does not appear.

purchased under the program should be made. Jacobi made that "recommendation" to the companies on his list.

184

We shall discuss later the effect of this buying program on the market.

The major companies regularly reported to Bourque, the trade association representative of the Mid-Continent independent refiners, the volume of their purchases under the program and the prices paid. Representatives of one of the corporate respondents repeatedly characterized its purchases under the program as "quotas", "obligations", or "allocations". They spoke of one of its "dancing partners" under the buying program as "one of the babies placed in our lap last spring when this thing was inaugurated." And they stated that "we don't have much choice as to whose material we are to take, when we purchase outside third grade gasoline in connection with the Buying Program Committee's operations. On such purchases, we have refineries 'assigned' to us." This was doubtless laymen's, not lawyers', language. As we have said, there does not appear to have been any binding commitment to purchase; the plan was wholly voluntary; there is nothing in the record to indicate that a participant would be penalized for failure to cooperate. But though the arrangement was informal, it was nonetheless effective, as we shall see. And, as stated by the Circuit Court of Appeals, there did appear to be at least a moral obligation to purchase the amounts specified at the fair market prices "recommended". That alone would seem to explain why some of the major companies cancelled or declined to enter into profitable deals for the exchange of gasoline with other companies in order to participate in this buying program. Respondent Skelly Oil Co. apparently lost at least some of its pipeline transportation profit of 5/16¢ a gallon "on every car of gasoline" purchased by it in the buying program. And both that company and respondent Wadhams Oil Co. continued to make purchases of gasoline under the program although they were unable then to dispose of it.

185

Up to June 1935, the expenses incurred by the members of the Mechanical Sub-Committee were charged to and paid by the Planning and Coordination Committee of the Code of Fair Competition for the Petroleum Industry. On May 27, 1935, this Court held in A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, that the code-making authority conferred by the National Industrial Recovery Act was an unconstitutional delegation of legislative power. Shortly thereafter the Tank Car Stabilization Committee held a meeting to discuss their future course of action. It was decided that the buying program should continue. Accordingly, that Committee continued to meet each month through February 1936. The procedure at these meetings was essentially the same as at the earlier ones. Gradually the buying program worked almost automatically, as contacts between buyer and seller became well established. The Mechanical Sub-Committee met at irregular intervals until December 1935. Thereafter it conducted its work on the telephone.

C. Formation and Nature of the East Texas Buying Program.

In the meetings when the Mid-Continent buying program was being formulated it was recognized that it would be necessary or desirable to take the East Texas surplus gasoline off the market so that it would not be a "disturbing influence in the Standard of Indiana territory". The reason was that weakness in East Texas spot market prices might make East Texas gasoline competitive with Mid-Continent gasoline in the Mid-Western area and thus affect Mid-Continent spot market prices. The tank car rate on gasoline shipments from the East Texas field to points in the Mid-Western area was about 1/8¢ a

186

gallon higher than from the Mid-Continent field. With East Texas spot market prices more than 1/8¢ a gallon below Mid-Continent spot market prices, there might well be a resulting depressing effect on the Mid-Continent spot market prices.[26]

26 Arnott was reported as saying: "East Texas has been a menace to not only the Eastern Seaboard, but its gasoline also has found its way up into the Mid-Continent and has been competitive with the so-called Mid-Continent suppliers' or refiners' gasoline."

The normal market for gasoline re-

Early in 1935 the East Texas Refiners' Marketing Association was formed to dispose of the surplus gasoline manufactured by the East Texas refiners. The occasion for the formation of this Association was the stoppage of the shipment of hot oil and gasoline as a consequence of a Texas law enacted in December 1934. As long as these refiners had operated on cheap hot oil they had been able to compete for business throughout the Middle West. If they used legal crude at a dollar a barrel, their costs would increase. Their shift from a hot oil to a legal oil basis necessitated a change in their marketing methods. They were already supplying jobbers and dealers of Texas with all the gasoline they could use. Hence, their problem was to find additional markets for the surplus gasoline which they manufactured from legal crude. The Association was to act as the sales agency for those surpluses. Shipments north would be against the freight differential. Therefore, without regular outlets for this surplus gasoline they would have been forced to dump it on the market at distress prices. Their plan was to persuade the major companies if possible to buy more East Texas gasoline and to purchase it through the Association which would allocate it among its members who had surpluses. Neil Buckley, a buyer for Cities Service

187

Export Corporation in Tulsa, was recommended by one of the independents as the contact man. Buckley undertook the job.[27]

Thus it was not established that the major companies caused the Association to be formed. But it is clear that the services of the Association were utilized in connection with a buying program by defendant companies. The record is quite voluminous on the activities of Buckley in getting the support of the majors to the Association's program. Suffice it to say that he encountered many difficulties, most of them due to the suspicion and mistrust of the majors as a result of the earlier hot oil record of the East Texas independents. His initial task was to convince the majors of the good faith of the East Texas independents. Many conferences were had. Arnott gave help to Buckley. Thus, on March 1, 1935, Arnott wired a small group of representatives of major companies, who were buyers and users of East Texas gasoline, inviting them to attend a meeting in New York City on March 6th "to hear outcome my meeting with East Texas refiners and to consider future action surplus gasoline this and other groups that is awaiting our decision * * * matter of extreme importance." The problem was discussed at that meeting[28] but reliable information was lacking as to the probable amount of distress gasoline, the size of the independents' Federal allocations and whether or not such gasoline was going to be manufactured within

188

those allocations. Accordingly Arnott appointed a committee to attend the meeting of the District Allocators[29] on March 13th and to obtain the information. That information was obtained and a schedule was prepared showing the probable amount of surplus gasoline in East Texas and the Gulf, the names of the regular buyers in those areas, and the amounts they might take. Arnott, on March 14th, by telegraph called another meeting in New York City for the next day, saying "The question of surplus gasoline which has been under consideration must be finalized tomorrow." At that meeting someone (apparently a representative of respondent Sinclair) "arose with a slip of paper in his hand and stated that it had been suggested" that each of 12 to 15 major companies "take so much gasoline" from East Texas, "the amounts being read off as to what each company would take". Nothing definite was decided at the meeting. Buckley continued his efforts, talking with Arnott and representatives of other

fined in East Texas was the State of Texas and the Atlantic seaboard, reached through tanker shipments from Gulf ports.

27 Buckley first secured the approval of his employer. His company, not the Association, paid his salary while he was engaged in this work; the Association paid his travel and telephone expenses.

28 Representatives of respondents Socony-Vacuum, Pure Oil, Sinclair and probably of Shell were present as well as representatives of other majors. The only individual respondents present were Arnott and McElroy.

29 They were part of the organization of the Planning & Coordination Committee under the Code. As to allocations under the Code see infra, 60 S.Ct. pp. 834–837.

majors. It is impossible to find from the record the exact point of crystallization of a buying program. But it is clear that as a result of Buckley's and Arnott's efforts and of the discussions at the various meetings various major companies did come into line and that a concerted buying program was launched. The correspondence of employees of some of the majors throughout the period in question is replete with references such as the following: "buying program in East Texas"; "our allocation of five cars per day"; "a general buying movement"; "regular weekly purchases from the East Texas group"; "allocations and purchases" in the East Texas field; and the like.

189

In 1935 the East Texas refiners named in the indictment sold 285,592,188 gallons of gasoline. Of this certain defendant companies[30] bought 40,195,754 gallons or 14.-07%. In the same year all independent refiners in East Texas sold 378,920,346 gallons—practically all of it on the spot market. Of this amount those defendant companies purchased 12.03% or 45,598,453 gallons. Of the 8,797 tank cars purchased by all defendants (except Sinclair) from March 1935 through April 1936 from independent refiners in the East Texas field, 2,412 tank cars were purchased by the present corporate respondents.

Every Monday morning the secretary of the East Texas association ascertained from each member the amount of his forthcoming weekly surplus gasoline and the price he wanted. He used the consensus of opinion as the asking price. He would call the major companies; they would call him. He exchanged market information with them. Orders received for less than the asking price would not be handled by the Association; rather the secretary would refer the buyer to one of the independents who might sell at the lower price. Very few cars were purchased through the Association by others than the major oil companies.[31] The majors bought about 7,000 tank cars through the Association in 1935 and about 2,700 tank cars in the first four months of 1936. And in 1935 the secretary of the Association placed an additional 1,000 tank cars by bringing the purchasers and the independent refiners together. The purchases in 1935 in East Texas were, with minor exceptions, either

190

at the low or slightly below the low quotation in Platt's Oilgram, following it closely as the market rose in March, April, and May, 1935; they conformed to the market as it flattened out into more or less of a plateau through the balance of 1935 with a low for third grade gasoline of 4⅝¢. This was consistent with the policy of the buying program. For the majors were requested to purchase at the "fair, going market price".[32] And it is clear that this East Texas buying program was, as we have said, supplementary or auxiliary to the Mid-Continent program. As stated in March 1935 in an inter-company memorandum of one of the majors: "* * * with east coast refiners having a program to purchase surplus East Texas gasoline over the next four months, we feel that still further advances can be made in the tank car market and a resultant increase in the service station price."

D. Scope and Purpose of the Alleged Conspiracy.

As a result of these buying programs it was hoped and intended that both the tank car and the retail markets would improve. The conclusion is irresistible that defendants' purpose was not merely to raise the spot market prices but, as the real and ultimate end, to raise the price of gasoline in their sales to jobbers and consumers in the Mid-Western area. Their agreement or plan embraced not only buying on the spot markets but also, at least by clear implication, an understanding to maintain such im-

30 Not including, inter alia, Cities Service Export Oil Co., Louisiana Oil Refining Corp., Tide Water Assoc. Oil Co., The Texas Co., and Gulf Refining Co., as respects which the indictment had been dismissed.

31 Only three of the corporate respondents purchased through the Association.

32 An inter-company communication between employees of respondent Pure Oil written in May 1935 stated: "Prices were advanced this week in both regions to 4½¢ and 4⅝¢–5⅝¢, in view of some of the refiners sqawking because our buying price was considerably lower than the publications."

provements in Mid-Western prices as would result from those purchases of distress gasoline. The latter obviously would be achieved by selling at the increased prices, not

191

by price cutting. Any other understanding would have been wholly inconsistent with and contrary to the philosophy of the broad stabilization efforts which were under way. In essence the raising and maintenance of the spot market prices were but the means adopted for raising and maintaining prices to jobbers and consumers. The broad sweep of the agreement was indicated by Arnott before a group of the industry on March 13, 1935. He described the plan as one "whereby this whole stabilization effort of markets, the holding up of normal sales market structures, the question of the realization of refineries, the working together of those two great groups in order that we may balance this whole picture and in order that we may interest a great many buyers in this so-called surplus or homeless gasoline, can be done along organized lines. * * *" Certainly there was enough evidence to support a finding by the jury that such were the scope and purpose of the plan.

But there was no substantial competent evidence that defendants, as charged in the indictment, induced the independent refiners to curtail their production.

E. Marketing and Distribution Methods.

Before discussing the effect of these buying programs, some description of the methods of marketing and distributing gasoline in the Mid-Western area during the indictment period is necessary.

The defendant companies sold about 83% of all gasoline sold in the Mid-Western area during 1935. As we have noted, major companies, such as most of the defendants, are those whose operations are fully integrated—producing crude oil, having pipe lines for shipment of the crude to its refineries, refining crude oil, and marketing gasoline at retail and at wholesale. During the greater part of the indictment period the defendant companies

192

owned and operated many retail service stations[33] through which they sold about 20% of their Mid-Western gasoline in 1935 and about 12% during the first seven months of 1936. Standard Oil Company (Indiana)[34] was known during this period as the price leader or market leader throughout the Mid-Western area. It was customary for retail distributors, whether independent or owned or controlled by major companies, to follow Standard's posted retail prices. Its posted retail price in any given place in the Mid-Western area was determined by computing the Mid-Continent spot market price and adding thereto the tank car freight rate from the Mid-Continent field, taxes and 5½¢. The 5½¢ was the equivalent of the customary 2¢ jobber margin and 3½¢ service station margin. In this manner the retail price structure throughout the Mid-Western area during the indictment period was based in the main on Mid-Continent spot market quotations,[35] or, as stated by one of the witnesses for the defendants, the spot market was a "peg to hang the price structure on".

About 24% of defendant companies' sales in the Mid-Western area in 1935 were to jobbers, who perform the function of middlemen or wholesalers. Since 1925 jobbers were purchasing less of their gasoline on the spot tank car markets and more under long term supply contracts from major companies and independent refiners. These contracts usually ran for a year or more and covered all of the jobber's gasoline requirements during the period. The price which the jobber was to pay over the life of the contract was not fixed; but a formula for its computation

193

was included. About 80% or more of defendant companies' jobber contracts provided that the price of gasoline sold thereunder should be the Mid-Continent spot market price on the date of shipment. This spot market price was to be determined by averaging the high and low spot market quotations reported in the Chicago Journal of Commerce and Platt's Oil-

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33 It appears that, beginning in 1935 and increasing in the latter part of 1936, state chain store legislation resulted in the majors leasing many of their retail service stations.

34 A defendant to whom a new trial was granted.

35 Further details of Standard's policy in posting retail prices are discussed, 60 S.Ct. p. 833.

gram or by averaging the high and low quotations reported in the Journal alone. The contracts also gave the jobber a wholly or partially guaranteed margin between the price he had to pay for the gasoline and the normal price to service stations—customarily a 2¢ margin.[36]

There is no central exchange or market place for spot market transactions. Each sale is the result of individual bargaining between a refiner and his customers, sales under long-term contracts not being included. It is a "spot" market because shipment is to be made in the immediate future—usually within ten or fifteen days. Sales on the spot tank car markets are either sales to jobbers or consumers, sales by one refiner to another not being included.[37] The prices paid by jobbers and consumers in the various spot markets are published daily

194

in the trade journals, Platt's Oilgram and Chicago Journal of Commerce. In the case of the Oilgram these prices are obtained by a market checker who daily calls refiners in the various refinery areas (major companies as well as independents) and ascertains the quantity and price of gasoline which they have sold *to jobbers* in spot sales.[38] After checking the prices so obtained against other sources of information (such as brokers' sales) and after considering the volume of sales reported at each price, he determines the lowest and highest prices at which gasoline is being sold *to jobbers* in substantial quantities on the spot market.[39] Thus, if he finds that substantial sales are reported at 5⅛¢, 5¼¢ and 5⅜¢, the Oilgram reports a price range of 5⅛-5⅜¢. The result is published in the Oilgram that same day.[40] The Chicago Journal of Commerce publishes similar quotations the day after the sales are reported. And its quotations cover sales to industrial consumers as well as to jobbers. But it was not shown that either journal had published prices paid by a major company as a price paid by jobbers on the tank car market.

F. The Spot Market Prices during the Buying Program.

In 1935 the 14 independent Mid-Continent refiners named in the indictment sold 377,988,736 gallons of gasoline. Of that output, the corporate respondents purchased

195

about 56,200,000 gallons or approximately 15%[41] and the defendant companies who went to trial, about 17%. The monthly purchases of all defendant companies from Mid-Continent independents from March 1935 to April 1936 usually ranged between 600 and 900 tank cars and in a few months somewhat exceeded those amounts.

Major company buying began under the Mid-Continent program on March 7, 1935. During the week before that buying com-

36 The following is illustrative: The spot market price (computed as indicated) was to govern when that price plus freight, plus 5½¢ per gallon did not exceed the posted service station price, exclusive of tax, at destination on date of shipment. In case that aggregate figure exceeded the service station price, then the price to the jobber would be reduced by an amount equal to one-half of the excess. In some cases the major companies assumed the full amount of the difference. The margin of 5½¢ was based on the seller's discount of 3½¢ to jobbers. Hence if the seller increased or decreased that discount generally then the margin of 5½¢ would be increased or decreased by an equal or like amount. The wording of the various contracts varied but there was great uniformity in principle.

37 For this reason "spot open market" is frequently used, "open" market referring to sales which are not made on contract nor based on future publications.

38 In case actual sales cannot be obtained, he gets the prices at which the refiners will sell to jobbers in that open spot market.

39 Major companies sell little gasoline to jobbers on a spot basis. The spot market prices published in the trade journals are based largely on sales by independent refiners.

40 The National Petroleum News gives the Oilgram quotations in weekly form.

41 That percentage is apparently reduced to about 10.5% if sales of 29 independent refiners (including the 14 named in the indictment) are taken.

What percentage these purchases by respondents were of the Mid-Continent spot market in 1935 does not clearly appear, the government's estimate of one-third to a half apparently being somewhat high.

menced the Mid-Continent spot market for third grade gasoline rose ⅜¢. The low quotation on third grade gasoline was 3½¢ on March 6, 1935. It rose to 4¾¢ early in June. That advance was evidenced by ten successive steps. The market on third grade gasoline then levelled out on a plateau which extended into January 1936, except for a temporary decline in the low quotation late in 1935. By the middle of January the low again had risen, this time to 5¼¢. It held substantially at that point until the middle of February 1936. By the end of February it had dropped to 5¢. It then levelled off at that low and remained there into May 1936 when the low dropped first to 4⅞¢ and then to 4¾¢. It stayed there until the first week in July 1936. The low then rose to 4⅞¢, maintained that level until mid-August, then started to drop until by successive steps it had declined to 4½¢ before the middle of September. It stayed there

196

until early October when it rose to 4⅝¢, continuing at that level until middle November when it rose to 4¾¢. The low remained at substantially that point throughout the balance of 1936.

During 1935, as the Mid-Continent spot market for third grade gasoline was rising, so was the East Texas spot market. And when in June 1935 the former levelled off for the balance of the year at a low of 4¾¢, the latter[42] levelled off, as we have seen, at a low of 4⅝¢.

During this period there were comparable movements on the Mid-Continent spot market for regular gasoline. From a low of 4⅜¢ on March 7, 1935, it rose to a low of 5⅝¢ early in June, that advance being evidenced by nine successive steps. As in the case of third grade gasoline, the market for regular gasoline then levelled out on a plateau which extended into January 1936. By the middle of January the low had risen to 6⅛¢. It held at that point until the middle of February 1936. By the end of February it had dropped to 5⅞¢. It rose to 6¢ in the first week of March, levelled off at that low and remained there into August 1936. By mid-August it started to drop—reaching 5½¢ in September, going to 5⅝¢ in October and to 5¾¢ in November, where it stayed through the balance of 1936.

These plateaus are clearly shown by a chart of the market journals' quotations. But that does not of course mean that all sales on the spot market were made between the high and the low during the period in question. As we have said, the quotations of the market journals merely indicated the range of prices (usually an eighth) within which the bulk of the gasoline was being sold. Hence actual sales took place above the high and below

197

the low. Thus between June and December 1935 while the low for third grade gasoline remained substantially at 4¾¢ and the high at 4⅞¢ jobbers' and consumers' purchases[43] ranged from 4⅜¢ to 5⅛¢. A similar condition existed as respects regular gasoline.

Purchases by the major companies likewise did not always fall within the range of these quotations. In fact, between 85 and 90% of their purchases from the independent refiners were made at prices which were at or below the low quotations in the market journals.[44]

198

There were few

42 Comparable movements took place in the East Texas spot market for regular gasoline until April 21, 1935, when those quotations were discontinued.

43 Respondents computed that for 1935 8% of these purchases of third grade gasoline were above the high; 10% were at the high; 7% were between the high and low; 16% were below the low.

44 Respondents' computations comparing their tabulations with the government's tabulations are as follows:

Price Group	Government's Tank-Cars	Government's %	Respondents' Tank-Cars	Respondents' %
Above the lowest quotations in Platt's Oilgram......	745	8.09	516	7.5
Above the lowest quotations in Chicago Journal of Commerce	984	10.7	992	14.3
At the lowest quotations in Platt's Oilgram..........	6407	69.64	4491-2/3	64.9
At the lowest quotations in Chicago Journal of Commerce	6564	71.31	4419-2/3	63.9
Below the lowest quotations in Platt's Oilgram....	2052	22.27	1912-2/3	27.6
Below the lowest quotations in Chicago Journal of Commerce	1656	17.99	1508-2/3	21.8
Total	9204	100.00	6920-2/3	100.

such purchases above the high and not a substantial percentage at the high.[45]

G. Jobber and Retail Prices during the Buying Programs.

That the spot market prices controlled prices of gasoline sold by the majors to the jobbers in the Mid-Western area during the indictment period is beyond question. For, as we have seen, the vast majority of jobbers' supply contracts during that period contained price formulae which were directly dependent on the Mid-Continent spot market prices.[46] Hence, as the latter rose, the prices to the jobbers under those contracts increased.

There was also ample evidence that the spot market prices substantially affected the retail prices in the Mid-Western area during the indictment period. As we have seen, Standard of Indiana was known during this period as the price or market leader throughout this area. It was customary for the retailers to follow Standard's posted retail prices, which had as their original base the Mid-Continent spot market price. Standard's policy was

199

to make changes in its posted retail price only when the spot market base went up or down at least $\frac{3}{10}$¢ a gallon and maintained that change for a period of 7 days or more.[47] Standard's net reduction in posted prices for the 6 months preceding March 1935 was 1.9¢ per gallon. From March 1935 to June 1935 its posted retail prices were advanced $\frac{3}{10}$¢ four times.

Retail prices in the Mid-Western area kept close step with Mid-Continent spot market prices during 1935 and 1936, though there was a short lag between advances in the spot market prices and the consequent rises in retail prices.[48] This was true in general both of the subnormal[49]

200

and normal

The government's tabulations dealt with 9,204 tank cars which defendants (excluding Sinclair) purchased on a flat price basis from independent refiners in the Mid-Continent field between March 1, 1935 and April 30, 1936. Respondents' tabulations included Sinclair and excluded sales by defendants who had already been dismissed, and eliminated or reclassified alleged omissions or improper classifications by the government.

Respondents' computations also show that the percentage of purchases at prices below the low quotations was higher during the March-May, 1935 price rise than during the indictment period as a whole, and that the percentage of purchases above the low was lower during that period of price rise than during the period as a whole.

45 Respondents' figures were: .7% above the high of the Journal; .8% above the high of the Oilgram; 3.7% at the high of the Journal; 6.1% at the high of the Oilgram. Apparently all purchases above the high were purchases of third grade, not regular gasoline.

46 One government witness testified that out of 1,729 contracts made by the defendant major oil companies with jobbers in the Mid-Western area during 1935, 1,461 provided that the basic price was to be determined "on the basis of the average of the averages of the high and low quotations of the Chicago Journal of Commerce and Platt's Oilgram on spot market tank car gasoline." During 1935 defendant companies sold over 900,000,000 gallons to jobbers in the Mid-Western area out of total sales by them in that area of over 4,000,000,000 gallons.

47 These changes were apparently not made automatically, as the factor of competition was taken into consideration.

48 A comparison of Monday low quotations for house brand gasoline (Oklahoma market) with average service station prices for Standard's regular grade gasoline (less taxes) for 28 cities (including La Crosse and Milwaukee, Wis.) in the Mid-Western area shows the latter following the former upward from March to June 1935 and in January 1936.

	Oklahoma	*Service Station*
March 4, 1935	4.375¢	12.56¢
March 11, 1935	4.625	12.56
March 18, 1935	4.750	12.56
March 25, 1935	4.750	12.90
April 1, 1935	4.875	12.90
April 8, 1935	5.000	12.97
April 15, 1935	5.125	13.26
April 22, 1935	5.250	13.32
April 29, 1935	5.250	13.32
May 6, 1935	5.250	13.56
May 13, 1935	5.250	13.56
May 20, 1935	5.375	13.56
May 27, 1935	5.500	13.56
June 3, 1935	5.625	13.56
January 6, 1936	5.625	13.35
January 13, 1936	6.125	13.45
January 20, 1936	6.125	13.93
January 27, 1936	6.125	13.93

49 Prices below the normal price which Standard posted.

retail prices. To be sure, when the tank car spot market levelled out on a plateau from June to the end of 1935, there was not quite the same evenness in the higher plateau of the average retail prices. For there were during the period in question large numbers of retail price cuts in various parts of the Mid-Western area, though they diminished substantially during the spring and summer of 1935. Yet the average service station price[50] (less tax) having reached 13.26¢ by the middle of April (from 12.56¢ near the first of March) never once fell below that amount; advanced regularly to 13.83¢ by the middle of June; declined to 13.44¢ in August; and after an increase to 13.60¢ during the last of the summer remained at 13.41¢ during the balance of 1935 except for a minor intermediate drop. In sum, the contours of the retail prices conformed in general to those of the tank car spot markets. The movements of the two were not just somewhat comparable; they were strikingly similar. Irrespective of whether the tank car spot market prices controlled the retail prices in this area, there was substantial competent evidence that they influenced them—substantially and effectively. And in this connection it will be recalled that when the buying program was formulated it was in part predicated on the proposition that a firm tank car market was necessary for a stabilization of the retail markets. As reported by one who attended the meeting on February 5, 1935, where the buying program was being discussed: "It was generally assumed that all companies would come into the picture since a stable retail market requires a higher tank car market."

201

IV. *Other Circumstances Allegedly Relevant to the Offense Charged in the Indictment.*

The following facts or circumstances were developed at the trial by testimony or other evidence or were embraced in offers of proof made by respondents.

A. Alleged Knowledge and Acquiescence of the Federal Government.

Such of the following facts as were included in respondents' offers of proof were not sought to be proved in order to establish immunity from prosecution under the anti-trust laws. For admittedly the authorization under the National Industrial Recovery Act necessary for such immunity[51] had not been obtained. Rather respondents' offers of proof were made in order to show the circumstances which, respondents argue, should be taken into consideration in order to judge the purpose, effect and reasonableness of their activities in connection with the buying program.

Arnott testified that on January 8 or 9, 1935, he reported the appointment of the Tank Car Stabilization Committee to officials of the Petroleum Administrative Board who, he said, expressed great interest in it. A member of that Committee late in January 1935 advised the chairman of that Board of the "necessity for action in getting tank car prices up before it is too late". The chairman replied that "the tank car situation in relation to the price of crude is one about which we have no disagreement. How to bring about a correction is the stumbling block." There was evidence that at least general information concerning the meetings of the Tank Car Stabilization Committee was given a representative of the Board in February 1935. In March 1935 the Code

202

authorities, with the approval of the Administrator, asked the major companies to curtail their manufacture of gasoline during that month by 1,400,000 barrels. The purpose was said to be to aid the small refiners by forcing the majors to buy part of their requirements from them. A voluntary curtailment of some 960,000 barrels was made.

On March 12, 1935, Arnott saw the Chairman and at least one other representative of the Board. Among other things the buying programs were discussed. Arnott did not ask for the Board's approval of these programs nor its "blessing". A representative of the Board testified that Arnott told them that he was conducting those buying programs "on his own responsibility". Arnott denied this. The Chairman of the Board asked Arnott if the programs violated the anti-trust laws. Arnott said he did not believe they did and described what his group was doing. Ar-

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50 Average price (28 cities Mid-Western area) for Standard's regular gasoline.

51 Sec. 5 is set forth, supra, note 18.

nott testified that he felt that the Board thought the program was sound and hoped it would work; and that if he had thought they disapproved, he would have discontinued his activities. There was no evidence that the Board told Arnott to discontinue the program. But on March 13, 1935, Arnott in addressing the District Allocators' meeting said, respecting these buying programs:

"I am perfectly conscious that we have made other efforts at times to have this question dealt with. It has always been done in group form. That has involved agreements, group agreements. Those of us who have had anything to do whatsoever with the whole national picture, who have come to Washington and have had any experience with the PAB and eventually the Department of Justice, know just how long that road is, and for some good reason or for some unknown reason or for no reason

203

at all those agreements seem to have disappeared; those outstanding attempts—and they were really sincere and worthy attempts—have disappeared in a sort of cloud of mystery, and I don't think I for one, or anybody else can tell you just where they have gone—they are out of our minds, they are completed, they are finished, and we are not interested."

Respondents also offered to prove that a committee of the industry (the Blazer Committee) appointed by the Administrator to study the condition of the small units in the industry, made a report to him in March 1935 which stated, inter alia, as a recommendation:

"We know of nothing, apart from continued improvement in crude production control, which would be so helpful to the tank-car price of gasoline at this time as the substantial buying of distress gasoline by major companies. We understand a program of this sort is being considered by the Industry now in connection with a broad stabilization program. We therefore urge that the Administrator give it his approval and active support."[52]

They also offered a memorandum dated March 22, 1935, from the Chairman of the Petroleum Administrative

204

Board to the Administrator[53] commenting on the above report and making the following suggestion:

"We believe success in Code administration, assuming that it is to continue, requires that some of the recommendations made should be adopted; e. g., we have encouraged stabilization efforts designed at

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52 That report went on to say:

"* * * we believe such a program might be successful in raising both tank-car and retail prices to their proper level in relationship to crude oil prices.

"If higher tank-car prices are obtained, we believe they can be sustained only by corresponding increases in retail gasoline prices; otherwise, the burden merely would be shifted from small refiners to small marketers, who in many instances have been in just as much distress as the refiners. We find that abnormally low retail prices can depress tank-car prices just as much as low tank-car prices can pull down the retail price structure. Thus it appears to be essential that both prices move up together."

53 The Administrator was reported as saying about that report that if a parity between crude oil prices and gasoline prices did not come soon he would call a meeting of representatives of the industry to see what could be done about it. On March 30, 1935, according to respondents, the Administrator wrote concerning that report:

"Concerning the independent refiners, other than those in California, it appears from the report of the Committee on Small Enterprise that the outstanding difficulty is due to the disparity between posted crude oil prices and refinery realizations. This situation has been deplorable for many months, but it is my understanding that at present the activity of the Stabilization Committees is having a distinct effect in the improvement of refinery prices, and that were it not for old contracts, many of which are badly shaded with respect to the posted price, the independent refiner is approaching a normal market structure."

Respondents also offered to prove that the Blazer Committee advised the Board in April 1935 that there was then no occasion to reduce crude oil prices since "we consider tank car gasoline prices now almost up to parity with sufficient additional advances anticipated in both tank car and retail prices"; and expressed its satisfaction "with the success of the program to stabilize tank-car markets".

this time to aid the independent refiner, * * *."

On April 2, 1935, the Administrator wrote Arnott, referred to his letter of July 20, 1934 and stated, inter alia:

"The matter that at present concerns me is the necessity of complying with the requirements of the basic law. In authorizing the formulation of a stabilization program, I necessarily conditioned the authority granted, by providing that the requirements of Clause 2 of Subsection (a) of Section 3 of the National Industrial Recovery Act should be observed. I know you will appreciate that agreements between supplying companies which might be in conflict with the anti-trust laws of the United States require specific approval after due consideration if companies are to receive the protection afforded by Sections 4 and 5 of the National Industrial Recovery Act.

205

"I understand that the temporary character of a number of situations and the need for immediate action has made formalized agreements impracticable and in a number of instances they may be unnecessary. However, when the understandings arrived at as bases of solution of price wars affecting the industry over a considerable area are intended to operate over a definite period of time or involve substantial changes in the policy of the various supplying companies made only in consideration of similar action on the part of other companies, it is necessary that the procedure required by the Recovery Act be followed in order that the arrangement be legal. If any such agreements have been made I should like a report as to them. If they require approval to be effective * * * I should be glad to give consideration to them under the provisions of the Act."

On April 22, 1935, the Petroleum Administrative Board wrote a letter to Arnott imposing three conditions on general stabilization work: (1) there should be no stabilization meeting without a representative of the Board being present; (2) every element in the industry should be heard from before any decisions were made; (3) no general instructions should be given under the July 20, 1934 letter. A meeting of Arnott's committee and members of the Board was held on May 8, 1935. A representative of the Board testified that they called Arnott "on the carpet to request him to explain" to them "what he had been doing". Arnott's group considered the conditions imposed by the Board quite impossible. The Board assigned two of its staff to work the problem out with one of Arnott's men. According to the testimony of one of the representatives of the Board at that meeting, Arnott

206

did not ask for the Board's approval of the buying programs—nothing being said "one way or the other, about approval or disapproval." And he testified that Arnott in substance was told at that meeting by the Board's Chairman that the letter of July 20, 1934, from the Administrator to Arnott (quoted supra, 60 S.Ct. p. 823) did not give authority to conduct any buying program;[54] and that Arnott said he was not relying on that letter for approval. Arnott, however, testified that he recalled no such statement made by the Board's Chairman. Apparently, however, Arnott, in answer to questions, gave a general explanation of the buying programs, stating that the majors were continuing informally to buy; that there was no pool; that no one was obliged to make purchases; that they were trying to lift from independent refiners distress gasoline which was burdening the market.[55]

Respondents also offered to prove that on May 14, 1935, the Chairman of the Petrol-

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54 Respondents offered to prove that Arnott's lawyer advised him on July 31, 1934, that although the letter of July 20, 1934, was "not precisely an approval" by the Administrator of any agreement which gave "complete protection" from any prosecution under the anti-trust laws, it nevertheless was "for all practical purposes a complete protection to you and your committees to engage in all reasonable activities to restore prices to normal levels."

55 A sub-committee of the Planning & Coordination Committee met with the Board on May 10, 1935, to discuss the report of the Blazer Committee. The recommendation in that report that the majors buy distress gasoline from the independents was discussed. Arnott testified that his group told the Board that

eum Administrative Board asked Arnott to undertake to stabilize the Pennsylvania refinery market in the way that he had stabilized the Mid-Continent refinery market; that in connection with this request the Board evinced support and approval

207

of the Mid-Continent buying program; and that Arnott undertook to do what he could in the matter and called a meeting of the Pennsylvania refiners for May 28, 1935. Apparently the Schechter decision terminated that undertaking.

Respondents also offered portions of a final report [56] prepared by the Marketing Division of the Petroleum Administrative Board which discussed the work of the General Stabilization Committee [57] saying, inter alia: "One of the most important was the tank-car committee, which attempted to get the tank-car market raised more in line with the price of crude recovery cost on the theory that a firm tank-car market was essential to a stabilized retail structure". And respondents offered testimony of a member of the Board before a Senate Committee in 1937 respecting the "buying pool efforts, that began in December of 1933 and continued from then on during the entire period of the Petroleum Code." That testimony was: "It was an effort of the Department and the industrial committees to bring about the normal relationship between gasoline prices and crude oil prices, in order to permit the independent, non-integrated refiner to be able to operate without loss."

In sum, respondents by this and similar evidence offered to establish that the Petroleum Administrative Board knew of the buying programs and acquiesced in them. And respondents by those facts, together with those discussed under II, supra, undertook to show that their objectives under the buying programs were in line

208

with those of the Federal government under the Code: to keep the price of crude oil at a minimum of $1 a barrel; to restore the wholesale price level of gasoline at the refinery to a parity with crude oil; to stabilize retail prices at a normal spread between the refinery price and the retail price.

B. Other Factors Alleged to have Caused or Contributed to the Rise in the Spot Market.

Respondents do not contend that the buying programs were not a factor in the price rise and in the stabilization of the spot markets during 1935 and 1936. But they do contend that they were relatively minor ones, because of the presence of other economic forces such as the following:

1. *Control of production of crude oil.*

Under the Code an attempt was made for the first time to balance the production of crude oil with the consumptive demand for gasoline. Monthly estimates of gasoline consumption would be made by the Bureau of Mines. The quantity of crude oil necessary to satisfy that demand was also estimated, broken down into allowables for each state, and recommended to the states. And there was evidence that the states would approximately conform to those recommendations. After the Code the oil states continued the same practice under an Interstate Compact which permitted them to agree as to the quantities of crude oil which they would allow to be produced.[58]

2. *Connally Act.*

As we have noted, this law was enacted late in February 1935 and began to be effective the first part of March 1935. Prior to this act, control of hot oil by the states

209

had not been effective for any extended period of time. Throughout 1933 and 1934 from 150,000 to 200,000 barrels of crude oil a day were estimated to have been produced in East Texas in excess of the state's allowables, much of it going into intero

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"we already had buying of gasoline in effect" to which the Chairman of the Board was said to have replied "That is quite so and disposes of that part of the report."

[56] Prepared between December 1935 and February 1936 and issued in June 1936 by the Department of the Interior.

[57] In speaking of the general work of this Committee (which as we have noted was set up to deal with price wars) the report stated: "The stabilization program was perhaps the outstanding development under the code."

[58] This Compact (49 Stat. 939) was authorized in February 1935 and became effective in August 1935.

state commerce. After the Connally Act went into operation, no hot gasoline went into interstate commerce according to respondents' evidence.

3. *$1 Crude oil.*

As we have noted, crude oil was brought to a dollar a barrel near the end of September 1933. Before the Connally Act, however, hot oil flooded the market at substantially lower prices. Gasoline produced from hot oil forced the price of gasoline produced from crude oil down below cost. But with the elimination of the hot oil, fluctuations in the price of crude ceased. This had a stabilizing effect on the price of gasoline.

4. *Increase in consumptive demand.*

Beginning in the spring of 1935 there was an increase in demand for gasoline. During the whole indictment period every month showed an increase over the corresponding month in the previous year. For the entire year of 1935 consumption for the country as a whole was 7% more than for 1934; that for 1936 was about 10% over 1935—substantially the same increases taking place in the Mid-Western area.

5. *Control of inventory withdrawal and of manufacture of gasoline.*

Under the Code crude oil could be withdrawn from storage only with the approval of the Administrator. Also under the Code there were manufacturing quotas for gasoline which through Code authorities were allocated among the refiners. In March 1935, as we have seen, gasoline inventories of the majors were reduced by over

210

900,000 barrels through a voluntary curtailment program. The demand was so heavy that the industry withdrew from storage and refined over 22,000,000 barrels of crude oil in storage in 1935. Further, imports of crude oil were limited by order of the Administrator.

6. *Improved business conditions.*

The years 1935 and 1936 were marked by improving general business conditions and rising prices everywhere.

Much testimony was taken on these and related points. It was designed to show that under the conditions which existed during the indictment period, stability in the market was to be expected from the play of these various economic forces. For it was argued that by reason of those forces supply and demand were brought into a reasonable continuing balance with the resultant stabilization of the markets. And there was much testimony from respondents' witnesses that the above factors as well as the buying programs did contribute to price stability during this period. But no witness assumed to testify as to how much of a factor the buying program had been.

V. *Application of the Sherman Act.*

A. Charge to the Jury.

The court charged the jury that it was a violation of the Sherman Act for a group of individuals or corporations to act together to raise the prices to be charged for the commodity which they manufactured where they controlled a substantial part of the interstate trade and commerce in that commodity. The court stated that where the members of a combination had the power to raise prices and acted together for that purpose, the combination was illegal; and that it was immaterial how reasonable or unreasonable those prices were or to what extent they had been affected by the combination. It further charged that if such illegal combination existed,

211

it did not matter that there may also have been other factors which contributed to the raising of the prices. In that connection, it referred specifically to the economic factors which we have previously discussed and which respondents contended were primarily responsible for the price rise and the spot markets' stability in 1935 and 1936, viz. control of production, the Connally Act, the price of crude oil, an increase in consumptive demand, control of inventories and manufacturing quotas, and improved business conditions. The court then charged that, unless the jury found beyond a reasonable doubt that the price rise and its continuance were "caused" by the combination and not caused by those other factors, verdicts of "not guilty" should be returned. It also charged that there was no evidence of governmental approval which would exempt the buying programs from the prohibitions of the Sherman Act;

and that knowledge or acquiescence of officers of the government or the good intentions of the members of the combination would not give immunity from prosecution under that Act.

The Circuit Court of Appeals held this charge to be reversible error, since it was based upon the theory that such a combination was illegal per se. In its view respondents' activities were not unlawful unless they constituted an unreasonable restraint of trade. Hence, since that issue had not been submitted to the jury and since evidence bearing on it had been excluded, that court reversed and remanded for a new trial so that the character of those activities and their effect on competition could be determined. In answer to the government's petition respondents here contend that the judgment of the Circuit Court of Appeals was correct, since there was evidence that they had affected prices only in the sense that the removal of the competitive evil of distress gasoline by the buying programs had permitted prices to rise to a normal competitive level; that their activities promoted rather

212

than impaired fair competitive opportunities; and therefore that their activities had not unduly or unreasonably restrained trade. And they also contend that certain evidence which was offered should have been admitted as bearing on the purpose and end sought to be attained, the evil believed to exist, and the nature of the restraint and its effect. By their cross-petition respondents contend that the record contains no substantial competent evidence that the combination, either in purpose or effect, unreasonably restrained trade within the meaning of the Sherman Act, and therefore that the Circuit Court of Appeals erred in holding that they were not entitled to directed verdicts of acquittal.

In United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700, 50 A.L.R. 989, this Court sustained a conviction under the Sherman Act where the jury was charged that an agreement on the part of the members of a combination, controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity is in itself an unreasonable restraint of trade without regard to the reasonableness of the prices or the good intentions of the combining units. There the combination was composed of those who controlled some 82 per cent of the business of manufacturing and distributing in the United States vitreous pottery. Their object was to fix the prices for the sale of that commodity. In that case the trial court refused various requests to charge that the agreement to fix prices did not itself constitute a violation of law unless the jury also found that it unreasonably restrained interstate commerce. This Court reviewed the various price-fixing cases under the Sherman Act beginning with United States v. Trans-Missouri Freight Association, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007, and United States v. Joint Traffic Association, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259, and said "* * * it has since often been decided and always assumed that uniform

213

price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon." 273 U.S. page 398, 47 S.Ct. page 380, 71 L.Ed. 700, 50 A.L.R. 989. This Court pointed out that the so-called "rule of reason" announced in Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, 34 L.R.A.,N.S., 834, Ann.Cas.1912D, 734, and in United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663, had not affected this view of the illegality of price-fixing agreements. And in holding that agreements "to fix or maintain prices" are not reasonable restraints of trade under the statute merely because the prices themselves are reasonable, it said (273 U.S. pages 397, 398, 47 S.Ct. page 379, 71 L.Ed. 700, 50 A.L.R. 989):

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

214

only after a complete survey of our economic organization and a choice between rival philosophies."

In conclusion this Court emphasized that the Sherman Act is not only a prohibition against the infliction of a particular type of public injury, but also, as stated in Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49, 33 S.Ct. 9, 15, 57 L.Ed. 107, a "limitation of rights" which may be "pushed to evil consequences, and therefore restrained".

But respondents claim that other decisions of this Court afford them adequate defenses to the indictment. Among those on which they place reliance are Appalachian Coals, Inc., v. United States, 288 U. S. 344, 53 S.Ct. 471, 77 L.Ed. 825; Sugar Institute, Inc., v. United States, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859; Maple Flooring Mfrs' Association v. United States, 268 U.S. 563, 45 S.Ct. 578, 69 L.Ed. 1093; Cement Mfrs' Protective Association v. United States, 268 U.S. 588, 45 S. Ct. 586, 69 L.Ed. 1104; Chicago Board of Trade v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683; and the American Tobacco and Standard Oil cases, supra.

But we do not think that line of cases is apposite. As clearly indicated in the Trenton Potteries case, the American Tobacco and Standard Oil cases have no application to combinations operating directly on prices or price structures.

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

In that case certain producers of bituminous coal created an exclusive selling agency for their coal. The agency was to establish standard classifications and sell the coal of its principals at the best prices obtainable. The occasion for the formation of the agency was the existence of certain so-called injurious practices and conditions in the industry. One of these was the problem of "distress coal"—coal shipped to the market which was unsold at the time of delivery and therefore dumped on the market irrespective of demand. The agency was to promote the systematic study of the marketing and distribution

215

of coal, its demand and consumption; to maintain an inspection and an engineering department to demonstrate to customers the advantages of this type of coal and to promote an extensive advertising campaign; to provide a research department to demonstrate proper and efficient methods of burning coal and thus to aid producers in their competition with substitute fuels; to operate a credit department dealing with the reliability of purchasers; and to make the sale of coal more economical. That agency was also to sell all the coal of its principals at the best prices obtainable and, if all could not be sold, to apportion orders upon a stated basis. And, save for certain stated exceptions, it was to determine the prices at which sales would be made without consultation with its principals. This Court concluded that so far as actual purpose was concerned, the defendant producers were engaged in a "fair and open endeavor to aid the industry in a measurable recovery from its plight". [288 U.S. 344, 53 S.Ct. 478, 77 L.Ed. 825.] And it observed that the plan did not either contemplate or involve "the fixing of market prices"; that defendants would not be able to fix the price of coal in the consuming markets; that their coal would continue to be subject to "active competition". To the contention that the plan would have a tendency to stabilize market prices and to raise them to a higher level, this Court replied (288 U.S. page 374, 53 S.Ct. page 479, 77 L.Ed. 825):

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

216

In distinguishing the Trenton Potteries case this Court said (288 U.S. page 375, 53 S.Ct. page 479, 77 L.Ed. 825):

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

Thus in reality the only essential thing in common between the instant case and the Appalachian Coals case is the presence in each of so-called demoralizing or injurious practices. The methods of dealing with them were quite divergent. In the instant case there were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of prices to jobbers and consumers in the Mid-Western area, by the elimination of distress gasoline as a market factor. The increase in the spot market prices was to be accomplished by a well organized buying program on that market: regular ascertainment of the amounts of surplus gasoline; assignment of sellers among the buyers; regular purchases at prices which would place and keep a floor under the market. Unlike the plan in the instant case, the plan in the Appalachian Coals case was not designed to operate vis a vis the general consuming market and to fix the prices on that market. Furthermore, the effect, if any, of that plan on prices was not only wholly incidental but also highly conjectural. For the plan had not then been put into operation. Hence this Court expressly reserved jurisdiction in the District Court to take further proceedings if, inter alia, in "actual operation" the plan proved to be "an undue restraint upon interstate commerce". And as we have seen it would per se constitute such a restraint if price-fixing were involved.

217

Nor are Maple Flooring Mfrs' Association v. United States and Cement Mfrs' Protective Association v. United States, supra, at all relevant to the problem at hand. For the systems there under attack were methods of gathering and distributing information respecting business operations. It was noted in those cases that there was not present any agreement for price-fixing. And they were decided, as indicated in the Trenton Potteries case, on the express assumption that any agreement for price-fixing would have been illegal per se. And since that element was lacking, the only issues were whether or not on the precise facts there presented such activities of the combinations constituted unlawful restraints of commerce. A majority of the Court held that they did not.

Nor can respondents find sanction in Chicago Board of Trade v. United States, supra, for the buying programs here under attack. That case involved a prohibition on the members of the Chicago Board of Trade from purchasing or offering to purchase between the closing of the session and its opening the next day grains (under a special class of contracts) at a price other than the closing bid. The rule was somewhat akin to rules of an exchange limiting the period of trading, for as stated by this Court the "restriction was upon the period of price-making". [246 U.S. 231, 38 S.Ct. 244, 62 L.Ed. 683.] No attempt was made to show that the purpose or effect of the rule was to raise or depress prices. The rule affected only a small proportion of the commerce in question. And among its effects was the creation of a public market for grains under that special contract class, where prices were determined competitively and openly. Since it was not aimed at price manipulation or the control of the market prices and since it had "no appreciable effect on general market prices", the rule survived as a reasonable restraint of trade.

There was no deviation from the principle of the Trenton Potteries case in Sugar Institute, Inc., v. United States,

218

supra. For in that case so-called competitive abuses were not permitted as defenses to violations of the Sherman Act bottomed on a trade association's efforts to create and maintain a uniform price structure.

[1,2] Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. And we reaffirmed that well-established rule in clear and unequivocal terms in Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 60 S.Ct. 618, 626, 84 L.Ed. —, decided March 25, 1940, where we said:

"Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700, 50 A.L.R. 989, and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act, * * *."

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

Respondents seek to distinguish the Trenton Potteries case from the instant one. They assert that in that case the parties substituted an agreed-on price for one determined by competition; that the defendants there had the power and purpose to suppress the play of competition in the determination of the market price; and therefore that the controlling factor in that decision was the destruction of market competition, not whether prices were higher or lower, reasonable or unreasonable. Respondents contend that in the instant case there was no elimination in the spot tank car market of competition

219

which prevented the prices in that market from being made by the play of competition in sales between independent refiners and their jobber and consumer customers; that during the buying programs those prices were in fact determined by such competition; that the purchases under those programs were closely related to or dependent on the spot market prices; that there was no evidence that the purchases of distress gasoline under those programs had any effect on the competitive market price beyond that flowing from the removal of a competitive evil; and that if respondents had tried to do more than free competition from the effect of distress gasoline and to set an arbitrary non-competitive price through their purchases, they would have been without power to do so.

But we do not deem those distinctions material.

[3,4] In the first place, there was abundant evidence that the combination had the purpose to raise prices. And likewise, there was ample evidence that the buying programs at least contributed to the price rise and the stability of the spot markets, and to increases in the price of gasoline sold in the Mid-Western area during the indictment period. That other factors also may have contributed to that rise and stability of the markets is immaterial. For in any such market movement, forces other than the purchasing power of the buyers normally would contribute to the price rise and the market stability. So far as cause and effect are concerned it is sufficient in this type of case if the buying programs of the combination resulted in a price rise and market stability which but for them would not have happened. For this reason the charge to the jury that the buying programs must have "caused" the price rise and its continuance was more favorable to respondents than they could have required. Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise

220

is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act, 15 U.S.C.A. § 1.

[5] Secondly, the fact that sales on the spot markets were still governed by some competition is of no consequence. For it is indisputable that that competition was restricted through the removal by respondents of a part of the supply which but for the buying programs would have been a factor in determining the going prices on those markets. But the vice of the conspiracy was not merely the restriction of supply of gasoline by removal of a

surplus. As we have said, this was a well organized program. The timing and strategic placement of the buying orders for distress gasoline played an important and significant role. Buying orders were carefully placed so as to remove the distress gasoline from weak hands. Purchases were timed. Sellers were assigned to the buyers so that regular outlets for distress gasoline would be available. The whole scheme was carefully planned and executed to the end that distress gasoline would not overhang the markets and depress them at any time. And as a result of the payment of fair going market prices a floor was placed and kept under the spot markets. Prices rose and jobbers and consumers in the Mid-Western area paid more for their gasoline than they would have paid but for the conspiracy. Competition was not eliminated from the markets; but it was clearly curtailed, since restriction of the supply of gasoline, the timing and placement of the purchases under the buying programs and the placing of a floor under the spot markets obviously reduced the play of the forces of supply and demand.

[6] The elimination of so-called competitive evils is no legal justification for such buying programs. The elimination of such conditions was sought primarily for its effect on the price structures. Fairer competitive prices, it is claimed, resulted when distress gasoline was removed from the market. But such defense is typical of the protestations

221

usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

[7-9] The reasonableness of prices has no constancy due to the dynamic quality of the business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied

222

competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike. There was accordingly no error in the refusal to charge that in order to convict the jury must find that the resultant prices were raised and maintained at "high, arbitrary and non-competitive levels". The charge in the indictment to that effect was surplusage.

[10-13] Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform

and inflexible. Price-fixing as used in the Trenton Potteries case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. That price-fixing includes more than the mere establishment of uniform prices is clearly evident from the Trenton Potteries case itself, where this Court noted with approval Swift & Co. v. United States, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518, in which a decree was affirmed which restrained a combination from "raising or lowering prices or fixing uniform prices" at which meats will be sold. Hence prices are fixed within the meaning of the Trenton Potteries case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the

223

fact that, as here, they are fixed at the fair going market price is immaterial. For purchases at or under the market are one species of price-fixing. In this case, the result was to place a floor under the market—a floor which served the function of increasing the stability and firmness of market prices. That was repeatedly characterized in this case as stabilization. But in terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone. Respondents, however, argue that there was no correlation between the amount of gasoline which the major companies were buying and the trend of prices on the spot markets. They point to the fact that such purchasing was lightest during the period of the market rise in the spring of 1935, and heaviest in the summer and early fall of 1936 when the prices declined; and that it decreased later in 1936 when the prices rose. But those facts do not militate against the conclusion that these buying programs were a species of price-fixing or manipulation. Rather they are wholly consistent with the maintenance of a floor under the market or a stabilization operation of this type, since the need for purchases under such a program might well decrease as prices rose and increase as prices declined.

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

[14-23] Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity in the interstate or foreign channels of trade, the power to fix prices exists

224

if the combination has control of a substantial part of the commerce in that commodity. Where the means for price-fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity. In such a case that power may be established if as a result of market conditions, the resources available to the combinations, the timing and the strategic placement of orders and the like, effective means are at hand to accomplish the desired objective. But there may be effective influence over the market though the group in question does not control it. Price-fixing agreements may have utility to members of the group though the power possessed or exerted falls far short of domination and control. Monopoly power (United States v. Patten, 226 U.S. 525, 33 S.Ct. 141, 57 L.Ed. 333, 44 L.R.A.,N.S., 325) is not the only power which the Act strikes down, as we have said. Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the Act.[59] The indictment in this case charged that this combination had that purpose and effect. And there was abundant evidence to support it. Hence the existence of power on the part of members of the combination to fix prices was but a con-

59 Under this indictment proof that prices in the Mid-Western area were raised as a result of the activities of the combination was essential, since sales of gasoline by respondents at the increased prices in that area were necessary in order to establish jurisdiction in the Western District of Wisconsin. Hence we have necessarily treated the case as one where exertion of the power to fix prices (i. e., the actual fixing of prices) was an ingredient of the offense. But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act. That would be true if power or ability to commit an offense was necessary in order to convict a person of conspiring to commit it. But it is well established that a person "may be guilty of conspiring, although incapable of committing the objective offense." United States v. Rabinowich, 238 U.S. 78, 86, 35 S.Ct. 682, 684, 59 L.Ed. 1211. And it is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. Nash v. United States, 229 U.S. 373, 378, 33 S.Ct. 780, 782, 57 L.Ed. 1232. It is the "contract, combination * * * or conspiracy, in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. See United States v. Trenton Potteries Co., 273 U.S. 392, 402, 47 S.Ct. 377, 381, 71 L.Ed. 700, 50 A.L.R. 989. Cf. Retail Lumber Dealer's Ass'n v. State, 95 Miss. 337, 48 So. 1021, 35 L.R.A.,N.S., 1054. And the amount of interstate or foreign trade involved is not material (Montague & Co. v. Lowry, 193 U.S. 38, 24 S. Ct. 307, 48 L.Ed. 608), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. Steers v. United States, 6 Cir., 192 F. 1, 5; Patterson v. United States, 6 Cir., 222 F. 599, 618, 619. In view of these considerations a conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. Whatever may have been the status of price-fixing agreements at common law (Allen, Criminal Conspiracies in Restraint of Trade at Common Law, 23 Harv.L.Rev. 531) the Sherman Act has a broader application to them than the common law prohibitions or sanctions. See United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 328, 17 S.Ct. 540, 554, 41 L.Ed. 1007. Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination. The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. See Handler, Federal Anti-Trust Laws—A Symposium (1931), pp. 91 et seq.

The existence or exertion of power to accomplish the desired objective (United States v. United States Steel Corp., 251 U.S. 417, 444–451, 40 S.Ct. 293, 296–299, 64 L.Ed. 343, 8 A.L.R. 1121; United States v. International Harvester Co., 274 U.S. 693, 708, 709, 47 S.Ct. 748, 753, 754, 71 L.Ed. 1302) becomes important only in cases where the offense charged is the actual monopolizing of any part of trade or commerce in violation of § 2 of the Act, 15 U.S.C.A. § 2. An intent and a power to produce the result which the law condemns are then necessary. As stated in Swift & Co. v. United States, 196 U.S. 375, 396, 25 S. Ct. 276, 279, 49 L.Ed. 518, "* * * when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." But the crime under § 1 is legally distinct from that under § 2 (United States v. MacAndrews & Forbes Co., C.C., 149 F. 836, United States v. Buchalter, 2 Cir., 88 F clusion from the finding that the buying programs caused or contributed to the rise and stability of prices.

225

[24-27] As to knowledge or acquiescence of officers of the Federal government little need be said. The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other 226 group may do so without specific Congressional authority. Admittedly no approval of the buying programs was obtained under the National Industrial Recovery Act prior to its termination on June 16, 1935, (§ 2(c) which would give immunity to respondents from prosecution under the Sherman Act. Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise 227 manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers. The method adopted by Congress for alleviating the penalties of the Sherman Act through approval by designated public representatives[60] would be supplanted by a foreign system. But even had approval been obtained for the buying programs, that approval would not have survived the expiration in June 1935 of the Act which was the source of that approval. As we have seen the buying program continued unabated during the balance of 1935 and far into 1936. As we said in United States v. Borden Co., 308 U.S. 188, 202, 60 S.Ct. 182, 190, 84 L.Ed. 181, "A conspiracy thus continued is in effect renewed during each day of its continuance." Hence, approval or knowledge and acquiescence of federal authorities prior to June 1935 could have no relevancy to respondents' activities subsequent thereto. The fact that the buying programs may have been consistent with the 228 general objectives and ends sought to be obtained under the National Industrial Recovery Act is likewise irrelevant to the legality under the Sherman Act of respondents' activities either prior to or after June 1935. For as we have seen price-fixing combinations which lack Congressional sanction are illegal per se; they are not evaluated in terms of their purpose, aim or effect in the elimination

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2d 625) though the two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1. Standard Oil Co. v. United States, 221 U.S. 1, 59–61, 31 S.Ct. 502, 515, 516, 55 L.Ed. 619, 34 L.R.A.,N.S., 834, Ann.Cas.1912D, 734; Patterson v. United States, supra, 222 F. page 620. Only a confusion between the nature of the offenses under those two sections (see United States v. Nelson, D.C., 52 F. 646; United States v. Patterson, C.C., 55 F. 605; Chesapeake & O. Fuel Co. v. United States, 6 Cir., 115 F. 610) would lead to the conclusion that power to fix prices was necessary for proof of a price-fixing conspiracy under § 1. Cf. State v. Eastern Coal Co., 29 R.I. 254, 70 A. 1, 132 Am.St.Rep. 817, 17 Ann. Cas. 96; State v. Scollard, 126 Wash. 335, 218 P. 224, 32 A.L.R. 1082.

[60] It should be noted in this connection that the typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives. Under the N. I. R. A. this could be done through the code machinery with the approval of the President as provided in §§ 3(a) and 5, supra note 18. Under § 407(8) of the Transportation Act of 1920, 41 Stat. 482, 49 U.S.C.A. § 5(8), carriers, including certain express companies, which were consolidated pursuant to any order of the Interstate Commerce Commission were relieved from the operation of the Anti-Trust laws. And see the Maloney Act (§ 15A of the Securities Exchange Act of 1934, 52 Stat. 1070, 15 U.S.C.A. § 78o-3) providing for the formation of associations of brokers and dealers with the approval of the Securities and Exchange Commission and establishing continuous supervision by the Commission over specified activities of such associations; and the Bituminous Coal Act of 1937, 50 Stat. 72, 15 U.S.C.A. § 828 et seq., especially §§ 4 and 12—particularly as they relate to the fixing of minimum and maximum prices by the Bituminous Coal Commission.

of so-called competitive evils. Only in the event that they were, would such considerations have been relevant.

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

B. Respondents' Offers of Proof.

[28] What we have said disposes of most of the errors alleged in exclusion of evidence. The offers of proof covering the background and operation of the National Industrial Recovery Act and the Petroleum Code, the condition of the oil industry, the alleged encouragement, cooperation and acquiescence of the Federal Petroleum Administration in the buying programs and the like were properly excluded, insofar as they bore on the nature of the restraint and the purpose or end sought to be attained. For as we have seen the reasonableness of the restraint was not properly an issue in the case.

There were, however, offers of proof alleged to be relevant to the cause of the price rise and the subsequent stability of the markets during the period in question.

In addition to the foregoing offers, respondents sought to show that the presence of hot oil and hot gasoline had greatly depressed the market from 1932 to early in 1935 when the Connally Act became effective, except for

229

one short period from October to December 1934; that beginning in October 1934 shipment of hot oil from East Texas into interstate commerce had for the first time been effectively controlled; that within a period of six weeks thereafter the tank car spot market rose 1½¢—an amount corresponding to the price rise from March to June 1935; that the various factors which primarily affect price were almost precisely the same in the fall of 1934 as they were in the spring of 1935; that the price of gasoline had borne a constant relationship to the price of crude oil from January 1918 to October 1933—that relationship disappearing when the price of hot oil fell below legal crude but reappearing in October 1934, and again in March 1935, when hot oil was eliminated; that gasoline prices were more depressed than the prices of other commodities and the cost of living in 1933 and 1934, and recovered and rose less than such other prices and the cost of living in 1935 and 1936.

We think there was no reversible error in exclusion of these various offers.

[29] To the extent that they were designed to show that respondents by their buying programs had not raised the spot market prices to an artificial and noncompetitive level, these offers of proof were properly denied as immaterial. For, as we have said, the reasonableness of the prices and the fact that respondents' activities merely removed from the market the depressive effect of distress gasoline were not relevant to the issues.

[30-33] And to the extent that these offers of proof were aimed at establishing and evaluating other contributory causes for the price rise and market stability during the indictment period, they were not improperly denied. In the first place, the record is replete with evidence showing the condition of the oil industry at the time of the adoption of the code and during the code period. There was

230

ample testimony bearing on the other causal factors which respondents contend were primarily responsible for the price rise and market stability during the indictment period. Much of the refused testimony was merely cumulative in nature. A trial court has wide discretion in a situation of that kind. The trial lasted about three and a half months. Terminal points are necessary even in a conspiracy trial involving intricate business facts and legal issues. In the second place, the offer to show the market conditions late in 1934 when hot oil was temporarily under control was not improperly denied. There was substantial evidence in the record to demonstrate the depressive market effect of hot oil. While the offer was not wholly irrelevant to the issues, it was clearly collateral. The trial court has a wide range for discretion in the exclusion of such evidence. See Golden Reward Mining Co. v. Buxton Mining Co., 8 Cir., 97 F. 413, 416, 417; Chesterfield Mfg. Co. v. Leota Cotton Mills, 8 Cir., 194 F. 358, 359. Admission of testimony showing the market conditions late in 1934 would have opened an inquiry into causal factors as involved and interrelated as those present during the indictment period. That might have confused rather than enlightened the jury. In any event it would not have eliminated the buying programs as contributory causes to the market rise and stability in 1935 and 1936. And it would have prolonged the inquiry and protracted the trial. As once stated by Mr. Justice Holmes, one objection to the introduction of collateral issues is a "purely practical one,—a concession to the shortness of life." Reeve v. Dennett, 145 Mass. 23, 28, 11 N.E. 938, 944. And see Union Stock Yard & Transit Co. v. United States, 308 U.S. 213, 223, 224, 60 S.Ct. 193, 197, 198, 84 L.Ed. 198. Similar reasons sustain the action of the trial court in limiting the inquiry into general economic conditions antedating and during the indictment period. In conclusion, we do not think that there was an abuse of discretion by the

231

trial court in the exclusion of the proffered evidence. A great mass of evidence was received, the range of inquiry was wide, the factual questions relating to the oil industry and respondents' activities were intricate and involved. In such a case a new trial will not be ordered for alleged errors in exclusion of evidence where matters of substance are not affected. See United States v. Trenton Potteries Co., supra, 273 U.S. page 404, 47 S.Ct. page 382, 71 L.Ed. 700, 50 A.L.R. 989.

VI. *Use of The Grand Jury Transcript.*

The Circuit Court of Appeals held that the trial court committed prejudicial error in refusing to permit defense counsel to inspect the transcript of grand jury testimony used to refresh the recollection of certain witnesses called by the government. Respondents here urge that the use made of the grand jury transcript was error because (1) they were denied the right to inspect it, (2) it had not been properly authenticated, (3) the reading of the grand jury testimony must have led the jury to conclude that it was affirmative testimony, and (4) such testimony was not given contemporaneously with the occurrences to which it was related. And in all respects, respondents contend that such use of the grand jury testimony was highly prejudicial.

There were about 90 instances when the government used that testimony. In practically all those cases, the witnesses were employees or representatives of respondents or former defendants, or were closely associated with them. That most of them were hostile witnesses—evasive and reluctant to testify—clearly appears from a reading of their entire testimony. Each of those witnesses had testified before the grand jury which returned the indictment in the case. At times counsel for the government would state to the court that he was surprised at the witness' answer to a question and that it contradicted testimony before the grand jury. More frequently

232

counsel would ask the witness if his memory could be refreshed by his grand jury testimony. During the first part of the trial government counsel apparently read some grand jury testimony to two witnesses from his notes. After objection had been made, the court instructed counsel to use the transcript. Soon thereafter, and early in the trial, the court adopted the practice of inspecting the transcript and itself seeking to refresh the witness' recollection by reading from his prior testimony. At no time was the transcript shown to the witness. At all times respondents appropriately objected to the practice.

Throughout the trial the stated single reason for the use of such prior testimony was the refreshment of the witness' recollection. Counsel for the defense were ever alert to denounce the practice, especially when it appeared that government counsel might seek to impeach the witness. In such cases the court normally would sustain the objection or admonish government counsel; or the question and answer would be stricken. In many instances where such testimony was used, the incident ended by the witness merely saying that his recollection had not been refreshed. In case it had been, he would state what his present recollection was. Only in about one-sixth of the instances was any inconsistency in testimony developed. In the balance, recollection was either not refreshed or the testimony which had been given was wholly or substantially consistent with the previous grand jury testimony.

During the trial the court told the jury:

"I have used some of the testimony and read some of it for the purpose only of refreshing the witnesses' memories, and many times I have indicated that there was no conflict or nothing inconsistent between the testimony of the witness and the transcript of testimony. The only reason we use this transcript of testimony of each witness before the Grand Jury is to, if we can, refresh their

233

memories so as to enable them to recall correctly what the fact is."

And the court made a similar statement in its charge to the jury.

[34-38] As in case of leading questions, St. Clair v. United States, 154 U.S. 134, 150, 14 S.Ct. 1002, 1008, 38 L.Ed. 936, such use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge. See Di Carlo v. United States, 2 Cir., 6 F.2d 364, 367, 368; Bosselman v. United States, 2 Cir., 239 F. 82, 85; Felder v. United States, 2 Cir., 9 F.2d 872. He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not under all the circumstances the use of grand jury minutes is necessary or appropriate for refreshing his recollection. As once stated by Judge Hough, "The bald fact that the memory refreshing words are found in the records of a grand jury is not a valid objection." Felder v. United States, supra, 9 F.2d page 874. Normally, of course, the material so used must be shown to opposing counsel upon demand, if it is handed to the witness. Morris v. United States, 5 Cir., 149 F. 123, 126, 9 Ann.Cas. 558; Lennon v. United States, 8 Cir., 20 F.2d 490, 493, 494; Wigmore, Evidence (2d ed.) § 762. And the reasons are that only in that way can opposing counsel avoid the risks of imposition on and improper communication with the witness, and "detect circumstances not appearing on the surface" and "expose all that detracts from the weight of testimony." See 2 Wigmore, supra, p. 42. The first of these reasons has no relevancy here. And as to the second, no iron-clad rule requires that opposing counsel be shown the grand jury transcript where it is not shown the witness and where some appropriate procedure is adopted to prevent its improper use. That again is a matter which rests in the sound discretion of the court. Grand jury testimony is ordinarily confidential. See Wigmore, supra, § 2362.

234

But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. See Metzler v. United States, 9 Cir., 64 F.2d 203, 206. Since there is no inexorable rule which under all circumstances entitles the witness and his counsel to see the prior statement made under oath and since in this case the court itself examined and thus directly controlled the use of the grand jury testimony, we cannot say that the refusal to make it available to counsel for the defense is per se reversible error. To hold that it was error in the instances here under review would be to find abuse of discretion, where in fact we conclude from the entire record on this phase of the case that the judge supervised the procedure with commendable fairness. In sum, the selective use of this testimony and the precautions taken by the trial judge make it impossible for us to say that he transcended the limits of sound discretion in permitting it to be used by the government without making it available to the defense.

If the record showed that the refreshing material was deliberately used for purposes not material to the issues but to arouse the passions of the jurors, so that an objective appraisal of the evidence was unlikely, there would be reversible error. Likewise there would be error where under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence. Rosenthal v. United States, 8 Cir., 248 F. 684, 686. But here the grand jury testimony was used simply to refresh the recollection on material facts, New York & Colorado Mining Syndicate & Co. v. Fraser, 130 U.S. 611, 9 S.Ct. 665, 32 L.Ed. 1031, not as independent affirmative evidence. Bates v. Preble, 151 U.S. 149, 14 S.Ct. 277, 38 L.Ed. 106. Furthermore, it was not used for impeachment purposes; and the content of this refreshing material related solely to conversations and events relevant to the formation and execution of the buying programs.

235

[39] In addition, it clearly appears that the use of this material was not prejudicial. So far as the subject matter of the inquiry is concerned, that prior testimony was either cumulative or dealt only with the minutiae of the conspiracy. The record minus that testimony clearly establishes all the facts necessary for proof of the illegal conspiracy. No portion of it was dependent on the minor facts concerning which the memory of these witnesses was refreshed.[61] Hence, the situation is vastly different from those cases where essential ingredients of the crime were dependent on testimony elicited in that manner or where the evidence of guilt hung in delicate balance if that testimony was deleted. See Little v. United States, 8 Cir., 93 F. 2d 401; Putnam v. United States, 162 U.S. 687, 16 S.Ct. 923, 40 L.Ed. 1118. Hence assuming arguendo, that there was error in the use of the prior testimony, to order a new trial would be to violate the standards of § 269 of the Judicial Code, 28 U.S. C.A. § 391, since the "substantial rights" of respondents were not affected. There are no vested individual rights in the ordinary rules of evidence; their observance should not be reduced to an idle ceremony.

236

[40] Putnam v. United States, supra, held it was prejudicial error to use grand jury minutes to refresh the memory of a witness unless that testimony was contemporaneous with the occurrences as to which the witness was testifying. There the testimony before the grand jury was more than four months after the occurrence. This Court held that because of that lapse of time the testimony was not contemporaneous. Whatever may be said of the Putnam case on the merits (see Wigmore, supra, § 761) it does not establish an inflexible four-months' period of limitation. There the event was a single isolated conversation, most damaging to the defendant. Here there was a continuing conspiracy extending at least up to the period when the witnesses were testifying before the grand jury. Much of the testimony related to events a year or more old. But in the main those matters were woven into the conspiracy, related to events in which the witness actively participated, concerned the regular business matters with which he was familiar, pertained to his regular employment, or constituted admissions against interest. On these facts we do not think there was an abuse of discretion on the part of the trial judge in permitting the testimony to be used. Measured by the test of whether or not the prior statement made under oath was reasonably calculated to revive the witness' present recollection within the rule of the Putnam case, there certainly cannot be said to have been error as a matter of law.

[41] Respondents say that the manner employed in refreshing the recollection of the witnesses was bound to inculcate in the minds of the jurors the feeling that the witnesses were testifying falsely or were concealing the truth. But here again, we find no reversible error. The trial judge, as we have said, was alert to stop impeachment. And in view of the obvious hostility and evasiveness of most of those witnesses, we cannot say that the judge transcended the bounds of discretion in permitting

237

their memories to be refreshed in this manner. "As is true of most that takes place in a trial, the right result is a matter of degree, and depends upon the sense of measure of the judge." See United States v. Freundlich, 2 Cir., 95 F.2d 376, 379.

61 Respondents strongly urge that this is not true in the case of the testimony of an employee of one of the trade journals. His prior testimony indicated (1) that the major companies were buying exactly at the journal quotations, so that the graph of those quotations represented prices paid under the buying program; (2) that prices paid by the majors "outweighed" the jobbers' sales reported to his journals. At the trial he testified that those grand jury statements were not true. And they were not. But those matters are not essential issues in the case. That purchases under the buying program did not lead the market up, that the vast majority of purchases were at or below the low quotations, that the volume of purchases did not eliminate all competition, that the spot market prices were still determined by competitive forces, that the volume of purchases under the buying programs was relatively small are wholly immaterial, as we have seen.

VII. *Arguments to the Jury by Government Counsel.*

Respondents complain of certain statements made to the jury by government counsel. Their objections are that government counsel (1) appealed to class prejudice; and (2) requested a conviction regardless of the evidence because the prosecution was convinced of respondents' guilt and because a conviction "was the wish and the desire of the highest officials in the Government of the United States."

Under the first of these, they point to the opening statement that this conspiracy involved some of the "biggest men" in the country—big in the sense of "controlling vast volumes of financial influence"; and that it is a "terrible thing that a group of influential, wealthy millionaires or billionaires should take over the power, take over the control, the power to make prices." At the close of those opening remarks and on objection of defense counsel the court counselled the jury that "any reference to the wealth of any of the defendants is entirely immaterial. A man of wealth has just as much standing in a court as a man that is poverty stricken."

But respondents complain that in the closing arguments the same matter was referred to again as follows: "A hundred lawyers employed—the very cream of the American Bar, the very best legal talent that these people can obtain—every one of them working night and day with suggestions as to how the red herring can be drawn across the clear cut issue in this case"; that it should not be taken for granted "that these more powerful people are above the law and can't be reached and

238

can't be brought to book"; that the "fear of corporate power in combination" is part of the American tradition as illustrated by a speech made in 1873 by a Wisconsin judge, who said: "There is looming up a new and dark power * * * The accumulation of individual wealth seems to be greater than it ever has been since the downfall of the Roman Empire. The enterprises of the country are * * * coldly marching, not for economic conquests only, but for political power * * * money is taking the field as an organized power. The question will arise * * * which shall rule, wealth or man? Which shall lead, money or intellect? Who shall fill the public stations, educated and patriotic free men, or the futile serfs of corporate capital?" But as to these statements no objection was made at the time by defense counsel.

There were other such references e. g., "malefactors of great wealth", "eager, grasping men" or corporations who "take the law into their own hands * * * without any consideration for the underdog or the poor man * * * We are going to stop it, as our forefathers stopped it before us and left this country with us as it is now, or we are going down into ruin as did the Roman Empire." Counsel for the defense objected to these statements as improper and prejudicial. The court overruled the objections stating it would deal with the matter in its charge to the jury. In its charge the court warned against convicting a corporation "solely because of its size or the extent of its business"; that it was "your duty to give these corporations the same impartial consideration" as an individual or small corporation would receive; and instructed the jurors not to be concerned "with the financial condition of any of these defendants. Whether a man be rich or poor, he is entitled to the same consideration in this Court."

[42-47] On this phase of the matter several observations are pertinent. In the first place, counsel for the defense

239

cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial. See Crumpton v. United States, 138 U.S. 361, 364, 11 S.Ct. 355, 356, 34 L.Ed. 958. Of course appellate courts "in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." See United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L.Ed. 555. But as we point out hereafter, the exceptional circumstances which call for an invocation of that rule are not present here. In the second place, it is not improper in a Sherman Act case to discuss corporate power, its use and abuse, so long as those statements are relevant to the issues at hand. For that subject is material to the philosophy of that Act. Its purposes and objectives are clearly legitimate subjects for discussion before the jury. But, thirdly, appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them. Some of the statements to which respondents now object fall in this class. They were, we think, undignified and intemperate. They do not comport with the standards of propriety to be expected of the prosecutor. But it is quite another thing to say that these statements constituted prejudicial error. In the first place, it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately. In the second place, this was not a weak case as was Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314, where this Court held that prejudice to the accused was so highly probable as a result of the prosecutor's improper conduct "that we are not justified in assuming its nonexistence." 295 U.S. page 89, 55 S.Ct. page 633, 79 L.Ed. 1314. Cf. New York Central Railroad Co. v. Johnson, 279

240

U.S. 310, 49 S.Ct. 300, 73 L.Ed. 706. Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial. But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice.

Under the second of these objections, respondents complain of the plea to the jury not to "let your Government and the United States and its citizens and society down", and that government counsel "believe to the bottom of their hearts in the justice of the cause that they espouse here". No objection at that time was made by defense counsel. But they did object at the trial to the statements by government counsel, "* * * do you honestly think that these boys here (government counsel) * * * would be trying to convict these men unless that was the wish and the desire of the highest officials in the government of the United States?"; "You don't think the government of the United States would allow four or five lawyers to come out here and prosecute this case against them, against their wishes, or that the Secretary of the Department of the Interior would allow us to do it, if he didn't want it done?" The court overruled the objections stating, "I suppose we have a right to assume that they are here under the instructions of the Attorney General of the United States." Respondents further complain of the statements that the evidence is "so overwhelming and overpowering that it doesn't even leave the trace or the shadow of a doubt"; that if "you are going to say they are not guilty on this evidence, then you take the responsibility, I won't; you get an alibi, I won't"; that the hundreds of thousands of dollars spent by the government "in trying to get before you the facts" should not be

241

"thrown to the winds" nor should these men "go clear". But no objection was made at the time by defense counsel.

[48] As respects the statement that it was the "wish and the desire of the highest officials" in the government to have defendants convicted, some background should be given. This came near the end of the closing arguments. In the opening statement, during the trial, and in the closing arguments the defense continuously emphasized the knowledge and acquiescence by government officials of the buying programs. As we have noted, that was one of the main lines of defense. From the beginning of the trial to the end, the defense sought to prove, not official approval in the legal sense, but official acquiescence or at least condonation. Bald statements were made that respondents "were conducting a program which resulted from the instigation and inducement of the Government itself"; after the Schechter case they endeavored to "stabilize marketing practices" at the "instance of officials of the Oil Administration"; "what was done by these defendants was done for the purpose of accomplishing the objectives and purposes of the National Industrial Recovery Act, and was undertaken at the request and pursuant to the authorization of the Secretary of the Interior, Mr. Ickes, the Administrator of the Petroleum Code"; respondents "acted to carry out the purposes and objectives sought by the Government and initiated by the

Government. * * * They were objectives defined by the President of the United States. They were purposes, the accomplishment of which the Secretary of the Interior had been charged, under his oath, to seek to obtain"; "with all this backing and all this help from the government, and all this urging from the government, are you going to brand these men as just selfish individuals?" On innumerable instances the impression was sought to be conveyed by subtle intimation, inference or suggestion

242

that responsibility for these buying programs should be placed on the shoulders of high government officials. Government counsel accordingly justified his statement on the grounds that it denied what the defense had continuously stated, viz., that the buying programs were conducted with the consent and approval of the Secretary of the Interior. At a subsequent point in the closing arguments government counsel again referred to the matter. On objection of defense counsel he withdrew the statement. And the court instructed the jury to disregard it, saying "This prosecution was commenced at the instigation of the Attorney General of the United States."

In view of these various circumstances we do not think that the above statements were prejudicial. Standing by themselves they appear to be highly improper. Even as a rebuttal to the defense which had been interposed throughout the trial, they overstep the bounds. But in view of the justification which respondents sought to establish for their acts, the subject matter of these statements was certainly relevant. The fact that government counsel transgressed in his rebuttal certainly cannot be said to constitute prejudicial error. For a reading of the entire argument before the jury leads to the firm conviction that the comments which respondents now rely on for their assertions of error were isolated, casual episodes in a long summation of over 200 printed pages and not at all reflective of the quality of the argument as a whole.

[49, 50] Respondents further urge as prejudicial error the assertions by government counsel of personal knowledge in contradiction of the record for the purpose of discrediting an important defense witness. The statement of government counsel was that in "1935 and 1936, you couldn't get a rowboat up the Mississippi River, north of Winona." Respondents contend that testimony as to navigability of that river was vitally material as establishing such outside competition as would have prevented them from

243

raising prices to artificial and non-competitive levels. But such testimony was wholly irrelevant, since the reasonableness of the prices was not properly an issue in the case. Furthermore, when objection was made to the remark, counsel withdrew it and the jury was instructed to disregard it. That must be deemed to have cured the error if it could be considered such. As stated in Dunlop v. United States, 165 U.S. 486, 498, 17 S.Ct. 375, 379, 41 L.Ed. 799, "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand."

VIII. *Granting of New Trials to Some Defendants.*

Respondents contend that the trial court committed reversible error in granting new trials to some defendants and denying them to respondents.

The court charged the jury that it could convict any of the defendants found to have been members of the combination and that it need not convict all or none. As has been noted, the jury found sixteen corporations and thirty individuals guilty. Thereafter the court discharged one corporation and ten individuals, and granted new trials to three corporations and fifteen individuals. Such action left the verdict standing as to only twelve corporations and five individuals. The trial court gave as its reason for granting some of the defendants a new trial its belief that they had not had "an adequate separate consideration of their defense, in view of the fact that as to some of them direct evidence of participation was lacking or slight, and the circumstantial evidence viewed as a whole may well have obscured other facts and circumstances shown, in some cases, to be highly suggestive of innocence, and in all cases entitled to be considered and weighed." United States v. Standard Oil Company (Indiana), D.C., 23 F.Supp. 937, 939. In denying the motions of respondents for a new trial it stated (page 944) that there was "evidence to go to the jury and to sus-

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244
its verdict as to every essential charge in the indictment" as to them.[62]

Respondents' argument runs as follows: The court charged the jury that it was the purpose and the power of the combination to raise prices which were material. Hence the fact that the jury found that the entire group possessed such power does not necessarily mean that the jury would have found that respondents acting alone possessed such power. Since the jury did not consider that issue, it is argued that denial of a new trial to respondents violates their constitutional right to a jury trial. And
245
in support of their contention, respondents insist that Standard of Indiana alone (one of the defendants granted a new trial) possessed such power as would make it impossible for them to raise prices without its agreement and cooperation.

[51] Respondents' argument does not focus sharply the basic and essential elements of the offense and of the instructions to the jury. As we have stated above, the offense charged in this indictment was proved once it was established that any of the defendants conspired to fix prices through the buying programs and that those programs caused or contributed to the price rise. Power of the combination to fix prices was therefore but a conclusion from the fact that the combination did fix prices. Hence in that posture of the case, the issue here is whether or not the finding of the jury that the buying programs affected prices was necessarily dependent on the participation in those programs of all who were convicted.

Obviously it was not. The order granting new trials in no manner impeached or questioned the evidence as to the total spot market purchases made by all companies (whether defendants, co-conspirators or others). Cf. Bartkus v. United States, 7 Cir., 21 F.2d 425. In their efforts to place a floor under the spot markets respondents assuredly received benefits and assistance from the purchases made by other companies. And the amount of benefit and assistance received did not necessarily depend on whether or not those other companies were co-conspirators. Market manipulators commonly obtain assistance from the activities of the innocent as well as from those of their allies. The fact that they may capitalize on the purchases of others is no more significant than the fact that they may gain direct or collateral benefits from market trends, bullish factors or fortuitous circumstances. And the mere fact that those circumstances
246
might have changed and that Standard of Indiana, say, might have substantially impaired the effect of the buying programs on prices by a change in its retail policies was as ir-

62 In this connection the court said (page 944) that it appeared "without dispute that a concerted buying movement took place in the Mid-Continent field"; that as to its character and the existence of a concerted East Texas program, there was "ample evidence to take the case to the jury"; and that the proofs were sufficient to sustain the verdict as to the charge that defendants "were able to and did effectually tie the jobbers' price" in the Mid-Western area to the tank car price in the spot market. It significantly added (page 944): "It is claimed by the defendants that they did not have the power to control the price as charged, and that inasmuch as some of the large companies did not or have not been shown to have participated in the movement, the power of the defendants in that respect was inadequate for the purpose. This does not follow, for the reason that large buyers both in East Texas and in the Mid-Continent fields, while acting separately, were nevertheless buying for their requirements in these fields, as they had always done and as defendants had every reason to believe they would continue to do. The defendants were thus able to consider that these buyings would necessarily reduce the available gasoline which they proposed to take off the market just as effectively as though these other companies had joined in the program. The amount of distress gasoline would be exactly the same in any event, and the proof shows that the surplus was in fact a very small part of the total, so much so that most of the defendants have shown that its acquisition in addition to other buying did not materially increase their inventories. I am satisfied that there was ample evidence to sustain the contention of the Government that the defendants did have the power to control the market, and that they did so, as charged."

relevant as was the chance that the Connally Act might have been repealed. The effect of the concerted activities was not rebutted by the fact that changes in events might have destroyed that effect.

[52, 53] Nor did the case against respondents automatically fall when three of the corporate defendants[63] were awarded a new trial. We have here a situation quite different from that where the participation of those to whom a new trial was granted or against whom the judgment of conviction was reversed was necessary for the existence of the crime charged. See Gebardi v. United States, 287 U.S. 112, 53 S.Ct. 35, 77 L.Ed. 206, 84 A.L.R. 370; Morrison v. California, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664; King v. Plummer [1902], 2 K.B. 339. In this case the crime was not indivisible (cf. Queen v. Gompertz, 9 A. & E., N.S., 824; Feder v. United States, 2 Cir., 257 F. 694, 5 A.L.R. 370) in the sense that the existence of a conspiracy under the Sherman Act was necessarily dependent on the cooperation of the other defendants with respondents. Nor was the case submitted to the jury on the assumption that the participation of any of the corporations which were granted new trials was indispensable to the finding of a conspiracy among the rest. As we have seen, the court charged that the jury could convict any of the defendants found to have been members of the combination and that it need not convict all or none. It was the existence of a combination and the participation in it of all or some of the defendants which were important, not the identity of each

247

and every participant. A conspiracy under the Sherman Act may embrace two or more individuals or corporations. Conviction of some need not await the apprehension and conviction of all. The erroneous conviction of one does not necessarily rebut the finding that the others participated. The theory of the charge to the jury was not that the defendants must be convicted, if at all, as a body; rather the issue of guilt was distributive; the identity of all the co-conspirators was irrelevant.

[54] In a Sherman Act case, as in other conspiracy cases, the grant of a new trial to some defendants and its denial to others is not per se reversible error. After the jury's verdict has been set aside as respects some of the alleged co-conspirators, the remaining ones cannot seize on that action as grounds for the granting of a new trial to them, unless they can establish that such action was so clearly prejudicial to them that the denial of their motions constituted a plain abuse of discretion. See Dufour v. United States, 37 App.D.C. 497, 510, 511; State v. Christianson, 131 Minn. 276, 280, 154 N.W. 1095; Commonwealth v. Bruno, 324 Pa. 236, 248, 188 A. 320; People v. Kuland, 266 N.Y. 1, 193 N.E. 439, 97 A.L.R. 1311; Browne v. United States, 2 Cir., 145 F. 1. There is a complete lack of any showing of abuse of discretion here, for no prejudice has been established.

[55] Hence this case falls within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 53 S.Ct. 252, 77 L.Ed. 439. Certain exceptions have been noted, such as instances where the trial court has "erroneously excluded from consideration matters which were appropriate to a decision on the motion". Fairmount Glass Works v. Cub Fork Coal Co., supra, 287 U.S. page 483, 53 S.Ct. page 255, 77 L.Ed. 439. But there

248

are no such circumstances here. No iota of evidence has been adduced that the trial court in denying respondents' motions failed to take into consideration the effect of the buying programs on gasoline prices in the Mid-Western area. In fact it seems apparent that the trial court considered that issue and ruled thereon adversely to respondents. It concluded in substance that whoever may have been all the members of the conspiracy, there was ample evidence to go to the

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63 The question of the effect of the buying programs on market prices obviously concerns only the corporate defendants. The one corporate defendant granted after verdict a directed verdict of acquittal was the Globe Oil & Refining Co. (Kansas). The record does not show that this company made any spot market purchases in 1935 or 1936.

jury on the nature and effect of these programs.

[56] Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review. Moore v. United States, 150 U.S. 57, 61, 62, 14 S.Ct. 26, 28, 37 L.Ed. 996; J. W. Bishop Co. v. Shelhorse, 4 Cir., 141 F. 643, 648; O'Donnell v. New York Transp. Co., 2 Cir., 187 F. 109, 110. In substance no more than that is involved here.

IX. *Variance.*

[57, 58] By their cross petition respondents contend that there was a fatal variance between the agreement charged in the indictment and the agreement proved, with a consequent violation of respondents' rights under the Sixth Amendment.

As we have noted, certain trade journals were made defendants. The indictment charged that they were "the chief agencies and instrumentalities" through which the illegally raised prices affected prices paid for gasoline in the Mid-Western area; that they "knowingly published and circulated as such price quotations the wrongfully and artificially raised and fixed prices for gasoline paid by" defendants in the buying programs while "representing the price quotations published by them" to be gasoline prices "prevailing in spot sales to jobbers in tank car lots" and while "knowing and intending them to be relied on as such by jobbers and to be made the basis of prices to jobbers."

249

At the close of the government's case the indictment was dismissed, on motion of the government, as against all trade journal defendants who went to trial. This was clearly proper, as the evidence adduced exculpated them from any wrongdoing. But respondents contend that the device charged in the indictment was one by which respondents were to pay higher than the actual spot market prices for their purchases and then to substitute in the trade journal quotations such prices for the lower prices actually paid by jobbers in spot market sales. Since there was failure of proof on this point of falsification, it is argued that there was a variance. For, according to respondents, that feature was an integral and essential part of the plan as charged.

We agree with the Circuit Court of Appeals that there was no variance. Analysis of the indictment which we have set forth, supra, 60 S.Ct. pp. 819–821, makes it clear that the charge against respondents was separate from and independent of the charge against the trade journals and that the allegations against those journals constituted not the only means by which the conspiracy was to be effectuated but only one of several means (supra, 60 S.Ct. pp. 819, 820). In effect, those charges in the indictment sought to connect the trade journals with the conspiracy as aiders and abettors. On the other hand, the gist of the indictment charged a conspiracy by defendants (1) to raise and fix the spot market prices and (2) thereby to raise and fix the prices in the Mid-Western area. So far as means and methods of accomplishing those objectives were concerned, the charge of falsification of the trade journal quotations was as unessential as was the charge, likewise unproved, that defendants caused the independent refiners to curtail their production. The purpose and effect of the buying programs in raising and fixing prices were in no way made dependent on the utilization of fraudulent trade journal quotations. As charged, the trade journals

250

were the chief instrumentalities by which the spot market prices were converted into prices in the Mid-Western area. Hence under this indictment they were wholly effective for respondents' purposes, though they were innocent and though their quotations were not falsified as charged. A variation between the means charged and the means utilized is not fatal. And where an indictment charges various means by which the conspiracy is effectuated, not all of them need be proved. See Nash v. United States, 229 U.S. 373, 380, 33 S.Ct. 780, 782, 57 L.Ed. 1232. Cf. Boyle v. United States, 7 Cir., 259 F. 803, 805.

X. *Jurisdiction.*

The Sixth Amendment provides that the accused shall be tried "by an impartial jury of the State and district wherein the crime shall have been committed." Respondents contend that the district court for the Western District of Wisconsin had no jurisdiction or venue to try them since the crime was not committed in that district. The Circuit Court of Appeals held to the contrary, one judge dissenting.

As we have noted, the indictment charged that the defendants (1) conspired together to raise and fix the prices on the spot markets; (2) raised, fixed, and maintained those prices at artificially high and non-competitive levels and "thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold and sold in interstate commerce as aforesaid in the Mid-Western area (including the Western District of Wisconsin)"; (3) have "exacted large sums of money from thousands of jobbers" in the Mid-Western area by reason of the provisions of the prevailing form of jobber contracts which made the price to the jobber dependent on the average spot market price; and (4) "in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area."

251

As we have seen, there was substantial competent evidence that the buying programs resulted in an increase of spot market prices, of prices to jobbers and of retail prices in the Mid-Western area. And it is clear that certain corporate respondents sold gasoline during this period in the Mid-Western area at the increased prices. The court charged the jury that even though they found that defendants had the purpose and power to raise the spot market prices, they must acquit the defendants unless they also found and believed beyond a reasonable doubt that defendants "have also intentionally raised and fixed the tank car price of gasoline contracted to be sold and which was sold in interstate commerce in the Mid-Western area, including the Western District of Wisconsin." It also charged that it was not enough "for the prosecution to show an increase in the tank car prices of gasoline within said area, but you must also find and believe beyond a reasonable doubt and to a moral certainty that the defendants combined and conspired together or with others for the purpose of increasing and fixing the same as well as for the purpose of raising and fixing the tank car prices in said spot markets, or one or more of them." It further charged that the jury in order to convict must find some overt acts in the Western District of Wisconsin; and that sales of gasoline therein by any of the defendants would constitute such overt acts.

Respondents, though agreeing that there were such sales in the Mid-Western area and that the prices on such sales were affected by the rise in the spot markets, deny that they were overt acts in pursuance of the conspiracy. Rather, they contend that each of such sales was an individual act of a particular conspirator in the ordinary course of his business by which he enjoyed the results of a conspiracy carried out in another district. That is to say, they take the position that the alleged conspiracy was limited to a restraint of competition in buying and

252

selling on the spot markets and included no joint agreement or understanding as respects sales in the Mid-Western area. In support of this view they cite the government's concessions that it "does not claim that each defendant 'entered into an agreement not to sell jobbers except in accordance with' the contract described in Paragraph 11 of the Indictment";[64] and that it does not contend that defendants were "sitting around a table and agreeing on a uniform retail price". And they as-

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64 The standard form of jobber contract referred to in par. 11 of the indictment was described therein as follows: "The price of gasoline to the jobber shall be the average spot market price, determined by averaging the high and low spot market prices for gasoline of comparable octane rating published by defendant Platt's Oilgram for the Tulsa, Oklahoma, market, and by defendant Chicago Journal of Commerce on date of shipment. If the average spot market price plus freight to destination shall allow the buyer a margin of less than 5½¢ per gallon below the service station price posted by defendant Standard of Indiana, then the buyer and the seller shall share equally in the deficit below a 5½¢ margin. In certain States in which the Standard of Indiana has recently discontinued the posting of retail prices, such jobber margins have been calculated on the basis of a margin of 2¢ below the dealer tank wagon prices posted by the Standard of Indiana (such tank wagon prices having usually been 3½¢ below the posted retail prices)."

sert that there was no evidence that respondents agreed not to sell gasoline in the Western District of Wisconsin except on the basis of spot market prices.

[59-61] Conspiracies under the Sherman Act are on "the common-law footing": they are not dependent on the "doing of any act other than the act of conspiring" as a condition of liability. Nash v. United States, supra, 229 U.S. at page 378, 33 S. Ct. at page 782, 57 L.Ed. 1232. But since there was no evidence that the conspiracy was formed within the Western District of Wisconsin, the trial court was without jurisdiction unless some act pursuant to the conspiracy took place there. United States v. Trenton Potteries Co., supra, 273 U.S. pages 402, 403, 47 S.Ct. page 381, 71 L.Ed. 700, 50 A.L.R. 989, and cases cited. We agree with the Circuit Court of Appeals that

253

there was ample evidence of such overt acts in that district. The finding of the jury on this aspect of the case was also supported by substantial evidence. As we indicated in our discussion of the buying programs, there was sufficient evidence to go to the jury that the conspiracy did not end with an agreement to make purchases on the spot markets; that those buying programs were but part of the wider stabilization efforts of respondents; that the chief end and objective were the raising and maintenance of Mid-Western prices at higher levels. As stated by the Circuit Court of Appeals a different conclusion would require a belief that respondents were "engaged in a philanthropic endeavor". [105 F.2d 834.] They obviously were not. The fact that no uniform jobbers' contract and no uniform retail price policy were agreed upon is immaterial. The objectives of the conspiracy would fail if respondents did not by some formula or method relate their sales in the Mid-Western area to the spot market prices. The objectives of the conspiracy would also fail if respondents, contrary to the philosophy of all the stabilization efforts, indulged in price cutting and price wars. Accordingly, successful consummation of the conspiracy necessarily involved an understanding or agreement, however informal, to maintain such improvements in Mid-Western prices as would result from the purchases of distress gasoline. The fact that that entailed nothing more than adherence to prior practice of relating those prices to the spot market is of course immaterial. In sum, the conspiracy contemplated and embraced, at least by clear implication, sales to jobbers and consumers in the Mid-Western area at the enhanced prices. The making of those sales supplied part of the "continuous cooperation" necessary to keep the conspiracy alive. See United States v. Kissel, 218 U.S. 601, 607, 31 S.Ct. 124, 54 L.Ed. 1168. Hence, sales by any one of the respondents in the Mid-Western area bound all. For a conspiracy is a partnership in crime; and an "overt act

254

of one partner may be the act of all without any new agreement specifically directed to that act." United States v. Kissel, supra, 218 U.S. page 608, 31 S.Ct. page 126, 54 L.Ed. 1168.

XI. *Respondent McElroy.*

[62] Respondent McElroy argues that the judgment of conviction rendered against him should be reversed and the indictment dismissed not only for the reasons heretofore discussed, but more specifically on the grounds that there was no substantial evidence that he had any knowledge of and participated in the unlawful conspiracy. His motion for a directed verdict at the conclusion of the case was denied by the trial court and the Circuit Court of Appeals held that there was no error in such denial. A question of law is thus raised, which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. Abrams v. United States, 250 U.S. 616, 619, 40 S.Ct. 17, 18, 63 L.Ed. 1173; Troxell v. Delaware, Lackawanna & Western Railroad Co., 227 U.S. 434, 444, 33 S.Ct. 274, 277, 57 L.Ed. 586; Lancaster v. Collins, 115 U.S. 222, 225, 6 S.Ct. 33, 34, 29 L.Ed. 373. We have carefully reviewed the record for evidence of McElroy's knowledge of and participation in the conspiracy. But without burdening the opinion with a detailed exposition of the evidence on this point, we are of opinion that there was no error in the denial of his motion.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed. It is so ordered.

The CHIEF JUSTICE and Mr. Justice MURPHY did not participate in the consideration or decision of this case.

Mr. Justice ROBERTS.

I regret that I am unable to agree to the court's decision. I think that for various reasons the judgment of the District Court should not stand.

255

The opinion fully and fairly sets forth the facts proved at the trial, and to its statement nothing need be added. Some of the reasons for my inability to agree with the court's conclusions follow:

The Government relied for venue in the Western District of Wisconsin upon the commission in that district of overt acts in aid of the alleged common enterprise. I think the indictment fails to allege, and the evidence fails to disclose, the commission of any such act in the district of trial. I agree with the dissenting judge in the Circuit Court of Appeals that the case should be dismissed for this reason.

Paragraph 17 of the indictment alleges that the spot market tank car prices of gasoline substantially influence the retail prices.

Paragraph 18 is the only one that defines the charged conspiracy. It alleges that the defendants and others, knowing the facts pleaded by way of inducement (including the fact that retail prices follow spot market tank car prices), "combined and conspired together for the purpose of artificially raising and fixing the tank car prices of gasoline in the aforementioned spot markets, * * * and, as intended by them, defendants have artificially raised and fixed such spot market tank car prices of gasoline and have maintained such prices at artificially high and noncompetitive levels and at levels agreed upon among them, * * * *and have thereby* intentionally increased and fixed the tank car prices of gasoline contracted to be sold, and sold, in interstate commerce as aforesaid in the midwestern area (including the Western District of Wisconsin) * * *." It is further alleged that the defendants have arbitrarily, due to the form of their contract[1] with jobbers, exacted

256

large sums of money from jobbers and, in turn, have intentionally raised the general level of retail prices in the midwestern area (including the Western District of Wisconsin).

The sole and only conspiracy charged is the agreement artificially to raise and fix spot market tank car prices of gasoline in the Mid-Continent field.

Paragraph 19 is devoted to the *means* by which the conspiracy thus described was "*effectuated*". The conduct of the defendants in this respect is described as their engaging and participating in two concerted gasoline buying programs, one, the East Texas buying program, and the other the Mid-Continent buying program, for the purchase by each of them from independent refiners in spot transactions of large quantities of gasoline in the East Texas and Mid-Continent fields.

After describing these buying programs in subsequent paragraphs, the indictment, in paragraph 25, alleges that the conspiracy "has operated and has been carried out in part within the Western District of Wisconsin". The method of its operation in that district is described as follows: "In pursuance of said combination and conspiracy, defendant major oil companies (with the exception of Standard of Indiana and Gulf) *have contracted to sell and have sold and have delivered* large quantities of gasoline in tank car lots to jobbers within said district at the artificially raised and fixed and non-competitive prices aforesaid and have arbitrarily exacted from jobbers within said district large sums of money. Defendant major oil companies (with the exception of Gulf) have solicited and taken contracts and orders for said gasoline within said district, sometimes by sales representatives located there, which district has been an important market for their product and they have required retail dealers and consumers in said districts to pay artificially increased prices for gasoline as aforesaid, all by virtue of said combination

257

and conspiracy and pursuant to the purposes and ultimate objectives thereof."

[1] The form and use of this contract is described in paragraph 11 of the indictment.

Thus, after describing the conspiracy as one to buy on spot markets for the purpose of raising the price of gasoline on those markets, the indictment purports to charge, as overt acts, entirely unrelated transactions of individual defendants in the resale of gasoline to jobbers and at retail in the Western District of Wisconsin.

There is no evidence in the record that any of the purchases made by the defendants pursuant to the conspiracy was made in Wisconsin. But if the indictment could bear the construction that the charged conspiracy involved an agreement as to the terms of resale to jobbers and retailers, proof was lacking to support any such alleged agreement. Government counsel, both in pleading and in admissions at trial, so conceded.

In its Bill of Particulars the Government said: "The Government does not claim that each defendant entered into an agreement not to sell jobbers except in accordance with 'the contract described in paragraph 11 of the indictment.'"

At trial Government counsel repeatedly disavowed any charge in the indictment or any claim of the Government that there was an agreement amongst the defendants with respect to the price at which gasoline should be sold to jobbers or at retail. The evidence showed, without contradiction, that the Standard Oil Company of Indiana was the market leader in this area, and that when it posted its price none of the other defendants could sell at a higher price. It further showed that at various times Standard was forced to reduce its price to meet the competition of others. In this connection Government counsel made the following statements:

"* * * We do not say that the Standard of Indiana when it posts a retail price first consults with the other companies to find out what retail price should be posted.

258

"If that is what you're worrying about, if you think we're charging you with sitting around a table and agreeing on a uniform retail price, don't worry because that isn't what we are charging."

In its brief in this court the Government attempts to avoid the effect of these concessions by the statement that the defendants "were not free to sell as they pleased in the midwestern areas" and adds that "an obligation to adhere to their price practice of selling on the basis of spot market prices *was implicit in their unlawful agreement.*" This amounts to saying that the conspiracy was not the one charged in the indictment but was a much more ample conspiracy not only to raise the general level of tank car prices on the spot market by purchasing on that market but to raise, maintain, and fix uniform resale prices to jobbers and retailers. But this contention does not aid the Government for there is no evidence of any agreement to raise, or to maintain, jobber and retail prices, but, on the contrary, evidence that competition in such sales existed during the period in question.

Situations arise, and results ensue, from the prosecution of any agreement or conspiracy. Individual defendants may expect benefits to follow from their adherence to a conspiracy or agreement; but benefits or results, whether anticipated or unforeseen, occurring after consummation of the conspiracy, and because of it, are not overt acts done in aid and furtherance of the conspiracy. The authorities to this effect are uniform.[2]

The Government relies on United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700, 50 A.L.R. 989. That case is clearly not in point. There the conspiracy was to fix the prices of the commodity manufactured and sold by the defendants and to adhere to the prices so fixed. This court held that

259

a sale made, pursuant to that agreement, in the Southern District of New York afforded venue in that district of an indictment for violation of the Sherman Act. The case would be apposite if the pleading and proof in the instant case were of a conspiracy to fix and maintain jobber and retail prices and adherence to the agreement in sales to jobbers and retailers. Neither pleading nor proof goes to any such conspiracy.

In accordance with the Government's contention, the trial court repeatedly charged

2 Lonabaugh v. United States, 8 Cir., 179 F. 476; United States v. Black, 7 Cir., 160 F. 431; Rose v. St. Clair, D.C., 28 F.2d 189.

that, in order to convict, the jury must find that a combination existed and that the combination agreed to, *and had the power to,* raise the tank car spot market price of gasoline. Of course, the jury was at liberty to find that any number of the defendants less than all fulfilled the conditions named by the court. By its verdict the jury found that those who were convicted, as a body, (1) possessed the power to raise the price and (2) agreed so to do. The trial court granted a new trial to a number of defendants, including Standard of Indiana, the largest major oil company doing business in the area.

Standard was granted a new trial on the ground that there was no sufficient evidence to connect it with the conspiracy. By refusing new trials to the other corporate defendants the court has entered its own verdict that the others involved, excluding Standard, had the power, and agreed, to raise the level of spot market prices in the midwestern area. There is no jury verdict to that effect; no jury has ever passed upon that question, but an affirmative finding on that question is vital to the guilt of the defendants now before us. To affirm the judgment of conviction is to affirm a finding of fact by the trial judge without a jury and to deny the respondents the right to jury trial guaranteed by the Sixth Amendment of the Constitution.

260

The court's instructions to the jury were that they should return a verdict of guilty if they found that the defendants' actions had in any degree contributed to a rise in gasoline prices. The defendants insisted that the test was the effect of their combination upon competition, and that they could not be convicted unless the jury found that their agreement, and their conduct pursuant thereto, unreasonably restrained competition in interstate commerce.

There was substantial evidence that all the defendants agreed to, or did, was to act in concert to eliminate distress gasoline; that such gasoline was a competitive evil in that it tended to impair or destroy normal competition. There was substantial evidence that what they agreed to, and did, neither fixed nor controlled prices nor unreasonably affected normal competition and that their conduct affected prices only in the sense that the purchase of distress gasoline at going prices permitted prices to rise to a normal competitive level. There was no evidence that, as charged in the indictment, they agreed to, or in fact did, *fix* prices. The Court of Appeals, as I think, correctly held that "the substance of what was accomplished and agreed upon was that the major companies would purchase from the independent refiners the latters' surplus gasoline at going market prices."

I think the defendants were entitled to have the jury charged that, in order to convict them, the jury must find that, although defendants knew the result of their activities would be a rise in the level of prices, nevertheless, if what they agreed to do, and did, had no substantial tendency to restrain competition in interstate commerce in transactions in gasoline the verdict should be not guilty.

As has been pointed out by this court, violation of the anti-trust act depends upon the circumstances of individual

261

cases.[3] It is always possible to distinguish earlier decisions by reference to the facts involved in them but, in the course of decision in this court, certain principles have been laid down to which, I think, the charge of the court ran counter.

One of these firmly established principles is that concerted action to remove a harmful and destructive practice in an industry, even though such removal may have the effect of raising the price level, is not offensive to the Sherman Act if it is not intended and does not operate unreasonably to restrain interstate commerce; and such action has been held not unreasonably to restrain commerce if, as here, it involves no agreement for uniform prices but leaves the defendants free to compete with each other in the matter of price.[4]

3 See Maple Flooring Mfrs' Ass'n v. United States, 268 U.S. 563, 579, 45 S.Ct. 578, 583, 69 L.Ed. 1093.

4 United States v. American Tobacco Co., 221 U.S. 106, 178, 180, 31 S.Ct. 632, 647, 648, 55 L.Ed. 663; United States v. Union Pac. R. Co., 226 U.S. 61, 84, 85, 33 S.Ct. 53, 56, 57, 57 L.Ed. 124; American Column & Lumber Co. v. United States, 257 U.S. 377, 400, 417, 42 S.Ct.

No case decided by this court has held a combination illegal solely because its purpose or effect was to raise prices. The criterion of legality has always been the purpose or effect of the combination unduly to restrain commerce.

I think Appalachian Coals, Inc., v. United States, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825, a controlling authority sustaining the defendants' contention that the charge foreclosed a defense available to them under the Sherman Act. It is said that their combination had the purpose and effect of putting a floor under the spot market for gasoline. But that was

262

precisely the purpose and effect of the plan in the Appalachian case. True, the means adopted to overcome the effect of the dumping of distress products on the market were not the same in the two cases, but means are unimportant provided purpose and effect are lawful.

Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 60 S.Ct. 618, 84 L.Ed. —, decided March 25, 1940, is relied upon by the Government but, in that case, as in United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700, 50 A.L.R. 989, maintenance of prices fixed by agreement was involved. So also in Sugar Institute v. United States, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859, condemned features of the common plan had to do with the maintenance of announced prices and the abstinence from selling certain sorts of sugar. The combinations or agreements in these cases specifically prevented competitive pricing or took a commodity out of competition. This is not such a case.

As I think, the error in the court's charge is well illustrated by the following instruction: "If you should find that the defendants acting together, and those independent refiners acting in concert with them, did not have the power to raise the level of spot market prices in the spot markets referred to in the indictment, *or* that they did not combine for that purpose, *and* if you should find also that the purchase of the said gasoline by the defendants affected the spot market prices only indirectly and incidentally, *then* you may consider all the circumstances surrounding the activities of the defendants to determine whether they were intended to produce destructive competition and restore competition to a fairer base and produce fairer price levels. In such event, you may conclude that the purchase of such gasoline in the manner shown by the evidence was reasonable, and beneficial and not injurious to the public interest and that, therefore, the restraint of trade was not undue and

263

not illegal, and you may acquit the defendants." (Italics supplied.)

This was to tell the jury that, if they found the combination had power and purpose to raise the general level of prices, they should convict without considering whether the defendants' concert of action was intended merely to remove a source of destructive competition, and without considering whether, as defendants contended and sought to prove, other factors in the industry, over which they had no control, limited their power to raise prices beyond a level which would be the normal result of the removal of the abuses engendered by the dumping of distress gasoline.

I think that the closing address of counsel for the Government is ground for setting aside the verdict.

It is true that to much that was objectionable in that address the defendants did not object or, if they did, failed to except. However, they assigned error to the whole of it and excepted to some of the more egregious violations of the canons of fair comment. I am of opinion that a situation is presented, which regardless of the technicalities of procedure, requires action by an appellate court. But, in any event, portions which are the subject of exception alone require a reversal of the judgment.

The final and closing address covers twenty-eight pages of the record. About

114, 117, 123, 66 L.Ed. 284, 21 A.L.R. 1093; Maple Flooring Mfrs' Ass'n v. United States, 268 U.S. 563, 568, 45 S.Ct. 578, 579, 69 L.Ed. 1093; Appalachian Coals, Inc., v. United States, 288 U.S. 344, 362, 363, 373, 374, 53 S.Ct. 471, 474, 475, 478, 479, 77 L.Ed. 825; Sugar Institute, Inc., v. United States, 297 U.S. 553, 597, 598, 56 S.Ct. 629, 641, 80 L.Ed. 859.

five refer to the facts in the case. The balance consists largely of what the speaker himself characterized as "clowning" and personal references to counsel, parties, the court, and other subjects, the object of which apparently was to distract attention from the issues.

At many points counsel should have been stopped by the court and warned against continuance of such tactics.

The Circuit Court of Appeals said as to this matter:

264

"The Government does not undertake to justify much of the argument and misconduct complained of, but it earnestly insists that any error committed is not of a reversible nature. As the case is to be reversed, there seems no occasion for us to make a determination in this respect. We shall merely express the opinion that some of the argument complained of was highly improper and that, taken in connection with the misuse of the Grand Jury testimony, heretofore discussed, would present a very serious obstacle to the affirmance of the judgment."

I shall not quote those portions of the address which are quoted or summarized in the opinion of the court. It will suffice to make added reference to several portions.

One of the most reprehensible things a prosecutor can do is to attempt to put into evidence before the jury his own, and his colleagues', opinion as to the guilt of the defendants he is prosecuting. Such a practice brings before the jury the unsworn testimony of a sworn officer of the Government. This fact lends it undue and improper weight and injects an element into the case which is so insidious and so impossible to counteract that trial judges, in my experience, have never hesitated to withdraw a juror and declare a mistrial because of this violation of the canons.

In the closing address counsel said to the jury: "Now, if anybody doubts, if anybody has the least shadow of a doubt about the fact that these men [referring to Government counsel] believe to the bottom of their hearts in the justice of the cause that they espouse here, I can disabuse their minds of that doubt at any time. They have been aggressive, and they have been forceful; their movements here have been intelligent, well-timed; and, as I said, they have come into this court room morning after morning, worn and tired almost to the breaking point. And it seemed to me that, I some times got the feeling, coming as they did then before you

265

to present this evidence and this case, they were something like the Crusaders of old, saying 'God wills it, God wills it.'"

Objection was not made by counsel for the defendants at the time of this statement but when a somewhat similar statement was made a few moments later objection was noted and exception taken. I think, however, that the offense was so flagrant that the court itself should have intervened irrespective of any objection.

A little later these statements occurred: "Now, just between yourselves, do you honestly think that these boys here (indicating counsel at government table) fired with the enthusiasm of crusaders, as I say, and having given to this case every ounce of mental and physical strength they have and I myself have contributed, also, would be trying to convict these men unless that was the wish and desire of the highest officials in the government of the United States?"

After objection and exception counsel continued as follows: "Now, just what do you think about it? Do you think these are three or four or five of these young fellows, as they have been calling them, just starting out on their own, running hog-wild? These are important men. I presume you all know they are engaged in a very important business, a business, the operation of which is almost a necessity in this country today. You don't think the government of the United States would allow four or five lawyers to come out here and prosecute this case against them, against their wishes, or that the Secretary of the Department of the Interior would allow us to do it, if he didn't want it done? And if he wanted it done it was because he believed, as did the other men in Washington, that there was a violation of law here, so outstanding and so withering and far-reaching in its effect that something ought to be done to stop it; and by that to tell the people

266

of this country that you can't do these things and get away with it."

Again there was objection and exception.

Counsel did not confine himself to testimony as to the prosecutors' belief in the defendants' guilt but, in attacking the credibility of an important witness for defendants, essayed to contradict that testimony by a statement of counsel's own knowledge of facts. The quotation from the address will make the matter clear:

"I want to refer in a moment to something that made an impression on me.

"You know we lawyers have to depend—most of us are kind of tough guys. We have our own way of talking about witnesses. And one thing that we very often say and talk about is the three classes of liars. There is the plain liar, the damn liar, and the expert witness. And of all of them, the expert witness is the worst.

"There were a few of them here. There was Swensrud, the representative of the Standard of Ohio; there was Van Covern, and I think there was another one.

"But I just didn't think much of Swensrud's whole testimony, especially after I found out that he was giving testimony that they could ship gasoline in 1935 and in 1936 up the Mississippi River to St. Paul. I happen to be around the Mississippi River quite a little, and know quite a lot about it. In 1935 and 1936, you couldn't get a rowboat up the Mississippi River, north of Winona—because the Government was putting in these dams for the purpose of creating the nine-foot channel that you have read so much about. They had concrete clear across the river, spaced in so many ways that, as I say, you just couldn't get a rowboat up there. When Swensrud talked about gasoline going up that river, where I knew, because I lived there and was around there, that it couldn't be done, I just thought—."

267

After objection and a request that the court direct the jury to disregard the statement the court ruled: "The jury may disregard it. I didn't hear it. I was thinking about something else."

Thereupon counsel resumed as follows:

"Now, if you will let me alone a few minutes, I will be through. If you don't, like 'Old Man River', I will just keep rolling along. I don't want to do that.

"Now I was referring to these witnesses who knew so much. There was Van Covern, Swensrud, and a fellow named J. D. Miller. He was the fellow who never looked at anybody, so you could catch his eye. They knew so much, in the way they were telling it to you, that it is impossible, just impossible to believe that they could know as much as they said they did about it. They just covered too much territory. I think all history, sacred and profane, gives us but one single example of a person who knew everything—and he was not only a man, but he was God. And He gave up His life in a shameful death upon the cross, between two thieves."

* * * * * *

It is true that no formal exception was taken but the matter was highly prejudicial. The court should have dealt with it in some definite and positive way, which he omitted to do.

Considering what is set out in the opinion of this court, and the additional references I have made to the address, I am of opinion that counsel's argument was highly improper, as indeed the Government admits, and, further, that it was highly prejudicial. I do not think the court took proper means to counteract the impropriety and prejudice thus created and I think the only remedy available is to set aside a verdict ensuing upon such misconduct. Compare Berger v. United States, 295 U.S. 78, 85, 88, 89, 55 S.Ct. 629, 632, 633, 79 L.Ed. 1314.

Mr. Justice McREYNOLDS concurs in this opinion.