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Maricopa County and the Problem of Per Se Characterization in Horizontal Price Fixing Cases

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MARICOPA COUNTY AND THE PROBLEM OF *PER SE* CHARACTERIZATION IN HORIZONTAL PRICE FIXING CASES

I. INTRODUCTION

The emergence and development of economics as a science[1] over the past century and an accompanying increase in the complexity and use of economic theory[2] has greatly complicated the judiciary's task of utilizing traditional legal analysis in resolving antitrust litigation.[3] However, the development of complex economic analysis is not the only factor contributing to the existing confusion and uncertainty in antitrust law. A general lack of agreement regarding the goals of antitrust law in general[4]

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1. "Economics. . . 2. The Science relating to the production and distribution of material wealth. . ." THE OXFORD ENGLISH DICTIONARY (3rd ed. 1969).

2. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, §1, at 1-2 (1977).

3. *See* Flynn, *Introduction-Antitrust Jurisprudence: A Symposium on the Economic Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977). *See also* L. SULLIVAN, *supra* note 2, §§1,2. A casual glance through any Journal of Law & Economics issue will convince even the greatest skeptic that the judiciary's task in comprehending available economic data is not an envious one. *See, e.g.*, McGee, *Predatory Price Fixing Revisited*, 23 J. LAW & ECON. 289 (1980).

4. *Compare* Bork & Bowman, *The Crisis in Antitrust*, 65 COL. L. REV. 363 (1965) (antitrust policy concerned with efficient resource allocation) *with* Blake & Jones, *Toward a Three Dimensional Antitrust Policy*, 65 COL. L. REV 377 (1965) (antitrust policy has political as well as economic goals). *See also* R. BORK, THE ANTITRUST PARADOX 1-11, 408-25 (1977). *But see* Brietzke, Book Review, 13 VAL. L. REV. 403 (1979). "You will . . .love [THE ANTITRUST PARADOX] if Bork's prejudices confirm your own. If they don't, you-like this reviewer-will undoubtedly remain unmoved. . . ." *Id.* at 405.

At present, there are two predominant and somewhat antagonistic approaches to antitrust law and analysis; they are popularly known as the "Chicago School" and the "Harvard School." Each "school" advocates its own form of antitrust ideology. Although other "schools" do exist, and although there is a broad range of principles and theories represented *within* both the Harvard and Chicago schools, this note will focus on the latter two "schools" and treat each as a homogenous body espousing singular principles.

Briefly, adherents to "Chicago School" analysis posit that the sole goal of antitrust policy is the promotion of "consumer welfare." *See* R. BORK, *supra*, 3-8, 50-66. Consumer welfare, in turn, is promoted by increasing a market's resource allocation efficiency (making what the consumer wants) and its productive efficiency (using the least amount of resources). The promotion of these *economic efficiencies* thereby reduces resource misallocation due to monopoly power. Thus, the maximization of consumer welfare is the one and only standard to be used in evaluating alleged restraints of trade.

Proponents of "Harvard School" analysis recognize the value and worth of economic analysis but do not believe that maximization of consumer welfare should be the sole goal of antitrust law. *See, e.g.*, Blake & Jones, *In Defense of Antitrust*, 65 COL L. REV. 377, 381-82 (1965) [hereinafter cited as Blake & Jones, *Defense*]. "Harvard"

and of the Sherman Act[5] in particular[6] is yet another factor contributing to the current crisis in antitrust.

The legal process' limited capability to adjudicate disputes through the use of economic analysis causes inconsistency in case law and doctrinal ambiguity in antitrust law.[7] Since courts employ traditional tools of legal analysis to formulate antitrust doctrine,[8] judges now find themselves required to resolve complex and diverse factual issues[9] by reference to fairly inflexible, generalized and simplified rules

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adherents emphasize the populist origins of American antitrust law and advocate that this populist tradition sometimes requires that social policy-oriented goals take precedence over the economically-oriented goal of maximizing consumer welfare. These goals include the decentralization of economic power, the optimization of individual entrepreneural freedom and opportunity, and a social preference for the smaller competitor. Generally, proponents of "Harvard" analysis favor more strenuous enforcement of antitrust statutes than their "Chicago" colleagues because such a policy furthers the goals enumerated above.

For further discussion and elucidation of the "Chicago School" of antitrust ideology, see generally R. BORK, *supra*; R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); G. STIGLER, THE ORGANIZATION OF INDUSTRY (1968). For a description of "Harvard School" ideology and analysis, see L. SULLIVAN, *supra* note 2, §§1,2; Blake & Jones, *Defense, supra*, at 377-400.

5. Sherman Antitrust Act of 1890, ch. 647, §1, 26 Stat. 209, 15 U.S.C. §1 (1976). The pertinent provision of the statute reads: "Every contract, combination . . . or conspiracy in restraint of trade . . . is hereby declared to be illegal." *Id.*

6. *Compare* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7 (1966) (Sherman Act enacted to promote maximization of consumer wealth) *with* Sullivan, *Economic and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1218 (1977) (Congressional purpose in enacting Sherman Act both vaguer and broader than Chicago analysts would allow).

For a thorough discussion of the Sherman Act's legislative history and policy goals, see W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT(1981); H. THORELLI, THE FEDERAL ANTITRUST POLICY (1955); Bork, *supra*.

7. The effectiveness of traditional legal analysis depends on the validity of general, broadly construed principles and rules, and well defined factual settings which permit consistency and predictibility in the application of those principles and rules. L. SULLIVAN, *supra* note 2, §1, at 7. Antitrust litigation, which involves less determinate factual issues and emphasizes economic theory, is more difficult to fit within the traditional legal analysis. *Id. See also infra* note 8.

8. Courts have long recognized that the Sherman Act cannot literally mean what it says. *See infra* note 36 and accompanying text. Since the Sherman Act cannot be interpreted literally, and because the statute provides little substantive guidance, judges use the legal process's analytical tools of characterization, rulemaking, and rule application (adjudication) to resolve the many economically-oriented factual disputes before them. *See* L. SULLIVAN, *supra* note 2, §1, at 7.

9. Common factual issues arising in the course of litigation are actual percentage of market power and a defendant firm's marginal cost.

which the legal process has a penchant for creating.[10] The incongruity of legal and economic methodologies has resulted in tremendous costs, both in terms of litigation expenses and judicial economy.[11]

Horizontal[12] price fixing[13] cases illustrate the difficulty of applying economic theory through the use of legal analytical tools such as

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10. Professor Flynn summarized the judiciary's formidible task:

> [T]he Court is charged with giving effect to the long term value choices underlying the vague and general language of. . . [antitrust] law, all the while respecting the effective limits of the judicial process and balancing the need for a generous flexibility to accommodate new circumstances and certainty to resolve present and pressing problems.

Flynn, *supra* note 3, at 1188.

11. Consider, for instance, the government's recently settled antitrust action against IBM. As of 1976, the Justice Department had spent approximately $5 million on the case. An earlier suit against IBM by Control Data Corp., which spawned the latter's now impressive computer litigation service, involved discovery of over 30 million documents. 11 U. MICH. J.L. REF. 387, 390 n. 9 (1978). *See also* Arizona v. Maricopa County Medical Soc'y, 102 S. Ct. 2466, 2473 (1982).

12. While any unreasonable restraint of trade is forbidden under the Sherman Act, such a restraint is usually classified by the structure of the market it affects. Those restraints which restrain competition among firms *at the same market level* (of production, distribution, etc.) are *horizontal* restraints. Price fixing among competing firms is an example of such a restraint.

Restraints linking *two different market levels* in the same chain of manufacture and distribution are *vertical* restraints. A manufacturer's ownership of retail outlets, such as a television manufacturer's ownership of the stores in which its product is sold, is a typical vertical market structure. Should that manufacturer prohibit the television retailer from selling the former's televisions at any location other than the store the latter now manages, this prohibition would be a vertical restraint of trade. *See* Continental T.V., Inc. v. GTE Sylvania, 8433 U.S. 36 (1977) (vertical territorial restraint imposed upon television retailer by television manufacturer not illegal *per se*).

13. Were "price fixing" a term readily subject to definition there would be no need to author this note, which analyzes that process by which courts determine whether a given agreement or activity constitutes "price fixing." The process by which courts characterize agreements or conduct as *per se* illegal "price fixes" is known as "*per se* characterization" analysis. For a discussion as to the meaning and significance of a finding of "*per se* illegality," see *infra* note 16. *See also infra* note 20.

While there is no authoritative definition of "price fixing" in existence, the Court has consistently declared as "price fixes" those agreements in which competitors directly set the price level at which their products will sell. Such agreements are characterized as "horizontal price fixes." *See supra* note 12. The Court has long held this type of agreement to be a violation of §1 of the Sherman Act. *See, e.g.,* United States v. Addyston Pipe and Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd.*, 175 U.S. 211 (1899) (agreement among six leading producers of iron pipe, which divided nation into territories and established fixed prices for each, declared illegal as violating Sherman Act); United States v. Joint Traffic Ass'n., 166 U.S. 290 (1897) (one of the first Supreme Court antitrust cases—agreement among railroads to set standard freight schedule declared an illegal restraint of trade violating §1 of the Sherman Act).

"Vertical price restraints" exist as well. *See* Albrecht v. Herald Co., 390 U.S.

rule application, the syllogism, and characterization.[14] Judges are often urged to characterize a contested agreement as a "price fix," a characterization which results in the agreement usually[15] being declared illegal *per se*.[16] Unfortunately, neither the Supreme Court nor lower federal courts have been able to adopt and maintain a *per se* characterization standard[17] which can be consistently and effectively applied in horizontal price fixing cases.[18]

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145 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951). The *Albrecht* and *Kiefer-Stewart* decisions were discussed at length in *Maricopa County*. *See Maricopa County*, 102 S. Ct. at 2474-75. *See also infra* note 70.

14. One commentator has effectively documented the lack of a uniform method for analyzing price fixing cases. Allison, *Ambiguous Price Fixing & The Sherman Act: Simplistic Labels or Unavoidable Analysis?* 16 HOUS. L. REV. 761 (1979).

15. Until recently, all "price fixes" were thought to be illegal *per se* in accordance with the Court's landmark decision in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). However, in a recent decision, the Court declared that "not all agreements impact[ing] on price are *per se* violations of the Sherman Act or even unreasonable restraints." Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 23 (1979). Thus, there is still some uncertainty as to whether *all* price fixes are illegal *per se*. However, as this note will discuss, the Court's most recent pronouncement on this subject appears to have substantially overruled the Court's dicta in Broadcast Music. *See Maricopa County*, 102 S. Ct. 2466, 2479-80, 2482-85. *See also infra* notes 269-81 and accompanying text.

16. In the ninety-plus years since the Sherman Act's enactment, the Court has found through judicial experience that certain types of agreements warrant a conclusive presumption of illegality because of "their pernicious effect on competition and lack of any redeeming virtues." Northern Pac. R.R. v. United States, 356 U.S. 1, 5 (1958) (the "classic" treatment of *per se* illegality). *See also* United States v. Container Corp. of America, 393 U.S. 341 (1969) (Marshall, J., dissenting); *Maricopa County*, 102 S. Ct. at 2473. The Court has found several categories of conduct, including price fixing, to be so inherently anticompetitive as to constitute unreasonable restraints of trade. United States v. Trenton Potteries, 273 U.S. 392, 398 (1927).

Plaintiffs frequently seek a *per se* labeling because the accompanying conclusive presumption of illegality prevents a defendant from supplying any justification for his actions: a plaintiff need merely show that proscribed *per se* conduct, such as a price fix, has occurred, and liability is automatically imposed upon the defendant. *cf. Maricopa County* 102 S. Ct. at 2473 (once Court can predict with confidence that particular type of restraint is unreasonable, it will use *per se* rule to make conclusive presumption of illegality). But *cf. supra* note 15. Thus, the *per se* rule is said to have a "preclusionary effect" by precluding defendants from making procompetitive justifications for their conduct. *See, e.g.*, Taylor, *Rule of Reason Cases Since National Society of Professional Engineers*, 51 ANTITRUST L.J. 185 (1982).

Courts have found four practices to be *per se* unlawful under §1 of the Sherman Act: price-fixing, *Trenton Potteries* 273 U.S. 392; division of markets, United States v. Topco Assoc's., Inc., 405 U.S. 596 (1972); group boycotts, Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959); and tying arrangements, *Northern Pac. R.R.*, 356 U.S. at 5.

17. *See supra* note 13. *See also infra* note 20.

18. In describing and explaining the sometimes arbitrary analysis courts use

The Court's most recent pronouncement in the *per se* price-fixing area is *Arizona v. Maricopa County Medical Society.*[19] The Court in *Maricopa County* radically altered the *per se* standard[20] to be applied in conducting a *per se* characterization analysis in price fixing cases.[21] Prior to *Maricopa County*, in *Broadcast Music Inc. v. Columbia Broadcasting System*,[22] the Court had constructed a *per se* standard which

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in characterizing agreements as *per se* illegal price fixes, one writer has noted that: "Factualfindings. . . sometimes appear to have been made by the court[s] solely from a vague sense of obligation, with no real nexus having been established between the findings and the ultimate conclusion. Not surprisingly, intuition seems to play an especially major role in such cases." Allison, *supra* note 14, at 768.

19. 102 S. Ct. 2466. In *Maricopa County*, the state of Arizona alleged that physicians in Maricopa County had violated the Sherman Act by forming a Foundation for Medical Care (FMC). This foundation's key function was to create and submit a fee schedule for approval by majority vote of the foundation's physician-members. *Id.* at 2469. This fee schedule established maximum fees which foundation members could charge patients insured under a foundation-sponsored health plan. *Id.* at 2480. The foundation invited insurance companies to participate in the foundation program by offering health insurance policies based on the fixed fee schedule. *Id.* at 2480-81.

The FMC argued that its fee schedule had saved consumers millions of dollars by allowing insurers to more efficiently underwrite medical insurance policies. *Id.* at 2472, 2481. The state argued that the creation of a fee schedule establishing maximum price levels was a direct and *per se* illegal "price fix" among competitors (foundation members). *Id.* at 2469. For further discussion of the case, see *infra* notes 222-50 and accompanying text.

20. This note distinguishes between a *per se standard* and the *per se* characterization *process*. A *per se* standard is a test or set of criteria which courts use in weighing various pro- and anticompetitive factors raised by antitrust litigants in regards to the propriety (or lack thereof) of a *per se* finding. Some of these factors include tampering with price competition, greater (or lesser) economic efficiency, and higher (or lower) transaction costs. The *per se* characterization process, described *supra* note 13, involves a court's applying a particular *per se* standard to a given case and subsequently reaching a conclusion as to whether *per se* illegality should be found.

21. *See Broadcast Music*, 441 U.S. 1 (1979).

22. 441 U.S. 1 (1979). In *Broadcast Music* competing composers allowed the American Society of Authors, Composers and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) to issue licenses giving users the right to perform any products of a given composer. In practice, ASCAP and BMI issued blanket licenses to networks and other users of compositions, which allowed the users to perform any of the millions of compositions in the organizations' repertoire. *Id.* at 5. CBS charged that the blanket license itself was illegal *per se* because it reduced competition among composers by reducing their incentive to bargain individually with users of their products. *Id.* at 6.

The Court refused to characterize the blanket licenses as illegal *per se* because, *inter alia*, they reduced the inherently high transaction costs involved in the music market. *Id.* at 20-22. Without the blanket licenses, costs to users of negotiating with individual copyright owners every time the former desired to perform the latter's composition would be prohibitive. Likewise, the costs to copyright owners in enforcing their statutory rights against unauthorized users of their works would be prohibitive. *Id.* The Court reasoned that the blanket licenses proved beneficial to both

incorporated concepts of economic efficiency and maximization of consumer wealth.[23] Many Court observers and several Justices interpreted *Broadcast Music* as allowing agreements which exhibited the potential for creating substantial and otherwise unattainable economic efficiencies to escape *per se* illegality, even if such agreements literally fixed a price.[24]

However, in *Maricopa County*, the Court characterized an agreement purportedly creating substantial economic efficiencies as a *per se* illegal "price fix."[25] The Court declared in dicta that all agreements directly or indirectly tampering with price or price structure were illegal *per se*.[26] A comparison of the Court's holdings in *Broadcast Music* and *Maricopa County* reveals obvious inconsistencies which cannot be explained by distinguishing the two cases on their facts.[27] The Court's apparent abandonment of *Broadcast Music*'s *per se* standard and its reinstatement of a previously discarded standard[28] will undoubtedly generate an enormous amount of confusion regarding the proper scope and application of the *per se* price fixing standard.

This note examines the various *per se* price fixing standards formulated by the Court since the Sherman Act's inception and traces the development of the *per se* characterization process used in horizontal price fixing cases. The discussion concentrates on the Court's holdings in *Continental Television Inc. v. GTE Sylvania*,[29] *National*

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buyers and sellers and thus created substantial economic efficiencies by reducing these high transaction costs. *Id.* at 19-20. *See infra* notes 156-204 and accompanying text.

23. *See supra* note 4.

24. *See Maricopa County*, 102 S. Ct. at 2482 (Powell, J., dissenting); ANTITRUST ADVISOR, 2D ED: 1982 CUMULATIVE SUPP. §1.29 at 13, 22 (1982) (prepared by Prof. Wesley Liebeler of the UCLA Law School) [hereinafter cited to as ANTITRUST ADVISOR].

25. *See Maricopa County*, 102 S. Ct. at 2475, 2477, 2480. The fixing of maximum fees purportedly saved consumers millions of dollars by enabling insurers to calculate more efficiently the risks they underwrote. *Id.* at 2472, 2481-82. *See also supra* note 19. In *Broadcast Music* ASCAP's & BMI's creation of a blanket license, which offered compositions to users at annual or per-program rates, greatly reduced the market's high transaction costs. *Broadcast Music* 441 U.S. at 20-22. *See also supra* note 22.

26. *See Maricopa County* 102 S. Ct. at 2472-78.

27. "The Court's effort to distinguish *Broadcast Music* is . . . unconvincing." *Maricopa County* 102 S. Ct. at 2484 (Powell, J., dissenting). *See also infra* note 281 and accompanying text; ANTIRRUST ADVISOR. *supra* note 24, §1.29, at 21-23.

28. *Broadcast Music* was thought to have tacitly overruled in part the Court's holding in *Socony-Vacuum*, 310 U.S. 150. *See* ANTITRUST ADVISOR *supra* note 24, §1.29. *See also infra* note 194 and accompanying text. *Maricopa County* appears to have revitalized *Socony-Vacuum*'s holding. *See Maricopa County* 102 S. Ct. at 2474-75. *See also infra* notes 263-67 and accompanying text. Note that the *Broadcast Music per se* standard existed for only two years before its apparent demise.

29. 433 U.S. 36 (1977) (vertical territorial restraint held not to be illegal *per se*).

Society of Professional Engineers v. United States,[30] *Broadcast Music*[31] and *Maricopa County*.[32] The latter case's flaws, implications and likely effect on existing case law are also examined. The distressing conclusion reached is that *Maricopa County* will further mire the Court in the "analytical swamp"[33] of *per se* characterization analysis.

Justice Stevens attempted to resolve existing conflicts and uncertainty in the *per se* process through his *Maricopa County* majority opinion. Unfortunately, he only heightened confusion and inconsistency in this area of the law through his questionable application of a rule which, ironically, was created to enhance certainty and litigational efficiency in antitrust law.[34] However, the informed antitrust observer will not be too critical of the Justice since confusion and uncertainty have been the trademarks of the *per se* price fixing rule since its inception seventy-three years ago.[35] Thus, before one can intelligently criticize the majority's position in *Maricopa County*, he or she must gain an appreciation of the difficulties and dilemmas which all judges face when applying a *per se* characterization standard. A brief review of the case law out of which the *per se* rule evolved is therefore in order.

II. THE CREATION AND EVOLUTION OF *PER SE* CHARACTERIZATION IN THE HORIZONTAL PRICE FIXING CONTEXT

A. *The Rule of Reason*

Courts have not interpreted the Sherman Act as prohibiting all contracts restraining trade, even though the Act liberally bars all such contracts.[36] Instead, the Supreme Court has honored the common law

30. 435 U.S. 679 (1978) (professional society's ethical canon prohibiting competitive bidding for members' services is a "price fix" and so is illegal *per se*).

31. 431 U.S. 1 (1979).

32. 102 S. Ct. 2466 (1982).

33. *See* L. SULLIVAN, *supra* note 2, §72, at 197.

34. *See Maricopa County* 102 S. Ct. at 2473; *Container Corp.* 393 U.S. at 341 (Marshall, J., dissenting); *Northern Pac. R.R.*, 356 U.S. at 5. *See also infra* notes 48-52 and accompanying text.

35. Most observers agree that the *per se* rule had its origin in the Standard Oil of New Jersey v. United States, 221 U.S. 1 (1911). *See, e.g., Maricopa County* 102 S. Ct. at 2473 (Court announced *per se* rule by establishing conclusive presumption of illegality in some instances); L. SULLIVAN *supra* note 2, §65, at 174 (*Standard Oil* accepts embroyonic *per se* rule).

36. As the Court noted in *Professional Eng'rs* "[R]estraint is the very essence of every contract; read literally, §1 would outlaw the entire body of contract law." 435 U.S. at 687. Justice Stevens also quoted Justice Brandeis' now-famous phrase: "Every

concept of "unreasonable restraints"[37] and has prohibited only those agreements which unreasonably or unduly restrain trade.[38] Courts gauge such "reasonableness" by applying the controlling standard of "competition"; only those agreements found to significantly restrain competition are declared illegal.[39]

Courts analyze an agreement's purpose and effect to determine if competition has been significantly altered.[40] If a court finds that an agreement's sole purpose is to restrain competition an anti-

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agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

37. Standard Oil v. United States, 221 U.S. 1, 60 (1911).

38. *See Professional Eng'rs* 435 U.S. at 688-90, where the Court traced the origins of the Rule of Reason to Mitchell v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711), and thereafter noted the *Standard Oil* Court's use of a similar "reason" analysis. The pertinent portion of *Mitchell* reads as follows:

> [A]ll contracts, where there is a bare restraint of trade, and no more, must be void; but this taking place only where the consideration is not shown can be no reason why, in cases where the special matter appears so as to make it a reasonable and useful contact, it should not be good....

P. Wms. 181, 24 Eng. Rep. at 351.

Standard Oil was the first Supreme Court case to use the "unreasonable" and "undue" restraint of trade language. 221 U.S. 60. This language has been used in a countless number of cases since then. *See, e.g., Professional Eng'rs* 435 U.S. 679; United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948); *Chicago Bd. of Trade* 246 U.S. 231. *See generally* L. SULLIVAN, *supra* note 2, §§ 64, 68.

39. The Court in *Standard Oil* for the first time explicitly used a "competition" standard to evaluate reasonableness: "[I]t may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions . . . led . . . to the prohibition . . . [of] all contracts or acts which were unreasonably restrictive of competitive conditions...." 221 U.S. at 58. *See also* L. SULLIVAN, *supra* note 2, §§ 65, 66.

40. *See, e.g., Columbia Steel Co.,* 334 U.S. at 525; United States v. American Tobacco Co., 221 U.S. 106, 179 (1911). *See also* R. BORK, *supra* note 4, at 36-37; L. SULLIVAN *supra* note 2, §§ 68, 71; Allison, *supra* note 14, at 766-70.

Judge (later Chief Justice) Taft combined common law doctrine with his own concept of antitrust law's proper scope to create an analytical "purpose or effect" device by which courts could effectively gauge the overall reasonableness (and hence legality) of a given act. *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd.*, 175 U.S. 211 (1899). Taft held that all restraints on competition were unlawful unless they: (1) were ancillary to the contract's (act's) main purpose; (2) were necessary to protect the promisee in employment of the contract's fruits; and (3) did not contain restraints exceeding those necessary to protect the promisee's employment of the contract. *Id.* at 282.

Courts have interpreted Taft's holding as requiring application of the Rule of Reason to all restraints which are ancillary to a legitimate purpose so as to determine whether the procompetitive benefits of such a restraint outweigh the anticompetitive harms. *See, e.g., Professional Eng'rs* 435 U.S. at 689. *Addyston Pipe* is thereby con-

competitive effect is conclusively presumed. Consequently, the agreement will be declared illegal regardless of its actual effect on

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sidered to mandate a determination of both *purpose* (legitimate vs. illegitimate) and competitive *effect* (pro- or anticompetitive).

Judge Bork has interpreted *Addyston Pipe* as validating combinations which exhibit no purpose to restrict output while simultaneously creating economic efficiencies (lower prices, higher quality product) through an integration of the competing firms' productive resources in which price fixing is merely an ancillary restraint. *See* R. BORK *supra* note 4, at 26-30, 263-75. Judge Bork defines an ancillary restraint as a restraint that is subordinate and collateral to a legitimate purpose and which also increases economic efficiency. *Id.* at 27. One effect of the judge's interpretation is to legalize those combinations in which a price fix is subordinate and collateral to the legitimate purpose of integrating firms' productive activities in order to enhance group members' economic efficiency. *Id.*

According to Judge Bork, such combinations are justified because the increase in economic efficiencies ultimately benefits consumers, thereby satisfying antitrust law's sole goal of maximizing consumer welfare. *See supra* note 4. Thus, a combination can actually suppress "competition" (defined by Judge Bork as "rivalry") and still be legal as long as productive efficiency is increased through the elimination of that competition by contract integration (integrations between independently owned rivals), or ownership integration (integration including the fusing of ownership, e.g., horizontal mergers). *See* R. Bork, *supra* note 4, at 279.

Judge Bork summarizes his theory by proposing a three-step model:

> The upshot is that when the integration is essential if the activity is to be carried on at all, the integration and restraints that make it efficient should be completely lawful. But when the integration may be useful but is not essential (in the sense that cooperation is not the essence of the activity), then the joint venture and its ancillary restraints (including price fixing) . . . should be lawful when three conditions are met: (1) The agreement fixing prices or dividing markets is ancillary to a contract integration; that is, the parties must be cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose.(2) The collective market share of the parties does not make the restriction of output a realistic danger (judged by rational horizontal merger standards).(3) The parties must not have demonstrated a primary purpose or intent to restrict output.
>
> Where any one of these conditions is not met, the horizontal agreement should be unlawful. Where there is no coordination of productive activities, the first condition is violated; such an agreement is naked rather than ancillary and should be illegal per se.

Id

Judge Bork's analysis is given extended attention here because it alters the *per se* characterization process (*see supra* note 20) to a great degree. Under the judge's analytical approach, agreements which tamper or suppress price competition would escape characterization as "horizontal price fixes" (which are illegal *per se*) provided these restraints were ancillary to a contract integration and increased productive efficiency. *Id.* However, under *Socony-Vacuum*'s description of the characterization process, such agreements would be characterized as *per se* illegal "price fixes" because they had the effect of "raising, depressing, fixing, pegging or stabilizing . . . [a commodity's]

competition.[41] However, if an anticompetitive purpose cannot be discerned, the court identifies the agreement's harmful and beneficial effects on competition. After identifying these pro- and anticompetitive effects, the court balances these effects to determine whether the agreement produces a net anti- or procompetitive effect.[42] If the court finds that an agreement's anticompetitive harm outweighs its procompetitive benefit, the agreement is classified as an unreasonable restraint of trade violating § 1 of the Sherman Act.[43] Alternatively, if the court finds that the agreement produces a net procompetitive effect, no § 1 violation is found. This "purpose or effect" analysis is known as the "Rule of Reason"[44] and has been applied by courts since shortly after the Sherman Act's inception.

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price." *Socony-Vacuum* 310 U.S. at 223. *See infra* notes 63-64 and accompanying text.

The distinction between these two conflicting approaches to *per se* characterization lies at the heart of the current "*per se* price fixing" characterization debate. *See infra* notes 73-82 and accompanying text.

41. One commentator succinctly summarized the rationale behind presuming effect solely on the basis of a proven purpose to restrict competition:

> Denunciation of conduct solely on the basis of predominant anticompetitive intent is entirely consonant with the rule of reason's concern for competitive impact. The combination's participants are probably the best judges of the feasibility of their scheme; they ordinarily would not undertake a plan to limit or to stifle competition without having a reasonably high probability of success. Furthermore, had the arrangement been totally abortive, there likely would have been no complaint. Given the great predictive value of an established intent, judicial administration is aided immensely by terminating the inquiry at this point.

Allison, *supra* note 14, at 767.

42. *See, e.g., Maricopa County*, 102 S. Ct. at 2477 (contested agreement does not significantly enhance competition); *Professional Eng'rs* 435 U.S. at 688-91. *See generally* R. BORK *supra* note 4, at 19-47; L. SULLIVAN *supra* note 2, §§ 64-68.

43. *See Professional Eng'rs* 435 U.S. at 688-91.

44. Justice Brandeis provided the "classic" and most frequently cited explanation of the Rule of Reason in *Chicago Bd. Of Trade:*

> 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.

246 U.S. at 238.

Actually, this "purpose or effect" analysis and the expedited *per se* analysis

Balancing an agreement's benefits and costs under the Rule of Reason does not include a consideration of social or other non-economic benefits.[45] Many Chicago and Harvard School analysts exclude non-economic social factors in any application of the Rule.[46]

In short, under the Rule of Reason, courts focus on the purpose behind an allegedly illegal restraint, and determine whether the defendant's main purpose was to restrain competition. If a Court cannot ascertain the existence of an anticompetitive purpose, it will then determine whether the contested agreement or conduct has the overall effect of promoting or suppressing competition.[47] If, on balance, the agreement's harmful anticompetitive effects outweigh the beneficial procompetitive justifications cited by the defendants, the court will find a § 1 violation. Unfortunately, this balancing of pro- and anti-competitive effects is an expensive and time-consuming process. Courts have employed a *per se* rule of illegality in an attempt to reduce the expenses incurred in antitrust litigation.

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are both distinct categories within the general framework of the "Rule of Reason" analysis. *See infra* notes 48-49 and accompanying text. *See also* Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 NW. U.L. REV. 137, 139-40 (1962) (Rule of Reason always applies—use of *per se* rule based on probability of a given type of restraint being unreasonable). *See also Professional Eng'rs*, 435 U.S. at 692. However, courts will often use the phrase "Rule of Reason" to refer only to the "purpose or effect" category of analysis. *See, e.g., Broadcast Music*, 441 U.S. at 26 (Stevens, J., dissenting) (blanket license not illegal *per se*, but violates the Rule of Reason); *GTE Sylvania*, 433 U.S. at 59 (vertical non-price restrictions to be policed under the Rule of Reason, rather than the *per se* rule). In fact, this colloquial usage has become fairly common. Unfortunately, the ambiguous use of the term "Rule of Reason" has resulted in the widespread misinterpretation of a recent Supreme Court case. *See infra* notes 141-45 and accompanying text. However, for purposes of simplicity and clarity in this note, the term "Rule of Reason" will be used as synomous with the "purpose and effect" category of analysis.

45. *Professional Eng'rs* 435 U.S. at 688, 692.

46. *Compare* L. SULLIVAN, *supra* note 2, §§68, 72 (analytical confusion surrounding Rule of Reason, *per se* analysis will be resolved if the Rule is solely concerned with "competition") *with* R. BORK, *supra* note 4, 22-24, 33-36 (maximization of consumer welfare is sole policy goal ascribed to the Sherman Act in *Standard Oil*—economic, not social, policy argument called for in §1 cases).

However, several respected antitrust authorities have called for a Rule of Reason which incorporates social concerns—especially social concerns regarding product safety. *See, e.g.*, Robinson, *Recent Antitrust Developments*—1979, 80 Col. L. REV. 1, 16, 17 n.106, 18-19 (1980); Handler, *Antitrust-1978 78Col. L. REV. 1363, 1372 n.57, 1373-74 (1978). A plea for placing weight on product safety, where doing so would suppress competition, was rejected by the Court in Professional Eng'rs* 435 U.S. 679. In that case, and once again in *Maricopa County*, the Court considered Congress to be the only authority capable of revising the Sherman Act's "competition" standard. *See Maricopa County*, 102 S. Ct. at 2478-79; *Professional Eng'rs* 435 U.S. at 689-90.

47. *Professional Eng'rs* 435 U.S. at 689, 692.

B. *The Per Se Rule and the Problem of Characterization*

Theoretically, the *per se* rule used in antitrust law is merely a special application of the Rule of Reason.[48] Once experience with a particular type of restraint suggests that the Rule will condemn it in the vast majority of cases, the Court conclusively presumes that type of restraint to be illegal *per se*.[49] The Court has adopted the *per se* rule because, *inter alia*, the tremendous costs associated with the Rule of Reason militate against its use in those instances where the restraint is so "plainly anticompetitive in nature"[50] that it rarely will escape condemnation by the courts under the Rule of Reason.[51] Moreover, the *per se* rule's generalized condemnation of plainly anticompetitive types of restraints provides a degree of certainty and consistency in the courts' application of the Sherman Act.[52]

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48. Rahl, *supra* note 44, at 139-40. *See also Professional Eng'rs, 435 U.S. at 692. But see* Handler, *supra* note 46, at 1372-74.

Judge Bork's description of the Rule of Reason standard articulated in *Standard Oil* illustrates the *per se* rule's inclusion as a separate category within the broader Rule of Reason analysis. Judge Bork interprets *Standard Oil*'s Rule of Reason analysis as requiring three tests to be applied to any practice or structure. First, when a practice has no significant beneficial effect but is solely a means of restricting output, the practice by its "inherent nature" is injurous to trade and is therefore illegal *per se*. The remaining two tests are the "inherent effect" and "evidence purpose" tests. These tests would be applied only to those cartels not illegal (*per se*) by their "inherent nature". R. BORK, *supra* note 4, at 36.

According to this description of the Rule of Reason, the *per se* rule is merely a threshold inquiry into the nature of the alleged restraint—an inquiry which the contested activity must endure successfully if it is to advance to the other stages of Rule of Reason analysis (i.e., purpose and effect). *See also* L. SULLIVAN, *supra* note 2, §68.

49. *See Maricopa County* 102 S. Ct. at 2473 (experience with particular type of restraint enables Court to confidently predict that the Rule of Reason will condemn it). *But see Topco*, 405 U.S. at 609-10 (Court's inability to balance pro- and anticompetitive effects in vertical territorial market restraints justifies application of *per se* rule). *See generally* L. SULLIVAN *supra* note 2, §72.

50. *Northern Pac. R.R.* 356 U.S. at 5.

51. *Id.* Justice Marshall stated the Court's rationale behind using and extending the *per se* rule as follows:

> *Per se* rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases.

United States v. Container Corp. of America, 393 U.S. 333, 341 (1969). *See also* L. SULLIVAN *supra* note 2, §70. *But see GTE Sylvania*,433 U.S. at 50 n.16 (*per se* rule should not be extended solely on basis of judicial convenience and business certainty).

52. *See, e.g., Maricopa County*, 102 S. Ct. at 2473; *Broadcast Music*, 441 U.S.

Horizontal price-fixing was the first category of business conduct to which the *per se* rule was applied.[53] In *United States v. Trenton Potteries*,[54] the Court approved a jury instruction allowing jurors to return a guilty verdict if they found an agreement to fix prices existed, regardless of the reasonableness of those prices.[55] Because price fixing by its nature decreased competition in a given market and increased a firm's ability to control a market, the Court found direct horizontal price fixing to be the type of restraint which it could reliably predict to be anticompetitive. Therefore, price fixing agreements were in themselves unreasonable and illegal restraints of trade.[56]

The direct horizontal price fixing *per se* rule was soon extended to apply to indirect restraints on price. In *United States v. Socony-Vacuum Oil Co.*,[57] the Court scrutinized an agreement by which a group of major oil companies bought excess supplies of "distress" gasoline from independents. Many independents were forced to sell large quantities of excess gasoline on a "spot" market due to a lack of adequate storage facilities and greatly excessive production. These "spot" market sales depressed prices to levels which at times fell below

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at 8 n.11; *Topco*, 405 U.S. at 609 n.10. Observe that up to this point in the note, discussion of the *per se* rule has focused on the rule as applied to broad types or categories of conduct, such as "price fixing" in general. However, the issue of whether the *per se* rule is to be extended to cover additional categories of conduct must not be confused with the characterization of a particular agreement as coming within or falling outside of a category of conduct previously declared to be illegal *per se*. The former instance involves courts evaluating a *type* of restraint, while the latter involves the courts characterizing a *particular* restraint. *Compare GTE Sylvania*, 433 U.S. 36 (Court eliminates *per se* rule extending to vertical territorial restraints) with *Broadcast Music*, 441 U.S. 1 (Court decides blanket license issued by ASCAP "literally" fixes prices, but is not a *per se* illegal "price fix"). *See also infra* notes 121-22 and accompanying text.

53. For inclusive listing of all categories of conduct to which the *per se* rule has been applied, see *supra* note 16.

54. 273 U.S. 392 (1927).

55. *Id.* at 401.

56. The Court noted:

> The aim of and result of every price-fixing agreement, if effective, is the elimination of one form of competition. . . Agreements which create such potential power [to control the market] 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....

Id. at 397.

57. 310 U.S. 150 (1940). For another example of "indirect" price fixing being declared illegal *per se*, see Sugar Institute v. United States, 297 U.S. 553 (1936) (agreement to adhere to previously announced prices and terms of sale illegal *per se*, even though advance price announcements are legal and agreement's terms not fixed by private agreement).

the cost of production.[58] Defendants arranged to have each major oil company in their group purchase the distress gasoline of one independent as its "dancing partner" to prevent such drastic drops in price levels.[59] There was no explicit agreement on the actual prices to be maintained; each defendant agreed to pay its "dancing partner" the fair going market price for the distress gasoline.[60] Thus, the defendants did not directly set a market price.

The Court broadened the scope of the *per se* price fixing standard by characterizing this agreement as a horizontal "price fix" and declaring it to be illegal *per se*.[61] Although there were no allegations of direct price fixing, the Court held that any combination "formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing" a commodity's price was illegal *per se*.[62] The Court characterized as "price fixes" agreements which indirectly "tampered" with price structure, as well as agreements which explicitly "set" fixed price levels.[63] Pursuant to *Socony-Vacuum*, courts inspected a contested agreement to determine whether a purpose and effect to raise, depress, fix, peg or stabilize prices existed. If such

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58. *Socony-Vacuum* 310 U.S. at 170-71.
59. *Id.* at 179.
60. *Id.* at 180.
61. *Id.* at 223.
62. *Id.*
63. *Id.* at 221.

> 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.

Id. at 222.

Socony-Vacuum expanded the *standard* used in *per se* characterization by declaring any agreements which directly or indirectly "tampered" with price competition to be illegal *per se*. Before *Socony-Vacuum*, courts usually characterized as illegal *per se* only those agreements explicitly setting prices at a fixed level. Therefore, *Socony-Vacuum* broadened the standard used by courts to determine whether a particular agreement constituted a "price fix." In short, the term "price fix" was given a more expansive and inclusive meaning.

Consequently, *Socony-Vacuum* also expanded the scope of the *per se rule*. If the standard defining which types of activity constitute "price fixing" is broadened, it logically follows that more types of agreements will be characterized as *per se* illegal "price fixes." *Socony-Vacuum* increased the scope of the *per se* rule by broadening the definition of "price fix" to include indirect "tampering" with a market's price structure. Recall that the term "*per se* characterization process" merely describes a court's scrutiny of a particular agreement using a given *per se* standard in order to ascertain whether the agreement is a "price fix." *See supra* note 20.

a purpose or effect was found, a court conclusively presumed that the agreement was illegal and did not conduct further inquiry into the effect of such arrangements on competition.[64] Thus, *Socony-Vacuum*'s *per se* standard did not provide for consideration of pro-competitive justifications for "price fixing" agreements.

An important observation needs to be made at this point. Courts and commentators often interpret *Socony-Vacuum* as removing from price fixing cases the "purpose or effect" analysis normally used by courts in antitrust analysis.[65] They argue that once an agreement is characterized as a horizontal "price fix" the purpose and effect of that agreement is irrelevant — it is illegal *per se*. The "purpose or effect" referred to in this context is the purpose or effect of the agreement on *market* competition. However, there still remains the task of applying a *per se* price fixing standard to determine whether an alleged restraint is actually a "price fix." Courts resort to a purpose and[66] effect analysis to make this determination. Any agreement among competitors arranged for the purpose, and having the effect, of directly or indirectly inhibiting *price* competition is illegal *per se*.[67]

Following *Socony-Vacuum*, the Court expanded the scope of the *per se* price fixing rule to agreements setting maximum prices in a vertical market context. The Court reasoned that "agreements to fix maximum prices, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in

64. This broad definition of "price fixing" was not the only expansion of the *per se* rule to be found in *Socony-Vacuum*. In a now-famous footnote, the Court held that a plaintiff need not demonstrate that the defendants possessed adequate market power to affect market prices in order to meet his burden of proof. *Id.* at 224 n.59. All price fixes were banned regardless of their ability to affect market conditions, because of their actual or potential threat to the "central nervous system of the economy." *Id.* "[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 . . . commerce in the commodity." *Id.* Thus, the Court's ruling also condemned those price fixing arrangements made by combinations which had less than total control over a market. These sorts of arrangements could cause at least temporary harm to competition, and therefore were illegal pursuant to the Sherman Act.

65. *See, e.g.*, Rahl, *supra* note 44, at 139.

66. Note that the conjunctive "and" rather than the disjunctive "or" is used to describe the test applied in *per se* analysis rather than Rule of Reason analysis. Thus, in *per se* characterization analysis, the court must look to both the purpose and effect of an agreement in regards to price structure whereas in the Rule of Reason context the Court can look to either a purpose or effect regarding actual market price.

67. It is because the *Socony-Vacuum* test focuses on price competition instead of actual market price that the Court considered market power to be an irrelevant issue. *See supra* notes 68-69 and accompanying text.

accordance with their own judgment."[68] By condemning vertical maximum price restraints as illegal *per se*, the Court reaffirmed that 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 elementary competition."[69] This reaffirmation, combined with *Socony-Vacuum*'s broad condemnation of price fixing, suggested that horizontal maximum price restraints would also be deemed illegal *per se*.[70]

The Warren Court's application of *Socony-Vacuum*'s rigid[71] *per se* standard, a standard which increased the scope of the *per se* price fixing rule, was characteristic of that Court's inclination to favor application and extension of the *per se* rule.[72] One can sympathize with a court's predisposition to favor mechanical rules of illegality over the ambiguous and complex economic analysis of the Rule of Reason: as mentioned earlier, the common law operates through the application of broad, generalized rules that can be applied in a mechanical fashion.[73] However, a growing dissent condemned this extensive expansion of the *per se* rule. Dissenters advocated that judicial convenience, business certainty and litigation efficiency were not sufficient in themselves to justify extension and application of the *per se* rule.[74] While recognizing the virtues and advantages of a properly

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68. Albrecht v. Herald Co., 390 U.S. 145, 151 (1968) (quoting Kiefer-Stewart, Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951)).

69. Rahl, *supra* note 44, at 142.

70. *Maricopa County* has dispelled any lingering notion that horizontal maximum price fixing would not be declared illegal *per se*. *See Maricopa County* 102 S. Ct. at 2474-75. This is not to say that such an extension of *Albrecht* should have occurred, but only that its extension to horizontal agreements was consistent with the reasoning displayed in *Socony-Vacuum* and *Kiefer-Stewart* For a discussion of *Albrecht* from a Chicago School point of view, see Blair & Kasserman, *The Albrecht Rule and Consumer Welfare: An Economic Analysis*, 33 U. Fla. L. Rev. 461 (1981).

71. The *Socony-Vacuum per se* standard is "rigid" in the sense that any agreement affecting price competition is declared illegal *per se*, without any inquiry regarding the agreement's procompetitive benefits. Theoretically, an agreement with a *deminimus* anticompetitive effect and substantial procompetitive benefits could be declared illegal *per se*. Justice Powell expressed his extreme displeasure with this inflexible *per se* characterization standard in his *Maricopa County* dissent. *See Maricopa County* 102 S. Ct. at 2480.

72. *See* Robinson, *supra* note 46, at 13 (Warren Court displayed unmistakable propensity to favor mechanical rules of illegality over in-depth economic analysis).

The Court extended the *per se* rule to cover horizontal market division in *Topco*, 405 U.S. 596 (1972), and vertical territorial restraints in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). In the latter case, the Court effectively overruled White Motor Co. v. United States, 372 U.S. 255 (1963), in which it had refused to extend the rule to such vertical non-price restraints.

73. *See supra* notes 8-10 and accompanying text.

74. *See, e.g., GTE Sylvania* 433 U.S. at 50 n. 16. "Once established, *per se*

limited *per se* characterization analysis, these dissenters saw the *per se* rule as an extraordinary remedy to be used only in exceptional circumstances.[75]

An inherent tension in the *per se* process itself was the source of these substantial differences of opinion among Justices and scholars alike regarding the *per se* rule's proper scope.[76] While the *per se* rule provides certainty and efficiency in judicial enforcement of the Sherman Act, the *per se* process does not possess the Rule of Reason's flexibility and greater accuracy.[77] During the late 1960's and early 1970's, debate continued regarding the proper scope of the *per se* rule and the role of economics in the *per se* characterization process. Since that time, the Court has altered, revised, and perhaps even overruled its position on the *per se* characterization process, and the debate is far from over. The remainder of this note focuses on the ramifications this debate has created in the area of horizontal price fixing cases.

Socony-Vacuum's rigid *per se* price fixing *standard* did not create an entirely mechanical *per se* characterization *process*. Although a finding of a "price fix" relieved the court from applying a "purpose or effect" analysis, it was still required to initially perform a "purpose *and* effect" analysis to determine whether the contested agreement was a "price fix."[78] Proponents of *Socony-Vacuum* searched for any evidence of a mere tampering with price structures in their *per se* characterization analyses; critics of *Socony-Vacuum* argued for a *per se* process based on "demonstrable economic effect"[79] rather than "formalistic line drawing."[80] *Continental T.V., Inc. v. GTE Sylvania*[81] was the first major indication that several Supreme Court Justices preferred the economically-oriented approach in *per se* characterization analysis.

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rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, [citations omitted] but those advantages are not sufficient in themselves to justify creation of *per se* rules." *Id. See also Topco*, 405 U.S. at 613 (Burger, C.J., dissenting).

75. *Cf.* Handler, *supra* note 46, at 983 (Court in *GTE Sylvania* breaks with Warren Court's practice and treats Rule of Reason as the approach favored by the Court and *per se* rule as an exceptional approach).

76. *See, e.g., Topco*, 405 U.S. at 613 (Burger, C.J., dissenting); *Container Corp.* 393 U.S. at 340 (Marshall, J., dissenting); *Albrecht*, 390 U.S. at 156 (Harlan, J., dissenting).

77. "For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements [under a *per se* analysis] that a full-blown inquiry might have proved to be reasonable." *Maricopa County* 102 S. Ct. at 2473 & n.16.

78. *See supra* note 66.

79. *GTE Sylvania* 433 U.S. at 58-59.

80. *Id.*

III. *GTE SYLVANIA*: REFORMULATION OF *PER SE* ANALYSIS?

The Supreme Court drastically altered the scope of the *per se* price fixing rule with its decision in *Continental T.V., Inc. v. GTE Sylvania.*[82] The decision represented the first major victory for proponents of Chicago School antitrust theory. Although the case dealt with a vertical territorial restraint, its implications for horizontal price fixing cases and the *per se* price fixing standard in particular are immense.[83]

The respondent-defendant, television manufacturer GTE Sylvania, Inc. (GTE), had limited the number of franchises it granted to retailers in specified geographic areas.[84] GTE required each franchise retailer to sell his products only from those locations at which he was franchised.[85] The petitioner-plaintiff, Continental T.V., Inc. (Continental), was a successful franchised retailer of GTE television sets in San Francisco.[86] Disheartened by poor sales revenues in that city, GTE franchised another retailer for the area and located this new distributorship approximately one mile from Continental's retail outlet.[87] Continental protested GTE's licensing of this new franchise and retaliated by cancelling a large GTE order and placing it instead with one of GTE's competitors.[88] Shortly thereafter, GTE refused to franchise Continental in Sacramento. Nevertheless, the latter went ahead with plans to open a retail outlet in that city.[89] Relations between the two parties continued to deteriorate until GTE finally terminated Continental's franchise altogether. GTE subsequently filed suit to recover money purportedly owed. Continental filed a cross-claim asserting that the territorial restriction imposed by GTE upon franchise retailers was a *per se* illegal restraint of trade.

The Court, per Justice Powell, unexpectedly[90] declared that this

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81. 433 U.S. 36 (1977).

82. 433 U.S. 36 (1977).

83. *GTE Sylvania*'s implications for horizontal price fixing cases are immense because the case's "substance over form" analysis gives rise to an economically-oriented methodology which is equally applicable in horizontal or vertical restraint cases. This methodology stresses "consumer welfare" as the ultimate goal of antitrust law. *See infra* text accompanying notes 110-25. *See also infra* text accompanying notes 152-53.

84. *GTE Sylvania* 433 U.S. at 38.

85. *Id.*

86. *See id.* at 38-39.

87. *Id.*

88. *Id.*

89. *Id.*

90. Judge Bork described the decision as coming "to the delight and astonishment of much of the business world." R.BORK, *supra* note 4, at 286.

vertical territorial restraint prohibiting sales outside of specified retail outlets was not illegal *per se*.[91] The *GTE Sylvania* decision was somewhat surprising because the Court overruled its relatively recent holding in *United States v. Schwinn & Co.*[92] *Schwinn* had extended the *per se* rule's scope to include vertical non-price restraints. The Court in *Schwinn* drew a distinction in vertical markets between those products whose title remained in the manufacturer after reaching a retailer and those products in which the manufacturer parted with dominion.[93] The Court declared as illegal *per se* any vertical restraint by which a manufacturer "parts with dominion" over his manufactured product yet nevertheless imposes conditions upon a wholesaler as to whom or in what area the latter may resell the manufactured product.[94] Consequently, the Court prohibited the defendant bicycle manufacturer from imposing on wholesalers any customer or territorial restraints involving bicycles in which the manufacturer had relinquished all title: these restraints were illegal *per se*.[95] However, the Court continued to apply a Rule of Reason analysis to evaluate restraints involving bicycles in which Schwinn retained title.[96]

Justice Powell in *GTE Sylvania* noted the similarities between the distributorship plan in *Schwinn* and the case at bar.[97] He concluded that both cases presented the same issue, i.e., were vertical non-price restraints *per se* violations of the Sherman Act?[98] *Schwinn* was not to be distinguished.

Justice Powell proceeded to chide the *Schwinn* Court for its artificial distinction between those products in which title had passed from manufacturer to wholesaler (or retailer) and those in which title had not so passed.[99] He noted that the emphasis on passage of title was based not on economic analysis but instead upon "formalistic line drawing."[100] Justice Powell suggested that this arbitrary distinction

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91. *GTE Sylvania* 433 U.S. at 57-58.

92. 388 U.S. 365 (1967). Note that only ten years had elapsed between the Court's *Schwinn* and *GTE Sylvania* decisions.

93. *Schwinn*, 388 U.S. at 378-81.

94. *Id.* The Court's holding applied to retailers as well as distributors. *Id.* at 378.

95. *Id.* at 379-80.

96. In 75% of all its business transactions, Schwinn retained title to its manufactured products under the "Schwinn plan." *Id.* at 370. Thus, the majority of Schwinn's transactions under franchise contracts were upheld, territorial restrictions notwithstanding. *Id.* at 380. Furthermore, *Schwinn*'s holding extended the *per se* rule to include only those vertical non-price restraints on the *sale* of bicycles. *Id.*

97. *Id.* at 45-46.

98. *Id.*

99. *Id.* at 52-54.

100. *Id.* at 58-59.

was based partially on broader social policies which he rejected.[101]

The Court in *GTE Sylvania* subjected the vertical restraint in question to an economic analysis rather than to a social policy-oriented analysis.[102] The Court's distinction between vertical restraints was based not on title, but rather on the two different types of competition affected by those restraints—interbrand and intrabrand competition.[103] Significantly, the Court analyzed the contested restraint's impact on both types of competition—something the Court previously had refused to do.[104]

Justice Powell concluded that GTE's territorial restraints increased economic efficiency and benefited interbrand competition[105] while noting that the restraints involved in the present case and did not significantly restrict competition.[106] The Justice also noted that the majority of scholarly and judicial authority advocated applying the Rule of Reason when analyzing vertical territorial restraints.[107]

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101. Justice Powell did not, to say the least, enthusiastically embrace the Harvard School theory that antitrust law should serve to optimize the freedom of small independent businessmen. *See id.* at 53, n. 21, 56. *Contra* L. SULLIVAN *supra* note 2, §2, at 11. *See also supra* note 4.

102. Chicago School proponents emphasize the value and importance of economic analysis in antitrust's characterization process. *See supra* note 4. Not surprisingly, *GTE Sylvania* contains much of their terminology. For example, Justice Powell mentioned "free rider" and "efficiency" concepts to support his overruling of *Schwinn*. *See GTE Sylvania* 433 U.S. at 55-56.

103. The intrabrand-interbrand issue arises in vertical restraint cases. Justice Powell provided concise definitions of both these concepts:

> Interbrand competition is the competition among the manufacturers of the same generic product—television sets in this case—and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors - wholesale or retail—of the product of particular manufacturer.

Id. at 51 n.19.

104. *See Topco,* 405 U.S. at 609-10. *See also* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme* Court Term—1977 COL. L. REV. 979, 986-87 (1977) (Court's willingness in *GTE Sylvania* to examine effects of contested restraint on interbrand and intrabrand competition a far different approach than one taken in *Topco*).

105. *GTE Sylvania* , 433 U.S. at 55-56.

106. *Id.* at 54.

107. *Id.* at 57-58. Justice Powell cited a fairly extensive list of articles which criticize d the *Schwinn* decision. *See GTE Sylvania,* 433 U.S. 47-48 & n.13. Not only did *Schwinn* come under heavy fire from government officials and academicians, but federal courts presented with vertical restraints analogous to those found in *Schwinn* sought to diminish that case's reach by distinguishing their own cases through strained and often tortured reasoning. *Id.* at 48 n.14. Justice Powell explicitly rejected the appellate court's attempt to distinguish *GTE Sylvania*'s vertical non-price restraints

The Justice concluded that the standard of proof required to create a conclusive presumption of *per se* illegality had not been met by Continental.[108] Thus, the territorial restrictions at issue were seen as requiring a Rule of Reason analysis. *Schwinn* was overruled.[109]

GTE Sylvania is important to any discussion of *per se* characterization problems for three reasons. First, the Court reversed the Warren Court's penchant for extending the scope of the *per se* rule.[110] The Court's emphasis shifted from a preference for business certainty, litigation efficiency, judicial economy and a relatively simple and rigid application of a *per se* rule to a preference for the flexibility and intense scrutiny characteristic of a Rule of Reason analysis.[111] Justice Powell interpreted *Northern Pacific Railroad v. United States*[112] as requiring a plaintiff to show that the conduct complained of had (or was likely to have) a "pernicious" effect on competition or was lacking in "any redeeming virtue." Such a showing was necessary before the Court would conclusively presume such conduct to be unreasonable and illegal *per se*: *Northern Pacific*'s holding was no longer considered to be a merely descriptive passage.[113] Broad social policy[114] and judicial inability to properly measure competitive effect[115] would no longer be sufficient to warrant extension of the *per se* rule. Justice Powell's formulation of a higher standard of proof made *GTE Sylvania* a landmark case.[116]

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from those found in *Schwinn*. *Id.* at 45-46. Powell also suggested that a split in the circuits might have prompted the Court to grant certiorari to hear the case. 433 U.S. 42 n.11, 53 n.21.

The Court's refusal to apply the *per se* rule to a vertical restraint only four years prior to *Schwinn* in *White Motor Co. v. United States* 372 U.S. 253 (1963), became another focal point in attacking the *Schwinn* decision. Justice Powell referred to *White Motor Co.* while questioning the wisdom and precedential value of *Schwinn*. *GTE Sylvania*, 433 U.S. at 50-51.

108. *GTE Sylvania*, 433 U.S. at 57-59. *See infra* text accompanying note 113.

109. *GTE Sylvania*, 433 U.S. at 57-59.

110. *See supra* note 72 and accompanying text. *See also supra* note 75.

111. *See supra* notes 72-76 and accompanying text.

112. 356 U.S. 1 (1958). "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal...." *Id.* at 5.

113. *GTE Sylvania*, 433 U.S. at 50-51, 57-59. *See also* Handler, *supra* note 104, at 982 (Justice Powell makes *Northern Pacific* explanation of *per se* conduct as "plainly anticompetitive and without lack of any redeeming virtue" into a factual requirement—a new standard is formulated).

114. *See supra* note 101 and accompanying text.

115. *See, e.g., Topco*, 405 U.S. at 609-10 (courts' inability to effectively weigh destruction of competition in one sector of economy against promotion of competition in another is one important reason for courts to formulate *per se* rules).

116. Many lower federal courts and state courts alike quickly adopted this

Second, the balancing test used by Justice Powell to determine whether an agreement was devoid of "any redeeming virtue" became an integral feature of the Court's *per se* characterization process. Justice Powell balanced the procompetitive effects of GTE's restraint against its anticompetitive effects to determine whether the *per se* rule of *Schwinn* should be repealed or affirmed.[117] Unless a balancing test suggested a net anticompetitive effect so great as to meet the burden stipulated in *Northern Pacific*, GTE's restraint would not be categorized as illegal *per se*.[118] This balancing approach represents a more lenient, flexible approach to applying the *per se* rule. *GTE Sylvania* does not contain the rigid, inflexible[119] language of *Trenton Potteries* and *Socony-Vacuum*.[120]

There was a possibility that *GTE Sylvania*'s balancing test would not be applied in *per se* characterizaion cases. *GTE Sylvania* did not involve a characterization issue: the contested restriction clearly was a territorial restraint of trade.[121] However, lower courts were soon

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burden of proof concept. *See, e.g.*, Guild Wineries and Distilleries v. J. Sosnick & Sons, 99 Cal. App. 3d 205, 212, 160 Cal. Rptr. 201, 205 (1980) (*per se* principles formulated where conduct is manifestly anticompetitive and has no clearly discernable benefits to competition).

117. *GTE Sylvania*, 433 U.S. at 54-59.

118. *See id.* at 57-59. Justice Powell's use of a balancing test based on economic analysis may have eliminated the "inherent nature" test of *per se* illegality articulated in *Standard Oil*. *See supra* note 48. Presumably, a restraint's nature can be revealed by balancing its pro- and anticompetitive effects. If the restraint is by nature anticompetitive with little or no procompetitive justifications, the conduct will be found to be "pernicious." Unfortunately, the Court did not describe what degree of imbalance creates a finding of perniciousness.

A balancing test which de-emphasizes the nature of a restraint also de-emphasizes judicial experience as an integral factor in determining whether certain kinds of conduct are to be characterized as "illegal *per se*." As long as a judge can apply an economic analysis and identify pro- and anticompetitive conduct, judicial experience is unnecessary. Of course, economic expertise is necessary, and therefore some experience with the type of restraint being contested is needed.

119. *See supra* note 71.

120. Prior to *GTE Sylvania* several Supreme Court decisions which involved neither horizontal or price restraints had cited to *Socony-Vacuum*. *See, e.g., Schwinn*, 388 U.S. at 375. The Court cited *Socony-Vacuum* to support its extending the *per se* rule, even though that case did not address vertical or non-price restraints. *See Topco*, 405 U.S. at 611; United States v. Sealy, Inc., 388 U.S. 300, 355 (1967).

121. The question before the Court in *GTE Sylvania* was whether a *category* of prohibited conduct itself, i.e., vertical territorial restraints, should be proscribed as illegal *per se*. The Court was not asked to characterize GTE's territorial restriction — the restriction clearly constituted a vertical non-price restraint of trade. Thus, the case differs significantly from *Socony-Vacuum* and *Trenton Potteries* and other characterization cases. In those cases, the category of conduct prohibited *per se* was

using *GTE Sylvania*'s balancing test to determine whether a contested agreement constituted a type of restraint *already determined to be illegal per se*. In short, *GTE Sylvania* is relevant to a discussion of *per se* characterization because lower courts used Justice Powell's balancing test to determine whether a contested agreement constituted a "price fix."[122]

Finally, Justice Powell's use of a Chicago School analysis foreshadowed the *Broadcast Music* decision and the Justice's vigorous dissent in *Maricopa County*. Justice Powell's consideration of economic efficiencies created by vertical territorial restraints, his use of a "free-rider" theory to justify these restraints, and his explicit rejection of the *Schwinn* Court's policy preference for small, independent businessmen was in keeping with Chicago School theory.[123] Although Justice Powell's use of economic analysis might well have been limited to those instances in which the Court considered extending or restricting the *per se* rule, the Justice promoted use of the rule in different contexts as well.[124] The Court's disdain for formalistic line drawing and conceptual rigidity, as well as its approval of economic analysis, suggested that this economic approach might be extended from vertical territorial restraints to horizontal restraints.[125]

GTE Sylvania was an unmistakable "victory" for proponents of Chicago School antitrust ideology. However, Justice Powell's fondness for the Chicago School approach was not shared by all of his brethren on the Court. The next significant Supreme Court antitrust case to follow *GTE Sylvania* did not contain any of the Chicago School's methodology or terminology.

IV. *PROFESSIONAL ENGINEERS:* RETURN TO A *SOCONY-VACUUM PER SE* STANDARD?

Professional Engineers[126] was the first Supreme Court decision following *GTE Sylvania* to shed any significant light on the nature of the *per se* characterization process. At issue in *Professional Engineers* was an engineering society's ethical canon which prohibited

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not contested—no one suggested that horizontal "price fixes" be scrutinized under the Rule of Reason. Rather, the cases involved characterization questions, e.g., "Did the activity constitute a'price fix'?"

122. *See* Arizona v. Maricopa County Medical Soc'y, 102 S. Ct. 2466 (1982) (Powell, J., dissenting); Broadcast Music v. Columbia Broadcasting Sys., 441 U.S. 1 (1979).

123. *See, e.g.,* R. BORK, *supra* note 4, at 41-47, 285-91. *See also supra* note 4.

124. *See, e.g., Maricopa County,* 102 S. Ct. at 2480 (Powell, J., dissenting).

125. Such an extension indeed occurred. *See Broadcast Music,* 441 U.S. 1 (1979).

126. 435 U.S. 679 (1978).

engineers from negotiating with a prospective client about fees until after that client had selected a single engineer for a given project.[127] The canon prohibited other engineers from providing the client with comparative price information so long as that client employed that particular engineer. The canon, in effect, constituted a ban on competitive bidding.[128]

The specific issue before the Court was whether the district court was obligated to consider the engineering society's justifications for its ban on competitive bidding before the court declared the ban illegal.[129] The district court did not consider the society's justifications for the ban because the court believed the prohibition constituted a "tampering with the price structure of engineering fees in violation of §1 of the Sherman Act."[130] The Supreme Court, per Justice Stevens, affirmed the district and circuit courts' refusal to consider the society's purported justifications for the ban—the Court declared the agreement illegal on its face.[131] In doing so, the Court dismissed the society's argument that price competition in engineering fees led to inferior work and adversely affected public health, safety and welfare.[132]

There are three reasons for *Professional Engineers* being included in any discussion of the *per se* characterization process. First, the Court in *Professional Engineers* failed to use the Chicago School terminology employed in *GTE Sylvania* and instead cited *Socony-Vacuum* with approval. This approval of *Socony-Vacuum* raised doubts as to whether the Court would consider "consumer welfare" and "productive efficiency" arguments in future *per se* and Rule of Reason analyses. Second, "competition" was made the sole standard by which to gauge an activity's legality under both the *per se* rule and the Rule of Reason:

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127. 435 U.S. at 683-84.

128. *Id.* at 700. The government alleged that the Society of Professional Engineer's ethical canon suppressed "price competition," a phrase which entails both explicit price fixing and agreements which tamper with the price structure as well. *See supra* text accompanying note 63.

Professional Eng'rs did not raise the issue of whether the *per se* rule should be extended to yet another category of conduct. Unlike *GTE Sylvania,* there was no question that the type of restraint deemed illegal *per se* in *Professional Eng'rs, i.e., horizontal price fixing, was properly categorized as* per se illegal conduct. Instead, the only question in *Professional Eng'rs* was whether an engineering society's ban on competitive bidding should be characterized as a price fix at all. The two cases are fundamentally different in this regard. *See supra* note 121. *See also infra* note 137 and accompanying text.

129. *Professional Eng'rs,* 435 U.S. at 681.

130. *Id.*

131. *Id.* at 693.

132. *Id.* at 694-95.

non-economic social concerns would not justify an agreement which was anticompetitive in character. Third, the Court's failure in *Professional Engineers* to articulate the nature and scope of its analysis, its failure to explicitly characterize the society's ethical canon as illegal *per se*, and its subsequent emphasis on the canon's lack of procompetitive benefits created a great deal of confusion as to whether a Rule of Reason analysis or *per se* analysis had been applied.

A. *Professional Engineers: Rejection of GTE Sylvania and "Consumer Welfare?"*

While both *GTE Sylvania* and *Professional Engineers* elaborate on the Rule of Reason and *per se* rule, the cases contain different interpretations and applications of these tools of antitrust analysis. Justice Powell in *GTE Sylvania* emphasized a return to economic analysis and an end to "formalistic line drawing" in defining the scope of *per se* rule.[133] Justice Stevens in *Professional Engineers* referred to *GTE Sylvania*, but only to buttress his argument that "competition was the sole standard of the Rule of Reason."[134] In treating the ethical canon as a "price fix" because it suppressed price competition, Justice Stevens cited *Socony-Vacuum* and noted that "no elaborate industry analysis is needed to demonstrate that the agreement has an anticompetitive character."[135] The Court stressed the vague term "competition," leaving open for argument whether that term heralded a return to a *per se* characterization standard based on considerations other than consumer welfare and sophisticated economic analysis.[136]

The absence of both Chicago School terminology and an economic efficiency analysis in *Professional Engineers* does not necessarily imply that the case is inconsistent with *GTE Sylvania*. Since *GTE Sylvania* dealt with *Schwinn*'s extension of the *per se* rule to a category of

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133. *See supra* notes 100-02 and accompanying text.

134. *See, e.g., Professional Eng'rs,* 435 U.S. at 691 & n.17.

135. 435 U.S. at 692-93.

136. Indeed, Justice Stevens' description of the Rule of Reason as a balancing test which determined only whether competition was promoted or suppressed by a contested agreement was not enthusiastically welcomed by those Chicago School proponents who had warmly embraced the *GTE Sylvania* decision. *See, e.g.*, R. POSNER & F. EASTERBROOK, ANTITRUST: CASES ECONOMIC NOTES, AND OTHER MATERIALS, 258-62 (2d Ed. 1981).

Most observers, however, did agree with the Court's refusal to consider non-economic concerns and social policy in both the *per se* and Rule of Reason analyses. *See, e.g., id.*; L. SULLIVAN *Supra* note 2, §72. *But see* Robinson, *supra* note 46, at 16-20; Handler, *supra* note 46, at 1372-73.

conduct theretofore subject to Rule of Reason analysis, careful economic analysis was necessary before the Court would generalize a certain type of restraint as being illegal *per se*. *Professional Engineers* merely involved characterizing a particular ban on bidding as being within or outside of the "price fixing" category of conduct, an area with which the Court had much experience.[137] Nevertheless, the Court's emphasis on and elaboration of "competition"[138] as the sole standard of review and the sole goal of the Sherman Act, combined with the omission of Chicago School terminology from the opinion, suggested that not all members of the Court accepted the Chicago School concept of "consumer welfare."[139]

B. *Competition as the Sole Standard for Evaluating Conduct and Restraints*

Justice Stevens in *Professional Engineers* declared competition to be the sole standard for the *per se* characterization process. By indirectly characterizing the society's ethical canon as a *per se* illegal "price fix," the Court looked solely to the effects of that canon on price competition. Justice Stevens explicitly rejected any defense based on the desirability of eliminating competition in the public interest. Thus, Justice Stevens reaffirmed *Socony-Vacuum*'s dictate that in determining whether a joint venture is a "price fix" for purposes of *per se* illegality only the venture's effect on competitive factors should be considered.[140] However, *Professional Engineers* failed to reveal whether competitive factors such as productive efficiency and efficient resource allocation would be given greater or lesser weight than other competitive concerns, such as the economic autonomy of the small businessman.

C. *Professional Engineers: Per Se or Rule of Reason Analysis?*

Justice Stevens' failure to articulate the relationship between the *per se* rule and the Rule of Reason, and his failure to explicitly state whether the ethical canon at issue was a "price fix" generated a great amount of confusion as to whether the Justice had applied

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137. *Professional Eng'rs* in short, only required the Court to determine whether or not the ethical canon was a "price fix"; it was taken as a given fact that the category of conduct involved in the case (price fixing) was properly regarded as illegal *per se*.

138. Handler, *supra* note 46, at 1364.

139. *See supra* note 4.

140. *See* Handler, *supra* note 46, at 1371. However, many lower courts have considered social and non-economic benefits arising out of a contested agreement, especially when those benefits involve product safety. Taylor, *supra* note 16, at 194-95.

a *per se* or Rule of Reason analysis.[141] The Justice referred to these two analytical tools as "complementary categories of analysis" within the single analytical framework known as the "Rule of Reason."[142] Justice Stevens was careful not to label that category of analysis involving a comprehensive extensive balancing test as the "Rule of Reason."[143] Therefore, when Justice Stevens referred to the "Rule of Reason" throughout his opinion he most likely was referring to both categories of antitrust analysis.[144] Unfortunately, Justice Stevens' failure to articulate this important point led many scholars to determine he had declared the canon illegal not by use of the *per se* rule but by employment of the more intricate balancing test.[145]

Moreover, Justice Stevens' internally inconsistent analysis of the ethical canon's effect on price competition heightened uncertainty as to whether the Justice had employed a Rule of Reason or *per se* analysis. On the one hand, the Justice approved a district court's use of *Socony-Vacuum per se* price fixing standard: this standard defined a "price fix" as any agreement which tampered with price competition.[146] The Justice concluded that the agreement did have an

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141. *Compare* Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemption, Expanding Coverage, and Refining the Rule of Reason,* 27 UCLA L. REV. 265, 323 (1979) ("the Court applied the Rule of Reason rather than the *per se* rule") *with Maricopa County* 102 S. Ct. at 2483 (Powell, J., dissenting) ("[I]n *Nat'l Soc'y of Professional Eng'rs*, we held unlawful as a *per se* violation a canon of ethics...."); Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos, 49 ANTITRUST L.J. 1953, 1594 (1980) (Court applied per se* rule in *Professional Eng'rs* after discussing Rule of Reason for several pages in the opinion).

The fact that these eminent antitrust authorities cannot agree as to what category of antitrust analysis (Rule of Reason or *per se*) was applied is testimony to the enigmatic character of *Professional Eng'rs*

142. *Professional Eng'rs* 435 U.S. at 692. As mentioned above, this conception of the Rule of Reason and *per se* rule's interrelationship is theoretically correct. *See supra* notes 44, 48.

143. *See Professional Eng'rs* 435 U.S. at 690-91.

144. The Justice's remarks in *Maricopa County* buttress this assertion: "[T]he Court . . . recognized that inquiry under its Rule of Reason ended once a price fixing agreement was proven." 102 S. Ct. at 2473.

145. Thus, Professor Sullivan interprets *Professional Eng'rs* as calling for an expedited Rule of Reason analysis whenever possible. However, the *Maricopa County* opinion, in conjunction with *Professional Eng'rs* suggests that rather than encouraging an expedited Rule of Reason process, Justice Stevens in the latter case advocated a strict limitation on the kinds of factors considered under the Rule of Reason (i.e., only economic, competitive effects), but not a limitation on the process's length. The analysis in *Professional Eng'rs* was indeed expedited, but only because the *per se* price-fixing rule was applied.

146.435 U.S. at 686. *See also supra* notes 62-67 and accompanying text.

anticompetitive effect on price competition.[147] On the other hand, Justice Stevens completed his analysis of the contested conduct by concluding that the ethical canon lacked any procompetitive benefits which could be balanced against its anticompetitive effects.[148] This additional demonstration of anticompetitiveness was both unnecessary and inappropriate: the canon had already been characterized as a *per se* illegal "price fix" due to its adverse effect on price competition. Many observers interpreted Justice Stevens' consideration of anti- and procompetitive effects to constitute a Rule of Reason balancing test.[149] More significantly, some academicians concluded that Stevens' analysis in *Professional Engineers* called for a balancing of an agreement's pro- and anticompetitive effects in the *per se* characterization stage[150]—a conclusion which is at odds with *Socony-Vacuum*'s "tampering" standard of *per se* illegality.[151]

In summary, the Court's position as to how it would conduct the *per se* characterization process was unclear after *Professional Engineers*. While the Court in *Professional Engineers* approved a *per se* characterization standard similar to that used in *Socony-Vacuum*, the Court in *GTE Sylvania* utilized an alternative *per se* standard which could easily be extended to apply to *per se* characterizations.[152] Since *GTE Sylvania*'s "consumer welfare" and "economic efficiency" theories allowed for interference in price competition so long as economic efficiency was created, the Court could extend such a consumer welfare analysis from the *GTE Sylvania* context to *per se*

147. *Id.* at 693, 695.

148. *Professional Eng'rs* 435 U.S. at 692-95.

149. "I think almost everyone reads the *Professional Engineers* case as a *per se* ruling, yet the analysis undertaken by the Court is much more typical of what we expect to find in a rule of reason case." Taylor, *supra* note 16, at 192. *See also supra* note 141.

150. The most prominent member of this group was Justice Powell. In his dissent in *Maricopa County*, Justice Powell criticized the majority for not conducting a proper balancing of pro- and anticompetitive effects in its *per se* characterization process. He cited *Professional Eng'rs* as a case in which the Court conducted such a balancing test. 102 S. Ct. at 2482-83. However, Justice Stevens emphatically stated that the characterization analyses undertaken in both *Maricopa County* and *Professional Eng'rs* considered only those effects which the agreement had on price competition. *Id.* at 2477. Thus, the *per se* characterization process is limited to considerations of those factors which would indicate whether price has been stabilized.

151. The inclusion of a balancing test in the *per se* characterization stage is inconsistent with *Socony-Vacuum because that case called for a prescription of per se* illegality once an agreement was found to tamper with price competition regardless of that agreement's procompetitive benefits. *See supra* note 71.

152. *See supra* notes 121-22 and accompanying text.

characterization cases[153] involving issues similar to those present in *Professional Engineers*.[154] Court observers awaited future Court decisions so as to ascertain which *per se* standard, *GTE Sylvania*'s or *Socony-Vacuum*'s, would be adopted by the Court.[155]

V. *BROADCAST MUSIC*: ASCENDANCY OF THE CHICAGO SCHOOL

Broadcast Music, Inc. v. Columbia Broadcasting System[156] was the first Supreme Court decision following *Professional Engineers* to further elaborate on the *per se* characterization process in horizontal price fixing cases. Unfortunately, the case did little to eradicate the confusion generated by the Court's previous holdings.

Broadcast Music raised the issue of whether certain joint conduct should be characterized as "price fixing."[157] Composers formed the American Society of Composers, Authors and Publishers (ASCAP) in an effort to enforce their statutory right to license the public performances of their works for profit.[158] Both ASCAP and Broadcast Music, Inc. (BMI) operated as "clearinghouses" for copyright owners and performers.[159] Owners gave these two organizations the nonexclusive right to license their works.[160] The clearinghouses then issued licenses to users which allowed the latter to perform copyrighted

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153. *Id. See also* R. BORK, *supra* note 4, at 279.

154. As mentioned previously, *Professional Eng'rs* involved the application of the *per se* rule in a particular context. The issue in these sorts of price fixing characterization cases is not whether conduct constituting "price fixing" should be declared illegal *per se*, but instead whether the agreement is a "price fix" at all. *See supra* notes 121, 137 and accompanying text.

155. *See, e.g.*, Sullivan & Wiley, *supra* note 141, at 324-25.

156. 441 U.S. 1 (1979).

157. *See supra* note 154. Thus, *Broadcast Music* and *Professional Eng'rs* dealt with similar issues. Both cases involve questions of "characterization" rather than extension or non-extension of the *per se* standard. Once a defendant's conduct had been characterized as constituting "price fixing," it was thought that *Socony-Vacuum*, *Trenton Potteries* and their progeny required a finding of *per se* illegality. *But see infra* notes 183-90 and accompanying text.

Copyright owners of musical compositions have possessed this statutory right since 1897. Copyright Act of January 6, 1897, 29 Stat. 281.

Because performers can easily use a copyrighted work, and because performances can be numerous, widespread and fleeting, it is often difficult for individual copyright owners to negotiate with and to license performers who desire to use their compositions. It is also extremely difficult to detect unauthorized uses. *Broadcast Music* 441 U.S. at 5.

159. ASCAP and BMI accounted for virtually the entire market for copyrighted compositions. *Id.*

160. In using a non-exclusive license, the owners retained the right to negotiate individually with users of their material. *Id.*

material without fear of suit.[161] Thus, users were not required to negotiate with owners every time the former wished to perform a copyrighted composition. Likewise, individual owners were not compelled to license every such performance of their works.[162]

Both clearinghouses operated under a consent decree as a result of an earlier antitrust action brought against them by the government.[163] Under the decree, the groups were allowed to issue blanket licenses authorizing a user to perform any and all of the works in the clearinghouses' repertoire as often as the licensee-user desired for a stated period of time.[164] The fee charged for this blanket license was either a flat dollar amount or a percentage of the user's advertising revenues.[165] Neither mode of fee-charging was based on the amount or type of compositions used.[166]

CBS desired a license on a per use basis from both ASCAP and BMI. The network brought suit against both clearinghouses since it could not amend the consent decree.[167] CBS alleged that the blanket license system used by ASCAP and BMI constituted "price fixing" and therefore was illegal *per se*[168] The district court found no such

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161. *Id.*

162. *Id.*

163. This earlier case had been initiated by the Justice Department to enjoin ASCAP from acquiring an exclusive license from copyright owners. *Id.* at 10-11. *See* United States v. ASCAP, 1940-43 Trade Case ¸56,104 (S.D.N.Y. 1941).

164. *Broadcast Music*, 441 U.S. at 5. Under the consent decree, neither ASCAP nor BMI could grant a user a license to perform one or more specified compositions without both the user and the owner requesting in writing for the organization to do so. *Id.* at 11.

165. *Id.* at 5. In addition, under the 1950 consent decree and later amendments to it, both ASCAP and BMI were required to sell licenses based on a per program basis as well as on an annual (specified time period) basis. Under a per program license, the user fee is determined by calculating the number of programs using ASCAP and BMI compositions and the amount of advertising revenues those programs generate for the individual user. *Id.* at 11. However, virtually all television stations hold "annual" blanket licenses. *Columbia Broadcasting Sys. v. American Soc'y of Composers, Authors and Publishers*, 562 F.2d 130, 134 (2d Cir. 1977).

166. *Broadcast Music* 441 U.S. at 5. As the circuit court noted in its opinion, "[N]either [license] permits the licensee to pay only for those compositions which it actually uses, and the per program license should not be confused with a per use license." *CBS v. ASCAP*, 562 F.2d at 134. Justice Stevens, in his dissent, stated that the blanket license system used by ASCAP and BMI was price discriminatory due to this lack of correlation between the fee charged and actual use. *See Broadcast Music* 441 U.S. at 30-32.

167. *CBS v. ASCAP*, 562 F.2d at 134. *See also* Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689-90 (1961) (private parties not prevented from bringing antitrust action against organization operating pursuant to government consent decree).

168. *Broadcast Music, 441 U.S. at 6.*

per se violation because CBS could still negotiate with individual copyright owners for use of the latter's material if the network did not wish to obtain a blanket license from ASCAP or BMI.[169] The district court consequently dismissed the CBS' complaint.[170] The court of appeals reversed the district court decision and found that the blanket licenses reduced price competition among composers and dulled their incentive to compete individually through separate negotiations with users such as CBS.[171]

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169. *Id.*

170. *CBS v. ASCAP*, 562 F.2d at 132.

171. *Id.* at 136, 139. The appellate court cited *Socony-Vacuum* in support of its position:

> [W]hen any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual seller has been restrained . . . [T]he determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his compensation. His distributive share of royalties may be greater than he would receive in a free market. In such case, even if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a "combination which tampers with price structures [and therefore] engage[s] in unlawful activity."

CBS v. ASCAP, 562 F.2d at 136 (quoting *Socony-Vacuum*, 310 U.S. at 221 (1940)).

However, the appellate court later stipulated that blanket licenses did not inevitably effect price competition among composers. 562 F.2d at 140. The court suggested that if a blanket license could be devised to encourage the composers to compete, or at least not discourage them from competing, the license might not be declared illegal *per se*. *Id.*

Thus, the circuit court saw the non-exclusive character of the blanket license to be irrelevant. The license itself impaired price competition because it dulled a composer's incentive to compete, and was therefore illegal *per se*. *Id.* at 139-40.

Although the appellate court adapted *Socony-Vacuum's rigid "price tampering" per se* standard, Judge Gurfein did consider ASCAP's defense of "market necessity," a defense which he recognized as a legitimate "exception" to the broad *per se* rule for price fixing espoused in *Socony-Vacuum*. However, the judge subsequently rejected this defense because the existence of a direct negotiating market undermined the "market necessity" of a blanket license. *Id.* at 138. *See CBS v. ASCAP, 562 F.2d at 136. Interestingly enough, as Justice Stevens notes, ASCAP's defense to a finding of per se* illegality under past Supreme Court block-booking and package-licensing case law was that its blanket license was non-exclusive: CBS could always enter negotiations with individual composers for a license to use the latter's compositions. *See Broadcast Music*, 441 U.S. at 29. *Cf.* Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950). Yet the circuit court disallowed the one "exception" it saw to *Socony-Vacuum's broad per se* price fixing rule precisely because of the availability of this alternative. 562 F.2d at 138. Apparently, ASCAP and BMI were doomed to lose! Judge Gurfein recognized this dilemma as well. *Id.*

Finally, note that the case is somewhat confusing due to the presence of ASCAP and BMI as intermediate licensors. The circuit court found the blanket license to be

The case presented the Supreme Court with an opportunity to affirm the circuit court's *Socony-Vacuum* analysis by finding any "tampering" with prices to constitute *per se* illegal "price fixing."[172] Such a finding would have reinforced not only the *Socony-Vacuum and Professional Engineers* cases, but also vertical restraint cases based on *Socony-Vacuum* reasoning.[173] Instead, the Court, per Justice White, found that the blanket license used by ASCAP and BMI was not a "price fix" deserving of *per se* illegality pursuant to § 1 of the Sherman Act.[174] The Court remanded the decision back to the court of appeals for a determination of the blanket license's "reasonableness" or lack thereof under a Rule of Reason analysis.[175]

According to Justice White, the appellate court's own remedy suggested that it had erred in characterizing the agreement as a *per se* illegal price fix. The Justice noted that the court of appeals allowed for the continued existence of the blanket license, albeit in a per-use rather than per-program or annual form.[176] The appellate court decision declared ASCAP's blanket license to be illegal *per se*, yet did not bar blanket licenses across the board—such licenses would be permitted in those circumstances where it was necessary and would "serve a market need."[177] The suggestion of such a remedy, Justice White reasoned, flatly undermined the lower court's finding of *per se* illegality.[178] Such *per se* status should be applied only to those practices which were so " 'plainly anticompetitive . . . and so often 'lack[ing] any redeeming virtue' . . . that they may be conclusively presumed illegal without further examination."[179] The appellate court's sugges-

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a price fix because it established a single blanket fee which artificially affected the fee which an individual composer would receive for use of his work. The Supreme Court noted the uniqueness of *Broadcast Music's* factual context and determined that the case was one of first impression. *Broadcast Music*, 441 U.S. at 10.

172. *See supra* note 171.

173. *See* Albrecht v. Herald Co., 390 U.S. 145, 151 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951). The continued vitality of these two cases had been in doubt following *GTE Sylvania*. Taylor, *supra note 16, at 190-91. See also* R. BORK, *supra* note 4, at 285-98.

174. *Id.* at 7.

175. *Id.* at 24-25.

176. *Id.* at 7 n.10.

177. *Id.* at 17 n.27. Morover, the Court noted that the court of appeals had not enjoined ASCAP's or BMI's use of the blanket license. *Id.*

178. *Id.* at 17 n.27, 24. The Justice observed: "[T]he *per se* approach does not yield [itself] so rigidly to circumstances . . . The enigmatic remarks of the Court of Appeals with respect to remedy appear to have departed from the Court's strict, *per se* approach and to have invited a more careful analysis." *Id.*

179. *Id.* at 8 (quoting Northern Pac. R.R. v. United States, 365 U.S. 1, 5 (1958)).

tion that a blanket license might be beneficial in some instances,[180] the Justice Department's approval of this license,[181] and Congress' employment of blanket licenses in the new Copyright Act[182] further militated against a finding of *per se* illegality.

Although the Court's actual holding was important because of its refusal to find a "*per se* price fix," Justice White's dicta was of greater significance. In dicta the Justice articulated the difficulties faced by courts in determining whether given conduct can be characterized as "price fixing."[183] Bringing back memories of Justice Powell's condemnation of "formalistic line drawing" in *GTE Sylvania*, Justice White declared that "price fixing," while a useful label in describing certain categories of proscribed business behavior, can be overbroad and overly simplistic if used in a literal sense.[184] Justice White declared that "literal" price fixing is not always a *per se* violation; only that category of price fixing which is characterized as "*per se* price fixing"[185] is considered to be illegal *per se*.[186]

Justice White's *per se* characterization theory seems to contradict the rigid *per se* characterization analysis advocated by Justice Douglas in *Socony-Vacuum*. Justice White's statement that "[not] all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints"[187] is clearly at odds with *Socony-Vacuum*'s dictate that *any* tampering with price competition, whether it be raising, depressing, pegging or stabilizing prices, is illegal *per se*.[188] Justice White's assertion not only allows some agreements which

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180. *Id.* at 17 n.27.

181. *Id.* at 13.

182. *Id.* at 15.

183. Professor Sullivan states that *Broadcast Music's* real significance lies in the "explicitness with which it identifies and discusses this characterization process." Sullivan & Wiley, *supra* note 141, at 332.

184. *Id.* at 8-9. Similarly, another commentator has noted that the use of labels such as "price fixing" sometimes serves to obscure rather than to clarify. All that is actually accomplished by use of a label such as "price fixing" is the statement of a conclusion. Taylor, *supra* note 16, at 186.

185. Note that the label "*per se* price fixing" is a new label which is not to be confused with the simple "price fixing" label. The former term implies that not all price fixes will be illegal *per se*.

Broadcast Music, 441 U.S. at 9. Justice White cited *Addyston Pipe* as support for his assertion that not all "price fixes" are illegal *per se*.

187. *Broadcast Music* 441 U.S. at 23.

188. Professor Robinson underestimates the importance and breadth of this statement. Although explicitly mentioning the obvious inconsistency with *Socony-Vacuum* and implying he was shocked upon his first reading of it, he notes that Justice White

tamper with price competition to escape *per se* illegality, but also declares that some of those agreements may even be legal.[189]

Justice White candidly admitted that the licensing arrangement at issue in *Broadcast Music* resulted in "literal" price fixing.[190] However, rather than declare the blanket license illegal *per se* because of its obvious effect on price competition, the Court found the license to be outside the category of "*per se* price fixing" because it reduced the high transaction costs that were an inherent flaw in the copyright market.[191] Thus, by emphasizing the creation of economic efficiencies

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was merely referring to activities long considered under a Rule of Reason analysis, i.e., horizontal merger and joint ventures. Robinson, *supra* note 47, at 24.

However, Professor Robinson fails to recognize that the Court used Chicago School concepts of contract integration and creation of otherwise non-existent economic efficiencies to reverse the court of appeals' *per se* characterization. *Id.* at 19-20; *See* ANTITRUST ADVISOR, *supra* note 24, §1.29 at 15; R. BORK, *supra* note 4, at 263-79; L. SULLIVAN, *supra* note 2, §§76,77. The Court cited to a passage in Professor Sullivan's treatise in which the author relates that economic efficiencies resulting from substantial integration will justify some restraints of trade. *Broadcast Music*, 441 U.S. at 20 (citing L. SULLIVAN, *supra* note 2, §59, at 154).

Moreover, Justice White's use of horizontal mergers and joint ventures as examples of legal restriants of trade is entirely consistent with a literal reading of his statement as rejecting an absolute ban on arrangements affecting price. Judge Bork has long held that horizontal price fixes should be treated no different than horizontal mergers if it can be found that such effects on price competition were ancillary to a contract integration: that is, the price fix was not created for the sole purpose of restricting competition, increases the effectiveness of the integration, and is no broader than necessary. R. BORK, *supra* note 4, at 279. *Seec also supra* note 16. Thus, with all respect to Professor Robinson, Justice White's statement does apply to price fixing agreements and should not be limited to the examples he provided in his opinion.

Professor Liebeler, who, like Judge Bork, advocates an economical approach to price fixing based on consumer welfare and economic efficiencies created through integration, supports this literal reading of Justice White's statement. While bemoaning the Court's failure to establish rules for when a price setting might be found illegal under the Rule of Reason, he notes: "It is a considerable accomplishment, however, for the Court to recognize that some kinds of price fixing are subject to rule ofreason analysis." ANTITRUST ADVISOR, *supra* note 24, §1.29 at 12-13.

189. Thus, Justice White's opinion recognizes three different types of price fixing: price fixing that is illegal *per se*, price fixing found to be illegal after a Rule of Reason analysis, and price fixing found to be legal under a Rule of Reason analysis. See ANTITRUST ADVISOR, *supra* note 24, §1.29, at 12-13.

190. *Broadcast Music*, 441 U.S. at 9.

191. The Court had found the costs associated with negotiating with individual composers to be prohibitive for smaller users. *Broadcast Music*, 441 U.S. at 20. Thus, the founding of ASCAP and BMI and their subsequent issuance of blanket licenses resulted in the creation of a service allowing users rapid and undemnified access to any composition they desired, and protected composers' statutory rights as well. *Id.* Neither of these benefits would have been possible without the integration of the composers' "sale, monitoring and enforcement" resources, which effectively reduced the market's high transaction costs. *Id.*

through contract integration,[192] the Court altered its *per se* characterization standard. Consequently, the Court shifted the focus of its *per se* characterization analysis in the price fixing context from an analysis of price structure to one that emphasized the presence of substantial and otherwise unattainable economic efficiencies which were attained through integration.[193] *Socony-Vacuum*'s *per se* standard, which analyzed effects on price competition and precluded defenses based on economic efficiency-creating potential, was for all practical purposes rejected by the Court.[194]

Justice White provided a new standard for determining whether or not an agreement fell within the category of "*per se* price fixing." Courts were now to assess whether the contested practice was one that "facially appear[ed] to . . . always or almost always restrict competition and decrease output . . . or instead . . . [was] designed to increase economic efficiency and render markets more, rather than less, competitive."[195] Simply stated, the Court's new *per se* standard allowed for an agreement's fixing of prices or tampering with price competition provided two requirements were met. First, the agreement must produce substantial procompetitive efficiencies. Secondly, those efficiencies must not be realizable in the absence of the agreement.[196]

This new *per se* standard calls for a more extended analysis of defendant firms' market power and increased economic efficiencies resulting from integration of the firms' productive resources. If an agreement literally "fixing" prices does not create or cannot potentially create such procompetitive efficiencies, the price fix will be declared illegal *per se*.[197] Of course, agreements which exhibit substantial and otherwise unattainable economic efficiencies would not

192. *See supra* note 191.

193. *See, e.g., Maricopa County,* 102 S. Ct. 2466, 2483 (1982).

194. The assertion that *Socony-Vacuum* does not take account of economic efficiencies resulting from integration (such as higher productivity through lower transaction costs) is by no means a novel one. *See* L. SULLIVAN, *supra* note 2, §74, at 200 (*Socony-Vacuum* does not include one important consideration - that the Sherman Act does not make unlawful arrangements which either affect price by improving competition or increase productivity through economies of scale); ANTITRUST ADVISOR *supra* note 24, §1.29 at 17 (*Socony-Vacuum* language not consistent with *Broadcast Music*). This assertion is buttressed by the fact that the appellate court decision overruled in *Broadcast Music* relied heavily on *Socony-Vacuum's per se* characterization theory. *See supra* note 171.

195. *Broadcast Music* 441 U.S. at 19-20.

196. Justice Powell iterated this interpretation of *Broadcast Music*'s per se price fixing standard in his dissent to *Maricopa County,* 102 S. Ct. at 2483-84.

197. *See* L. SULLIVAN, *supra* note 2, at 154. Under Judge Bork's model, an agreement without sufficient integration would not be capable of maximizing consumer wealth

automatically be declared *per se legal*—these pacts would merely escape *per se* illegality and be subjected to a Rule of Reason analysis.[198]

Broadcast Music's new *per se* standard also raised the plaintiff's burden in proving that a contested agreement constituted a "*per se* price fix." Under Justice White's standard, as rephrased by Justice Powell in *Maricopa County*,[199] an agreement found to tamper with the market price structure would not be declared illegal *per se* unless the plaintiff proved that the combination was plainly anticompetitive and without substantial and procompetitive efficiency justifications.[200] It is much more difficult for plaintiffs to meet *Broadcast Music*'s burden of proof because they must do more than show a mere theoretical or possible effect on price competition.[120]

To the degree that plaintiffs must show more before they can prove "*per se* price fixing," the practical significance of the *per se* rule's preclusionary effect[202] is diminished. Although defendants are still precluded from justifying conduct once it is deemed illegal *per se*, Justice White's economic efficiency-oriented *per se* standard allows them to escape *per se* illegality by permitting defenses heretofore unallowed.[203] Thus, the *per se* rule's preclusionary effect is reduced, not because any procompetitive justifications will be allowed after a *per se* violation is found, but because the *Broadcast Music per se* standard allows such justifications to be made before that *per se* characterization is made.[204]

Justice Stevens' dissenting opinion is perhaps the most intriguing and enigmatic portion of the *Broadcast Music* opinion. Characteristically, Justice Stevens did not address the *per se* issue

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and would therefore not be allowed as an "ancillary restraint." *See* R. BORK, *supra* note 4, at 262-79.

198. The Court did not provide a standard for evaluating such agreements under a Rule of Reason analysis; this omission has made application of *Broadcast Music's* new *per se* standard somewhat confusing. *See* ANTITRUST ADVISOR *supra* note 24, §1.29 at 12, 13, 16.

199. *See supra* note 196 and accompanying text.

200. *Maricopa County*, 102 S. Ct. at 2485. Justice Powell dissented, believing that this higher burden of proof was not met. Justice Stevens, writing for the majority, used a less stringent burden of proof and held that the plaintiffs had met their burden.

201. Under the *Socony-Vacuum per se* standard, plaintiffs often were awarded damages merely by showing that harm to market price structure was theoretically possible. Handler, *supra* note 104, at 983.

202. *See supra* note 16.

203. *See supra* text accompanying notes 191-94.

204. *Socony-Vacuum's per se* standard prohibited defendants from raising defenses such as "efficiency-creating potential" during the *per se* characterization process. *See supra* text accompanying notes 191-94.

in terms of economic efficiency or restriction of output.[205] Instead he summarily cited his support of the majority's refusal to find a *per se* violation of the Sherman Act.[206] The Justice explained in some detail why the non-exclusive nature of BMI's and ASCAP's blanket license differentiated their license from those licenses found illegal *per se* in a block-booking or blanket license context.[207] As to his reasons for not finding a *per se* illegal price fix in the case at bar, Justice Stevens implied that the availability of an altered blanket license as an appropriate remedy[208] precluded a finding of a plainly anticompetitive arrangement.[209] It would appear, however, that Justice Stevens could have found the defendants' blanket licenses to constitute "*per se* price fixing"—his dissenting opinion stated that the blanket license could possibly produce a deleterious effect on competition between composers.[210] Presumably, had he desired, the Justice could have expounded upon the court of appeals' rationale and justified a *per se* characterization in *Broadcast Music* based on the analysis used in *Socony-Vacuum*.[211]

The unique facts of *Broadcast Music* may best explain why Justice Stevens failed to apply *Socony-Vacuum* to find a "*per se* price fix." The lack of an adequate remedy given the market structure of the copyright industry may have been a primary reason for not applying the *per se* rule.[212] Since a blanket license in some form (*i.e.*, per use) is an adequate remedy, and indeed, seems by far the most effective remedy, any decision proclaiming that license to be illegal *per se* would almost assuredly do more harm to the industry (and general public) than good. Moreover, the Justice Department and the Congress had already approved blanket licenses,[213] as Justice White acknowledged several times in his opinion. There was also no guarantee that any benefits generated by increased competition among

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205. Such an approach is characteristic of Justice Stevens, given his *Professional Eng'rs'* opinion. *See supra* notes 146-151 and accompanying text.

206. *Broadcast Music*, 441 U.S. at 25-26.

207. *Id.* at 28-33.

208. The Justice suggested that a blanket license based on actual usage of compositions might be a reasonable restraint of trade, thereby echoing the court of appeals' position. *Broadcast Music*, 441 U.S. at 30-34. *See also supra* note 171.

209. *Broadcast Music*, 441 U.S. at 25-26.

210. *Id.* at 32.

211. *See supra* notes 171-72 and accompanying text.

212. Judge Posner & Professor Easterbrook suggest that this factor may have been a consideration in *Broadcast Music*. R. POSNER & F. EASTERBROOK, *supra* note 136, at 212-15. Professor Easterbrook argued the *Broadcast Music* case before the Court on behalf of the government. *See also* Sullivan & Wiley, *supra* note 141, at 335-36.

213. *See Broadcast Music*, 441 U.S. at 10-15.

composers as a result of a *per se* finding would be passed on to consumers.[214] Thus, *Broadcast Music*'s unique facts justify Justice Stevens refusal to declare the blanket licenses illegal *per se*. At the same time, Justice Stevens' failure to adopt the language of *GTE Sylvania*, his stated apprehension of centralized economic power,[215] and the unique facts of *Broadcast Music* suggested that he might be receptive to finding a *per se* violation in future instances.[216]

Broadcast Music raised many questions regarding the Court's *per se* price fixing characterization process. The case's comprehensive and candid description of the characterization process was highly unusual, given past Court opinions. Justice White's new standard for *per se* characterization was nothing short of a revolution in the Court's analytical process in this area. This new *per se* characterization standard simultaneously altered the price fixing *per se* process, raised the plaintiff's burden of proof, and reduced the *per se* rule's preclusionary effect.

Justice White's new *per se* standard also significantly restricted the scope of the *per se* price fixing rule and generated a *per se* characterization process which was more comprehensive, time-consuming and costly than *Socony-Vacuum*'s characterization analysis. In light of the many changes rendered by this opinion, even those scholars who erroneously interpreted *Professional Engineers* as creating an expedited Rule of Reason analysis acknowledged some difficulty in squaring that case with *Broadcast Music*.[217] However, the unusual factual context presented in *Broadcast Music* provided a convenient justification for limiting the case to its facts. Justice Stevens, the lone dissenter in that case, eventually took advantage of this opportunity three years later to severely limit *Broadcast Music* with his majority opinion in *Maricopa County*.

VI. *MARICOPA COUNTY*: THE FINAL WORD

The Court's commitment to a *per se* characterization process based on "efficiency-creating" potential has been called into question on several occasions since *Broadcast Music*[218] *Catalano, Inc. v. Target*

214. *See* Sullivan & Wiley, *supra* note 141, at 335-36.

215. *Broadcast Music*, 441 U.S. at 37.

216. Justice Stevens' expression of support for decentralizing economic power is important, for it is advocated by proponents of Harvard School theory and indicates that Justice Stevens favors that school's antitrust ideology. *See supra* note 4.

217. Sullivan & Wiley, *supra* note 141, at 333-34 (*Professional Eng'rs'* Rule of Reason analysis, as described in *Broadcast Music*, perhaps was rejected by majority due to latter case's unique facts).

218. *See* Arizona v. Maricopa County Medical Soc'y, 102 S. Ct. 2466 (1982);

Sales, Inc.[219] was the first decision to limit the far-ranging dicta of Justice White.[220] *Arizona v. Maricopa County Medical Society*[221] confirmed commentators' suspicions that the Court might extend *Catalano* and severely limit the scope and precedential value of *Broadcast Music*

A. *The Factual Context of Maricopa County*

The Maricopa County Medical Society[222] organized the Maricopa Foundation for Medical Care (FMC) in order to make available a type

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Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980).

219. *Id*

220. In *Catalano*, a group of beer wholesalers made a secret agreement to eliminate interest-free credit to beer retailers. *Catalano*, 446 U.S. at 644. The retailers brought a suit against the combination, arguing that the wholesalers' agreement constituted a "price fix" and was therefore in violation of § 1 of the Sherman Act. *Id.* at 643.

The district court denied the petitioner's motion to declare the wholesaler's arrangement illegal *per se*. *Id.* at 643-44. However, since the *per se* status of an agreement fixing credit terms was a controlling question of law to which there was substantial ground for difference, the district judge certified this *per se* characterization issue to the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1292(b). *Id.* The court of appeals affirmed the district court's denial and the Supreme Court subsequently granted certiorari. *Id.*

The Court, *per curiam*, found this agreement to fix credit terms to be illegal *per se*. Curiously, the opinion referred to both the *per se* characterization dicta of *Socony-Vacuum* and to Justice Powell's "no redeeming value" test of *GTE Sylvania*. *See id.* at 647-49. However, the Court applied *Socony-Vacuum's per se standard in deciding the case and consequently characterized the wholesaler agreement as illegal per se* because it affected price competition among beer distributors. *See id.* at 649.

The Court's preference for *Socony-Vacuum's per se* standard was significant because the Justices could have condemned the agreement as illegal *per se* pursuant to *Broadcast Music's per se* standard had they chosen to do so. For instance, Professor Liebeler has argued that the agreement between wholesalers involved no integration of productive facilities and consequently did not provide any efficiency-creating integration to which the fix on credit terms could have been ancillary. Thus, the agreement could have been found illegal *per se* under the *per se* characterization standard articulated by Judge Bork and adopted by the Court in *Broadcast Music*. Professor Liebeler advocates the use of this economically-oriented standard. ANTITRUST ADVISOR, *supra* note 24, § 1.29 at 17.

Some observers interpreted the Court's use of the *Socony-Vacuum* standard as a refutation of *Broadcast Music* and a return to the analytical rigidity which dominated the Court's decisions prior to *GTE Sylvania*. *See, e.g.*, ANTITRUST ADVISOR, *supra* note 24, § 1.29 at 17. However, by acknowledging that only those agreements which were plainly anticompetitive and possessed "no apparent potentially redeeming value" were to be found illegal *per se*, the Court left open the possibility that *Catalano* would later be interpreted as being entirely consistent with *Broadcast Music*. *See, e.g., Maricopa County*, 102 S. Ct. 2483. (Powell, J., dissenting) (*Catalano* consistent with *Broadcast Music*—both support notion that only plainly anti-competitive agreements were illegal *per se*).

221. 102 S. Ct. 2466 (1982).

222. The Pima County Medical Society organized a similar foundation and was originally joined as a party to the lawsuit, but was later dismissed from the suit under

of prepaid insurance plan.[223] The foundation was composed of approximately 1750 physicians[224] and performed several essential services,

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a consent order. *Maricopa County*, 643 F.2d 553, 554 n.2 (1980), *rev'd*, 102 S. Ct. 2466 (1982).

223. *Maricopa County*, 102 S. Ct. at 2470-71, 2480. Foundations for Medical Care (FMC's) are of relatively recent origin. *See Maricopa County*, 643 F.2d at 554 (1980). Medical societies, largely due to public pressure, have created these foundations in an effort to halt the rapid increase in health costs. Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 DUKE L.J. 303, 315-25 (1978) [hereinafter cited as Havighurst, *Health Care Financing*]. Medical societies argue that FMC's lower the costs of health care by providing "peer review," a procedure by which the foundations review the medical necessity and appropriateness of treatment rendered by foundation members to persons insured under a foundation plan. *See Maricopa County*, 102 S. Ct. at 2471; 562 F.2d at 555. FMC's have been the subject of controversy, however—many experts believe the organizations are designed by the medical profession merely to eliminate any alternative means for financing health care. Havighurst, *Health Care Financing*, *supra* at 315-16. For a more comprehensive description and discussion of FMC's, see C. STEINWALD, AN INTRODUCTION TO FOUNDATIONS FOR MEDICAL CARE (1971).

A viable alternative to FMC's that is disapproved of by medical societies but which may reduce health costs is the "closed panel prepaid health insurance plan," better known as a "health maintenance organization" (HMO). *Id.* at 304-05. *See also* Kissam, *Health Maintenance Organizations and the Role of Anti-trust Law*, 1978 DUKE L.J. 487 (1978). Under an HMO form of health plan, the consumer pays a fixed periodic fee to a functionally integrated panel of doctors in exchange for the latters' promise to provide any medical services the subscriber might desire during the course of the insured term. *Maricopa County*, 102 S. Ct. at 2470 n.7. Under this plan, doctors bear the economic risks associated with health care and are thereby encouraged to provide only those medical services necessary and to instigate cost-effective treatment and procedure. For a comprehensive listing of the advantages and disadvantages of 79HMO's, see Havighurst, *Health Maintenance Organizations and the Market for Health Services*, 35 LAW & CONTEMP. PROBS. 716, 720-24 (1970) [hereinafter cited as Havighurst, *HMO's*].

Critics of the medical profession charge that FMC's violate antitrust laws by detering HMO's from entering the market. These critics contend that FMC's bar the entry of HMO's into the market by "limit-pricing" foundation services. According to this theory, FMC's charge a lower price than what could be obtained by them, but still higher than what they could obtain in a purely competitive market where price would equal marginal cost. FMC's fix a price level low enough to prevent smaller competitors (like HMO's) from making enough revenue to overcome operating cost, with the differing economies of scale explaining the differing cost curves of the two organizations. For a short discussion of this theory and criticisms of it, see *Maricopa County*, 562 F.2d at 558. *See also* Havighurst, *HMO's*, *supra* at 767-77; Havighurst, *Health Care Financing*, *supra* at 377-81. *But see* Markovits, *Potential Competition, Limit Price Theory, and the Legality of Horizontal and Conglomerate Mergers Under the American Anti-trust Laws*, 1975 WIS. L. REV. 658 (1975). Justice Stevens apparently had this "limit price" theory in mind when he wrote the majority opinion in *Maricopa County*: "[I]n this case the [per se] rule is violated by a price restraint that . . . may discourage entry into the market and may deter experimentation and new development." 102 S. Ct. at 2475.

224. This number comprised 70% of all the practitioners in Maricopa County. *Maricopa County*, 102 S. Ct. at 2470.

including peer review[225] and the setting of maximum fees.[226] These fees set a limit on the amount foundation members could charge patients who were insured under a foundation-approved health care plan.[227] Foundation members voted on whether to accept the proposed maximum fee schedule.[228] Periodically, the FMC's Board of Trustees revised the fee schedule and submitted the revised schedule to members for a vote.[229]

The foundation did not insure risks itself,[230] but instead solicited private insurance companies to offer medical insurance policies based upon the established fee schedules.[231] The insureds were guaranteed complete reimbursement for the full amount of their medical bills if they chose physicians who were foundation members.[232] An insured was free to consult a non-foundation member, but he was not reimbursed for charges that exceeded the maximum fee schedules established by the foundation.[233] In exchange for limiting their fees, foundation members were guaranteed full reimbursement for those charges not exceeding the fee schedule limits.[234] However, members were permitted to treat patients not insured under a foundation-sponsored plan and charge whatever fee they desired in such instances.[235]

The State of Arizona brought a civil suit against the Maricopa FMC alleging that the organization violated § 1 of the Sherman Act by establishing the maximum fee schedule.[236] The plaintiff moved for partial summary judgment, urging the Court to declare the setting of maximum fees to be illegal *per se* pursuant to *Socony-Vacuum*[237] The district court denied the state's motion[238] but certified the ques-

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225. *See supra* note 223.

226. *Maricopa County*, 102 S. Ct. at 2470-71.

227. *Id.*

228. *Id.* at 2470.

229. *Id.*

230. *Id.* at 2480. The foundation was a not-for-profit corporation licensed merely an "insurance administrator"—it did not underwrite insurance policies. See *id.* at 2471 & n.11.

231. *Id.* at 2480-81. Seven insurance companies underwrote insurance policies for the Maricopa FMC. *Id.* at 2471 n.11.

232. Id. at 2471-72.

233. *Id.* at 2472. Insureds were thus free to choose any physician they desired.

234. *Id.* at 2471.

235. *Id.*

236. *Id.* at 2469.

237. *Maricopa County*, 643 F.2d at 557. Note that *Maricopa County's* procedural background is similar to that found in *Catalano. See supra* note 220 and accompaning text.

238. *Maricopa County*,102 S. Ct. at 2469. The district court noted a recent trend

tion of whether the foundation's fee setting arrangement was illegal *per se* under § 1 of the Sherman Act.[239]

The court of appeals affirmed the district court's denial.[240] The appellate court concluded that the record was too sparse and the judiciary's experience in the field of health care too limited to permit a finding of *per se* illegality.[241] The circuit court wanted more information regarding the maximum fee schedule at issue and the health care industry in general before evaluating the procompetitive justifications for the fee setting.[242] The appellate court's analysis was consistent with the *per se* standard used in *Broadcast Music* to determine whether a contested activity or agreement was illegal *per se*:[243] the circuit court looked to whether the agreement in question generated

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to prefer a Rule of Reason analysis over a *per se* characterization and cited *GTE Sylvania* to support this assertion. Id. at 2469 n.2.

239. *Id.* at 2469.

240. *Maricopa County*, 643 F.2d 553 (1980). However, as Justice Stevens noted, each circuit judge had his own reasons for holding as he did. *Maricopa County*, 102 S. Ct. at 2469-70.

241. *Maricopa County*, 643 F.2d 556-60.

> [T]he record reveals nothing about the actual competitive effects of the challenged arrangement nor do the authorities . . . afford assurance concerning its competitive impact. In truth, we know very little about this and many other arrangements within the health care industry. This alone should make us reluctant to invoke a *per se* rule....

Id. at 556.

242. *Id.* Judge Sneed cited the court's lack of knowledge regarding the nature of FMC's and HMO's, and its lack of knowledge regarding their relationship to each other, as primary reasons why the pro- and anticompetitive impact of the FMC's maximum fee schedule could not be properly evaluated. The judge considered a *per se* characterization unwise given the court's lack of expertise in this area. *Id. at 558.*

243. *See supra* note 242 and accompanying text. However, while the appellate court opinion did cite *Broadcast Music* for support, the court did not mention the concept of efficiency-creating potential (resulting from integration) that was central to the *Broadcast Music* holding. Instead, the appellate court interpreted *Broadcast Music* as requiring a balancing of pro- and anticompetitive effects in both *per se* and Rule of Reason analyses. *Maricopa County*, 643 F.2d at 558. This interpretation is misleading as it suggests that the *per se* and Rule of Reason processes are largely repetitive in cases of difficult characterization. Indeed, a respected commentator has reached that same conclusion after analyzing *Broadcast Music. See* Sullivan & Wiley, *supra* note 141, at 332-33.

The appellate court's misinterpretation is due to the failure of the Court in *Broadcast Music* to articulate a clear standard for the Rule of Reason analysis and properly distinguish that analysis from the *per se* characterization process. *See* ANTITRUST ADVISOR, *supra* note 24, § 1.29, at 12, 13, 16 (Court's failure to provide standards for distinguishing between *per se* and Rule of Reason analyses results in cases like *Maricopa County* and *Catalano*). *Cf. Taylor, supra* note 16, at 186 (*Maricopa County* illustrates difficulty of distinguishing between Rule of Reason and *per* se cases).

substantial economic efficiencies which were unattainable in the absence of the agreement.[244] Unable to determine whether any economic efficiencies resulted from the foundation's setting of maximum fees, the court of appeals refused to establish *per se* illegality because it could not be certain that the agreement was plainly anticompetitive and without redeeming virtue.[245]

The Supreme Court subsequently granted certiorari.[246] As in *Catalano*, the Court was required to assume that the respondent-FMC's statement of facts was true.[247] The court, per Justice Stevens, reversed the court of appeals and held[248] that the foundation's establishing of a maximum fee schedule by a polling of those who were to collect the fixed fees was "*per se* price fixing," and, therefore, violated § 1 of the Sherman Act.[249] Justice Powell wrote a vigorous dissent joined by Justice Rehnquist and Chief Justice Burger.[250]

B. *The Significance of Maricopa County*

There are four reasons why *Maricopa County* is a significant decision. First, the case indicated that the Court's supposed preference for a Rule of Reason (vs. *per se*) analysis is probably at an end.[251] Second, Justice Stevens' opinion relied heavily on *Socony-Vacuum* rather than on *Broadcast Music* and the latter's economically-oriented characterization analysis.[252] *Maricopa County* further reduces the scope and precedential value of *Broadcast Music*—a reduction which began with *Catalano*.[253] Third, unlike *Professional Engineers*, *Broadcast Music*

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244. *See supra* notes 195-96 and accompanying text.

245. *See Maricopa County*, 643 F.2d at 556-60.

246. *Maricopa County*, 102 S. Ct. at 2469.

247. *Id.*

248. *Maricopa County* was a 4-3 decision. Justices Blackman and O'Connor did not participate in the case's decision. Justice Stevens was joined by Justices Brennan, Marshall, and White.

249. *Id.* at 2480.

250. *Id*

251. Recall that the district court identified a trend favoring the more comprehensive Rule of Reason analysis and cited *GTE Sylvania* for support. *See supra* note 238. The *GTE Sylvania* and *Broadcast Music* decisions, along with an erroneous interpretation of *Professional Eng'rs* as a Rule of Reason case, suggested a judicial tendency to prefer Rule of Reason over *per se* analysis. *See supra* note 240. *See also* L. SULLIVAN, *supra* note 2 at 322; Robinson, *supra note 46, at 14; Handler, supra* note 46, at 983.

252. Terms such as "efficiency-creating potential," "integration" and "plainly anticompetitive without any potentially redeeming virtue" were not in the majority opinion. *See infra* notes 263-67 and accompanying text.

253. *See supra* note 220.

and *Catalano*, *Maricopa County* contains a vigorous dissent which reveals deep dissention within the Court regarding the proper scope and nature of the *per se* characterization process.[254] Fourth, Justice Stevens' opinion contains some of the same inconsistencies which were evident in his *Professional Engineers* majority opinion.[255] The *Maricopa County* decision has several other important implications for antitrust law, but these considerations are outside the scope of this discussion.[256]

1. *Predominance of the per se* rule?

Maricopa County perhaps signals the end of the Burger Court's preference for the more comprehensive Rule of Reason analysis over the simplicity and expeditiousness of the *per se* rule.[257] While denying Arizona's motion for summary judgment, the circuit court noted that it could declare the FMC's fee schedule to be illegal *per se* at a later date.[258] The Supreme Court undoubtedly realized that an affirmation

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254. *See infra* note 318-44 and accompanying text.

255. After advocating an expedited and cursory *per se* characterization process, Justice Stevens seems to apply a truncated Rule of Reason analysis to *Maricopa County's* factual context. *See Maricopa County*, 102 S. Ct. at 2477-80. *See also infra* notes 282-87 and accompanying text.

256. Several commentators have suggested that *Maricopa County* revitalizes the *Albrecht* and *Kiefer-Stewart* holdings by confining *GTE Sylvania's prohibition of per se* illegality to only vertical non-price restraints. *See, e.g.*, Taylor, *supra* note 16, at 190-91. Following *GTE Sylvania, several courts extended the ban on per se* illegality to prevent the characterization of vertical price restraints as illegal *per se. See, e.g.*, Donald B. Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15 (4th Cir.), *cert. denied*, 102 S. Ct. 324 (1981); In Re Nissan, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

More important, Justice Stevens in *Maricopa County* apparently abandoned the simplified Rule of Reason standard he applied in *Professional Eng'rs* which looked to whether the contested agreement suppressed or promoted competition. *Professional Eng'rs*, 435 U.S. at 691. *See also supra* text accompanying notes 133-140. Instead, the Justice applied the standard formulated by Justice Powell in *GTE Sylvania* which required the fact-finder to "weigh all of the circumstances of a case" in deciding whether to declare a restrictive practice to be an unreasonable restraint on competition. *See Maricopa County, 102 S. Ct. at 2472; GTE Sylvania, 433 U.S. at 49.*

Finally, Maricopa County appears to have further narrowed the antitrust exception for professional societies. *See Maricopa County*, 102 S. Ct. at 2475-76. *See also* Note, *Arizona v. Maricopa County Medical Society: Supreme Court Refuses to Immunize Doctors Against Sting of Sherman Act Section 1*, 1983 WIS. L. REV. 1203 (1983).

257. *See supra* note 251.

258. Judge Kennedy addressed this point in his concurring opinion:

> This is not to suggest, however, that I have found these reimbursement schedules to be *per se* proper, 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

of the ninth circuit's opinion would similarly allow it to declare the fee schedule illegal *per se* in the future. Indeed, Justice Powell mentioned this consideration in arguing for affirmance of the appellate court decision.[259] Thus, the Court had ample justification for affirming the lower courts' denials of summary judgment.[260] However, Justice Stevens unequivocally stated that the *per se* price fixing standard did not allow for any consideration of procompetitive justifications whatsoever.[261] Given the meager record and lack of judicial experience in this case, the Court's granting of summary judgment can be interpreted as a rejuvenation of the *per se* price fixing rule—a rejuvenation which began with *Catalano*.[262]

2. *Revitalization of Socony-Vacuum* and repudiation of *Broadcast Music*

Maricopa County's foremost contribution to contemporary antitrust doctrine is its resounding rejection of the FMC's procompetitive justifications for the fee schedule. The majority believed that the maximum fee schedule's purported creation of otherwise unattainable efficiencies was an irrelevant factor.[263] Quoting *Socony-Vacuum* at length, Justice Stevens held that " '[w]hatever economic justification particular price agreements may . . . have . . . [t]hey are all banned.' "[264] The FMC's fee schedule tampered with price structure (and therefore violated the *per se* rule) because it "tend[ed] 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. . . ."[265] Thus, even though the fee schedule may have saved consumers millions of dollars, Justice Stevens dismissed the FMC's procompetitive justifications for the schedule

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> per se violations. The evidence adduced at trial may very well show that the theories which Judge Sneed refutes in the abstract do have an empirical foundation and that the challenged practices have the proscribed effect of suppressing rather than promoting competition.

Id. at 560.

259. *See Maricopa County*, 102 S. Ct. at 2485 n.13 (Powell, J., dissenting). Justice Powell advocated further review of the fee schedule's efficiency-creating potential.

260. *See id.*

261. *Id. at 2477. (foundation's claim of procompetitive justifications as defense to per se* illegality indicates a misunderstanding of the *per se* concept).

262. *See supra* note 220.

263. Indeed, given *Maricopa County*'s procedural posture, the Court was required to assume that the FMC's fee schedule saved consumers millions of dollars. *Maricopa County*, 102 S. Ct. at 2472, 2481.

264. *Id.* at 2477 n.23 (quoting *Socony-Vacuum*, 310 U.S. at 224 n.59).

265. *Maricopa County*, 102 S. Ct. at 2475.

because *Socony-Vacuum* demanded that any agreement tampering with price structure be banned due to the anticompetitive potential inherent in all "price fixes."[266] *Maricopa County*'s revitalization of the *Socony-Vacuum per se* standard[267] is significant because this revitalization represents a repudiation of the *per se* characterization standard found in *Broadcast Music*.[268]

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266. *See id.* at 2477. Justice Stevens' repudiation of "efficiency-creating potential" and his reaffirmation of *Socony-Vacuum's* rigid "price-tampering" *per se* standard suggest that a *per se* characterization analysis based upon economic analysis has presently lost favor with the Court. Indeed, in applying *Albrecht's* prohibition of vertical maximum price restraints to the horizontal market structure found in *Maricopa County*, Justice Stevens admitted that maximum and minimum prices were not economically equivalent. 102 S. Ct. at 2475. The Justice proceeded to dismiss this economic distinction as irrelevant, commenting that since both affected price levels they were legally equivalent, *i.e., illegal per se. Id.*

Moreover, factors such as barriers to entry, restrictions on freedom to charge whatever price one desires in a free market, and the substitution of sellers' judgment regarding price levels for market forces replaced "efficiency creating potential" as primary considerations in Maricopa County's per se characterization analysis. *Id. at 2474-75. For example, contract integrations which created otherwise unattainable economic efficiencies and relieved an agreement of per se* illegality under *Broadcast Music*'s dictate resulted in increased barriers to entry or decreased freedom for individual businessmen. By allowing vertical territorial and customer restrictions in *GTE Sylvania*, the Court sanctioned the restriction of individual retailers' freedom to compete wherever they wished and to sell to whomever they wished. However, the Court recognized that such a restriction on individuals' freedom was ancillary to the legitimate end of promoting efficient franchise systems. *See GTE Sylvania*, 433 U.S. at 54-56 (discussion of numerous efficiencies created in product distribution through vertical non-price restraints). *Cf.* Albrecht v. Herald Co., 390 U.S. 145, where the Court rejected a similar defense of efficiencies created through the imposition of a maximum price in a vertical market structure. The Court in *Albrecht* rejected this defense by citing *Socony-Vacuum*, and *Maricopa County* seems to follow *Albrecht's* analysis. *See supra* note 256. *See also supra* note 70.

Maricopa County suggests that these efficiency-creating integrations may be declared illegal *per se*. The Court undoubtedly was aware that medical professions had been accused of establishing FMC's as barriers to prevent HMO's from entering the health care market. *See supra* note 19. Professor Liebeler, arguing from a Chicago School viewpoint, discussed the *Maricopa County plaintiff's "price-limiting" theory as irrelevant, stating that this barrier to HMO's merely resulted from the increased efficiency in services provided by FMC's. See* ANTITRUST ADVISOR *supra* note 24, § 1.29 at 20.

267. The Court quoted *Socony-Vacuum* at length several times in the opinion, including that langauge forbidding "any combination which tampers with price structures" and those combinations "formed for the purpose of raising, depressing, fixing, pegging or stabilizing the price of a commodity." *Maricopa County*, 102 S. Ct. at 2474 (quoting *Socony-Vacuum*, 310 U.S. at 213, 221-22).

268. The Justice conducted an elaborate historical analysis of the *per se* rule which relied heavily on a handful of cases which had been implicitly rejected in *GTE Sylvania* as being based on "formalistic line drawing" rather than "demonstrable economic effect." *See Maricopa County*, 102 S. Ct. at 2473-75 (citing *Trenton Potteries*,

Justice Stevens attempted to distinguish *Broadcast Music* from *Maricopa County* so that the latter's rigid "price tampering" *per se* standard would be seen as the authoritative *per se* characterization test. Justice Stevens postulated that the blanket license sold by ASCAP and BMI in *Broadcast Music* was a "different product" than the license sold by individual composers. Therefore, ASCAP and BMI were not joint sales agencies offering the individual products of many competitors, but separate competitors in their own right offering their own blanket licenses, "of which the [competing composers'] individual compositions [were the] raw material."[269] Justice Stevens held that no such different product was created by the FMC's existence in *Maricopa County*.[270] The Justice noted that the medical services offered by doctors to patients insured under the FMC-sponsored plan were no different in nature than the services rendered to consumers who did not partake in this plan.[271] The integration of doctors merely provided for lower market prices due to reduced transaction costs and did not create a "different product."[272] Thus, *Broadcast Music* and *Maricopa County* were distinguishable on their facts.

However, Justice Powell asserted in his dissent that to characterize the doctors in *Maricopa County* as horizontal competitors while somehow distinguishing the composers in *Broadcast Music* as competitors of a "different product" was a specious differentiation which failed to adequately distinguish the two cases.[273] The contested activity in both cases involved competitors who reduced transaction

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273 U.S. 392, *Socony-Vacuum*, 310 U.S. 150, *Albrecht*, 390 U.S. 145 and *Kiefer-Stewart*, 340 U.S. 211). Neither *GTE Sylvania* nor *Broadcast Music* was included in the Court's historical account of the *per se* rule's development. Such an omission was surely not inadvertant for these two cases were landmark decisions which adopted for the first time the Chicago School notion of "efficiency-creating potential." Rather, the conspicuous omission of *GTE Sylvania* and *Broadcast Music from Maricopa County's* historical segment and the Court's infrequent citation to them in its opinion amounted to a rejection of the Chicago School theory upon which the former cases rested. In short, the Court in *Maricopa County* adopted a *per se* price fixing standard far different from that stipulated in *Broadcast Music*. For further discussion of the differences between the *per se* standards formulated in *Broadcast Music* and *Socony-Vacuum*, see *infra* note 292.

269. *Maricopa County*, 102 S. Ct. at 2479 n.31 (quoting *Broadcast Music*, 441 U.S. at 22). Thus, the composers were not seen as the competitors at issue in *Broadcast Music*—the clearinghouses themselves were the relevant competitors. Since no agreement to fix prices existed between the clearinghouses, no price restraint existed among competitors.

270. *Id.* at 2479 & n.33.

271. *See id.*

272. *Id.*

273. *See id.* at 2483-84.

costs and provided substantial procompetitive efficiencies through cooperative pricing.[274] Justice Powell claimed that the "new product" made in *Broadcast Music* was "made" through the reaping of "otherwise unattainable efficiencies."[275] He concluded that the FMC in *Maricopa County* provided a different product "to precisely the same extent as did *Broadcast Music*'s clearinghouses."[276]

Justice Powell's refutation of the majority's "different product" theory for distinguishing *Broadcast Music* effectively denies the existence of a different product in either case. The Justice's assertion that both agreements created a "different product" to the same extent was correct[277]—neither agreement created such a product. The blanket license in *Broadcast Music* gave licensees immediate access to millions of compositions for unlimited usage during a fixed period of time. Yet, the licensees could have obtained the same results through separate negotiations with the individual copyright holders. Thus, the integration of the composers' marketing and selling resources did not alter the product they sold, but merely lowered the cost of acquiring their products individually. This lower "transaction cost" thereby facilitated widespread use of many different compositions.[278] The integration did not create a "different product." Unfortunately, Justice Powell did not reject the use of this legal fiction as a factor in *per se* characterization analysis, but asserted that a "new product" also existed in *Maricopa County*.[279] Antitrust law would be better served if this misleading concept were rejected at the next available opportunity.[280]

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274. *Id.* at 2483-85 & nn.12-13. Moreover, the foundation plan created incentives to cut down on costs by substituting the weak cost containment incentives of "usual, customary and reasonable"ee-for-service plans with the stronger cost control mechanism of maximum fee schedules. *Id.*

275. *Id.* at 2484.

276. *Id.* at 2484 n.12.

277. *Id.*

278. *See Broadcast Music*, 441 U.S. at 20. Professor Sullivan summarized this concept in a passage written two years before *Broadcast Music* was decided: "A joint selling agent does not merely set joint prices for firms which previously competed as to price; it also performs in an integrated manner, functions which the firms had previously performed independently." L. SULLIVAN *supra* note 2, §77 at 208. By substituting the word "composer" for "firms," one obtains an accurate description of how ASCAP created economic efficiency: it reduced transaction costs by integrating functions such as selling, marketing, and copyright enforcement. Composers had performed these functions independently prior to 1914. *See Broadcast Music,* 441 U.S. at 20. Note that Professor Sullivan says nothing about a "different product" being created.

279. *Maricopa County*, 102 S. Ct. at 2484.

280. The "different product" theory was probably created to appease those Justices who could not bring themselves to approve a price fix which affected price

Justice Stevens failed in his effort to persuasively distinguish *Maricopa County* from *Broadcast Music*. The latter case hinders the Justice's attempt to create an ironclad prohibition of price-fixing based on a *Socony-Vacuum* "price tampering" *per se* standard. *Broadcast Music*'s refusal to declare a literal price fix illegal *per se* simply cannot be squared with *Maricopa County*'s *per se* prohibition of all agreements restricting price competition—unless one makes the rather reasonable assumption that *Maricopa County* is a *de facto* overruling of *Broadcast Music*.[281]

3. *The internal inconsistency within Maricopa County*

The force and persuasiveness of *Maricopa County* is further undermined by the internally inconsistent *per se* characterization analysis undertaken by the majority in that case. Justice Stevens emphatically rejected as immaterial any procompetitive justifications for the fee schedule and instead focused on the fee schedule's effect on the market price structure. However, he simultaneously conducted a truncated Rule of Reason analysis to reach conclusions which bolstered his finding of *per se* illegality.[282]

The inconsistency of such a *per se* characterization analysis is readily apparent from a reading of the majority opinion. Justice Stevens stated the now familiar rule that all tamperings with price are illegal *per se*, even if some might be found reasonable under a Rule of Reason analysis – procompetitive justifications were irrelevant once a *per se* illegal "price fix" was found. Yet even though he

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competition among approximately 52,000 competitors. The use of this legal fiction was necessary to overcome what Justice Powell condemned as "formalistic line drawing" in *GTE Sylvania*. See*GTE Sylvania*, 433 U.S. at 58-59. The fiction certainly was not necessary to the *Broadcast Music* holding; under the Chicago School theory adopted by the Court in that case, competitors' restriction of price competition is irrelevant to a *per se* characterization analysis. Instead, the analysis focuses on whether the combination formed is designed to produce substantial economic efficiencies unattainable in the absence of an agreement. *Maricopa County*, 102 S. Ct. at 2482. In short, any distinctions between "competitors" and "non-competitors" and "indirect" and "direct" price restrictions are considered irrelevant in *Broadcast Music's per se* characterization process. The emphasis is on efficiency and "demonstrable economic effect," not on "formalistic line drawing."

281. Justice Powell concluded that Justice Stevens had effectively overruled *Broadcast Music*. *See Maricopa County*, 102 S. Ct. at 2483-85.

282. *Id.* at 2477-80. This practice of formulating one standard of *per se characterization while applying a different standard is not a new phenomenon in Supreme Court cases. A similar approach was taken in Professional Eng'rs.* For a discussion regarding the confusion generated in the legal community as a result of this inconsistent approach to *per se* characterization, see *supra* notes 146-51 and accompanying text.

found the FMC's fee schedule to be illegal *per se* and accordingly rejected the FMC's procompetitive justifications for the schedule, Justice Stevens nevertheless evaluated these justifications in order to illustrate their lack of merit:

> Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the [*per se*] rule that is justified in its general application. Even when respondents are given every benefit of the doubt, the limited record in this case is not inconsistent with the presumption that the respondent['s] agreements will not significantly enhance competition.[283]

However, such an evaluation was unnecessary given Justice Stevens' application of a rigid *per se* characterization standard based on *Socony-Vacuum*. Even if the fee schedule did enhance competition, the anti-competitive potential inherent in all price fixes mandated that the fee schedule's maximum prices be conclusively presumed illegal *per se*.[284]

The truncated Rule of Reason analysis performed by Justice Stevens undermines whatever persuasiveness and appeal the reader might find in the mechanical and formal *per se* characterization analysis described in *Maricopa County*.[285] One must wonder whether lower court

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283. *Maricopa County*, 102 S. Ct. at 2477.

284. *See id.* at 2473, 2477.

285. Moreover, some of the logic used to rebut a showing of procompetitive effects is suspect. For instance, at one point Justice Stevens noted that the FMC health care plan would provide only as much guarantee of full payment for bills as would a medical care plan providing for payment of all "usual, customary and reasonable" fees. *Id.* Justice Stevens arrived at this conclusion by calculating the percentage of cases in which insurers pay for the insured's entire medical bill under the "usual, customary" plan, and compared this percentage to the percentage of physicians who were members of the Maricopa FMC. Since the percentages were the same (i.e., 70%, Justice Stevens presumed that in either case, a patient had a 70% chance of getting all medical costs reimbursed. *Id.* This reasoning assumes that insureds in a FMC-sponsored plan had a 70% likelihood of receiving medical services from a consulting member. However, it seems very likely that any person who would join the FMC-sponsored plan would do so in order to rid himself of doubts as to whether the insurer would pay for all his medical bills under the "usual, customary and reasonable" plan. This being the case, it seems probable that he would not seek medical service from a physician who was not a Maricopa foundation member, and it is likely that an insured in a foundation-sponsored plan had a better than 70% chance of having his entire medical bill paid for, as compared to the lower 70% figure cited for those insureds covered under a normal "usual, customary, and reasonable" insurance plan.

The many presumptions and inferences made by Justice Stevens in evaluating the respondent's procompetitive justifications all appear to favor the petitioner. These

judges will be able to apply *Maricopa County*'s rigid *per se* characterization standard in cases involving difficult characterization problems, since the Court itself could not apply the standard in *Maricopa County*'s relatively simple factual context without butressing its holding by use of a truncated Rule of Reason analysis.[286] The Justice's use of two seemingly contradictory *per se* characterization processes in *Maricopa County* is likely to generate as much confusion as his *Professional Engineers* opinion did in this regard.[287]

In fairness to Justice Stevens, there may be a plausible explanation for his seemingly contradictory approach. Presumably, the Justice recognized that not all price fixes are illegal *per se*: he refused to declare ASCAP's blanket license illegal *per se* in *Broadcast Music*.[288] He distinguished *Broadcast Music* from *Maricopa County* by noting that FMC's were not analagous to "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."[289] Justice Stevens also pointed to the creation of a "different product" in *Broadcast Music*.[290] Justice Stevens' admission that certain arrangements may escape *per se* illegality through a sharing of risks, losses, and profits, combined with his belief that ASCAP's blanket license was not illegal *per se*, effectively create an exception to his *Maricopa County per se* characterization standard. Those agreements which are ac-

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presumptions seem to be inconsistent with the procedural context in which the case is set. Given that the petitioner was requesting summary judgment, the Court was obligated to accept the respondent's facts as true and make references and presumptions giving the respondent the benefit of the doubt. Justice Powell took note of this inconsistency in his dissent. *See id.* at 2482.

286. The characterization of the Maricopa FMC's fee schedule as illegal *per se* should have been relatively easy under the majority's reasoning, given the fact that the schedule rather blatantly and directly fixed prices.

Of course, had the fee schedule's economic efficiencies, the uniqueness of the professional health care industry, and the judiciary's lack of experience all been given weight by the Court, *Maricopa County* would have presented a much more complex and difficult characterization problem, as evidenced by Justice Powell's and Judge Sneed's desire to remand the case for further findings of fact.

287. *See supra* notes 146-51 and accompanying text. However, in contrast to his *Professional Eng'rs* opinion, Justice Stevens did make it clear in *Maricopa County* that the Court was applying the *per se* rule. *See Maricopa County*, 102 S. Ct. at 2475.

288. *Broadcast Music*, 441 U.S. at 25. In *Maricopa County*, Justice Powell went so far as to quote that part of Justice Stevens' *Broadcast Music* dissent in which the latter unequivocally supported the majority's refusal to find *per se* illegality. *Maricopa County*, 102 S. Ct. at 2483 n.7 (quoting *Broadcast Music*, 441 U.S. at 25).

289. *Maricopa County*, 102 S. Ct. at 2479-80.

290. *Id. However, this "different product" distinction is without merit, as has been previously discussed. See supra* notes 269-80 and accompanying text.

companied by a sufficiently high degree of integration of resources, facilities, and risks of loss and opportunities for profit will escape *per se* illegality. Likewise, those agreements which reduce transaction costs so drastically as to practically create a "new product" through the improvement of a market will also escape a finding of *per se* illegality.[291] Thus, Justice Stevens may have recognized the impracticality of applying a *per se* characterization standard which declares every restraint tampering with price competition to be illegal *per se*.[292]

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291. Justice Stevens appeared to have adopted a *per se* characterization theory in *Maricopa County* which was similar to Professor Sullivan's. The latter distinguishes "naked" price restraints (which are always illegal *per se*) from arrangements accompanying "partial integrations" and arrangements "making" (or improving) a market. *See* L. SULLIVAN, *supra* note 2, §§ 76, 77. Justice White noted that the copyright market was improved by reducing transaction costs and creating integrations (ASCAP and BMI) which granted blanket licenses. *Broadcast Music*, 441 U.S. at 20-22. Justice Powell suggested that the maximum fee schedule in *Maricopa County* similarly reduced transaction costs. *See Maricopa County*, 102 S. Ct. at 2482 n.6. *See also* R. POSNER & F. EASTERBROOK, *supra* note 136, at 14-15; Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981).

292. Such a broad *per se* standard does not inexorably follow from *Socony-Vacuum. For example, Justice White in Broadcast Music* readily admitted that ASCAP's and BMI's blanket licenses literally fixed prices and affected price competition. 441 U.S. at 19-20. However, the Court emphasized that an agreement which threatens the proper operation of competitive markets must also be intended to obstruct free market forces before it will be declared illegal *per se*. *Id.* Recognizing that the blanket license did have an effect which threatened the operation of the free market economy, the Court nonetheless upheld ASCAP's licensing practice because the purpose of that practice was not to restrict price competition. *Id.* at 19-21. Rather, the setting of the license's price was ancillary to the creation of an integration (ASCAP) which resulted in more efficient economic activity through lower transaction costs. *Id.*

The Court in Broadcast Music did, however, effectively alter the nature and scope of the characterization process. The Court's *per se* characterization in *Broadcast Music* differs greatly from the one advocated in *Socony-Vacuum*. In the former case, the Court looked to the existence of economic efficiency-creating potential as a means of determining whether the contested agreement was designed to curb price competition. The Court in *Broadcast Music* managed to avoid overruling *Socony-Vacuum* by using the existence of substantial procompetitive efficiencies to prevent a finding that "the combination [was] found for the purpose and with the effect of raising, depressing, fixing . . . the price of a commodity." *Socony-Vacuum*, 310 U.S. at 213. In short, Justice White in *Broadcast Music* used the "purpose" element of the *Socony-Vacuum per se* standard as a means of limiting the latter decision and allowing him to declare that some price fixes were not illegal *per se*. *Broadcast Music*, 441 U.S. at 23.

However, Justice Stevens failed to emphasize this "purpose" limitation of *Socony-Vacuum's* standard in formulating his own *per se* standard in *Maricopa County*. Not surprisingly, his *per se* characterization standard was extremely broad: the Justice forbade *all* price fixes and implied that any agreement tampering with price structures would be illegal *per se*. *See Maricopa County*, 102 S. Ct. at 2475-77. Similarly, there was no mention of factors such as "ancillary restraints" and economic "efficiency-creating potential" serving as justifications for agreements affecting price competition.

Given these exceptions to the *per se* characterization standard Justice Stevens formulated in *Maricopa County*, his use of a Rule of Reason analysis to rebut many of the FMC's procompetitive justifications was not illogical or inappropriate. The Justice used a truncated Rule of Reason analysis to determine whether the FMC's fee schedule made possible a "unique" form of insurance coverage otherwise unattainable, and whether the FMC's members' voting on these schedules was necessary.[293] Justice Stevens may have phrased his inquiry in terms of whether a "unique" health care plan was established so that he could, by rejecting that defense, further demonstrate that no "new product" was created in *Maricopa County*.[294] Had Justice Stevens found that the fee schedule created such procompetitive efficiencies as to effectively create a "new product," and had these efficiencies resulted from the integration of the foundation members' productive resources,[295] he presumably would have found the schedule to be legal as a "necessary consequence"[296] of creating a "unique" form of insurance coverage.[297]

Unfortunately, there are several flaws in Justice Stevens' use of a truncated Rule of Reason analysis. First, while it may be wise to retain agreements which create procompetitive efficiencies through

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293. *Maricopa County*, 102 S. Ct. at 2477-78.

294. The "new product" theory in reality involves not the creation of a "different" product but merely a reduction in transaction costs or other substantial efficiency gains. *See supra* notes 269-80 and accompanying text. Therefore, Justice Stevens' Rule of Reason analysis ultimately inquires into whether the fee schedule created any substantial economic efficiencies otherwise unavailable.

Ironically, this inquiry is similar to the one advocated by Justice Powell in his dissent. Justice Powell would introduce a *per se* standard requiring courts to determine whether the contested agreement created any substantial and otherwise procompetitive benefits. *See Maricopa County*, 102 S. Ct. at 2482-83. Justice Stevens used a truncated Rule of Reason analysis to determine if the agreement provided consumers with "a uniquely desirable form of insurance coverage that could not otherwise exist." *Id.* at 2477.

295. Professor Liebeler postulates that the Maricopa FMC was an integration of productive resources: the members jointly provided peer-group analysis (a major justification for the existence of FMC's in the first place) and distributed insurance proceeds. ANTITRUST ADVISOR, *supra* note 24, §1.29 at 18.

296. The Court in *Broadcast Music* held that the blanket license escaped *per se* illegality because it was a "necessary consequence of the integration necessary to achieve [economic] efficiencies." 441 U.S. at 21.

297. However, there is a good possibility, as noted in the text, that Justice Stevens would have justified the schedule because it created a "new product." Justice Powell, on the other hand, would have justified the agreement because it provided substantial and otherwise unavailable procompetitive efficiencies. *See supra* note 291 and accompanying text.

integration,[298] such agreements simply do not fall within the *Maricopa County—Socony-Vacuum* unconditional prohibition of all agreements which tamper with price competition. While Justice Stevens may be justified in making exceptions to this *per se* standard and using an abbreviated Rule of Reason analysis to determine whether such exceptions are applicable in a given case, this method of *per se* characterization analysis confuses lawyers and jurists alike. The use of a truncated Rule of Reason analysis also undermines the very justifications given for applying such a broad rule, i.e., clarity and consistency in analysis, and a reduction in the use of judicial resources.[299] Justice Stevens should state his reasons for conducting a truncated Rule of Reason analysis instead of requiring legal analysts to use circuitous and often tortuous reasoning to rationally explain inconsistencies and contradictions within Court opinions and between Court cases.[300] If such a candid explanation would weaken *Maricopa County*'s broad *per se* standard (as it undoubtedly would), then that standard should not be so broad and rigid in the first place.

Second, Justice Stevens' failure to articulate any criteria for distinguishing between acceptable degrees of integration, such as partnerships and "other joint agreements,"[301] and unacceptable degrees of integration[302] leaves the bar and judiciary without any workable guidelines for determining which integrations should be declared illegal *per se* and which should not be so declared.[303] Obviously, total integrations are acceptable and not illegal *per se*.[304] Yet some partial integra-

298. There appears to be nearly universal agreement on this point, even among antitrust antagonists. *Compare* R. BORK, *supra* note 4, at 279 (agreement not illegal *per se* if it designed to create procompetitive efficiencies, is capable of doing so, and no broader than necessary) *with* L. SULLIVAN, *supra* note 2, §77 at 210 ("[A]utomatic application of the *per se* rule comes to an end where significant, otherwise unattainable integration benefits begin.").

299. *Maricopa County*, 102 S. Ct. at 2473, 2478.

300. Professor Sullivan's HANDBOOK ON ANTITRUST LAW attempts to spin a web of consistency and logic in a hopelessly confusing and inconsistent body of case law. *See generally* L. SULLIVAN, *supra* note 2. His recent attempt to harmonize the *GTE Sylvania*, Professional Eng'rs and *Broadcast Music* opinions illustrates even better the difficulties of attempting such a ormidible task. *See* Sullivan & Wiley, *supra* note 141, 322-36, 339-42.

301. Such as ASCAP and BMI.

302. Such as the Maricopa FMC. *See Maricopa County*, 102 S. Ct. at 2479-80.

303. *See infra* note 345 and accompanying text.

304. A "total" integration connotes a total integration of ownership, which is a merger. Antitrust law has long allowed such mergers, subject to the requirements of §7 of the Clayton Act. *See generally* L. SULLIVAN, *supra* note 2, §§ 192-216; R. POSNER & F. EASTERBROOK, *supra* note 136, at 386-478.

tions,[305] such as ASCAP and BMI, escape *per se* illegality while others, such as the Maricopa FMC, do not. The *Maricopa County* majority opinion offers little guidance as to the degree of integration required to prevent a price-setting arrangement among competitors from acquiring *per se* illegality.[306]

Third, while Justice Stevens' use of a truncated Rule of Reason analysis in *Maricopa County* was not illogical given his exception to *Maricopa County*'s *per se* standard,[307] his application of the Rule in that case's particular factual setting is suspect. Justice Stevens based his rejection of the foundation's fee schedule on questionable presumptions.[308] Moreover, these presumptions were not made in favor of the defendant, as one would have expected in a summary judgment proceeding initiated by the plaintiff.[309]

Fourth, the Justice erroneously rejected the FMC's argument that its fee schedule created enormous procompetitive benefits and saved consumers millions of dollars by allowing insurance companies to underwrite insurance policies more efficiently.[310] Although this rejection would have been proper in the absence of exceptions to *Maricopa County*'s *per se* standard, these exceptions *do* exist. Therefore, the Justice's rejection of this economic efficiency creating potential was not justified. The establishment of a maximum fee schedule presumably not only saved millions of dollars but also lowered the high transaction costs in the health care industry thereby allowing consumers to shop for quality medical services at lower prices.[311] The economic efficiencies created here are no different from those

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305. Partial integrations are integrations which integrate some productive functions, but leave other functions, such as manufacturing, to be carried on separately by the participating firms. L. SULLIVAN, *supra* note 2, §77 at 207.

306. Perhaps the Court presently intends to conduct a case-by-case analysis to determine whether a given combination exhibits a sufficient degree of integration to escape *per se* characterization. One can only hope that the Court will not require a degree of integration sufficient to effectively create a "new product." As previously stated, the Court should immediately abandon use of this legal fiction because further reliance on it will only serve to further confuse an already confusing and myopic area of the law. *See supra* notes 269-80 and accompanying text.

307. *See supra* notes 288-97 and accompanying text.

308. *See supra* note 285.

309. Recall that the plaintiff in *Maricopa County* was requesting summary judgment, and therefore the Court was called upon to favor the defendant's position when making any inferences or giving any presumptions. *See supra* note 285.

310. *See Maricopa County*, 102 S. Ct. at 2477 & n.25, 2478.

311. Justice Powell referred to this reduction in transaction costs in several places in his dissenting opinion in *Maricopa County*. *See id.* at 2482 n.6, 2485 n.13. *See also* R. POSNER & F. EASTERBROOK, *supra* note 136, at 14.

present in *Broadcast Music*. In deference to *Broadcast Music* and the doctrine of *stare decisis*, the Court should have affirmed the appellate court decision.[312]

Finally, the majority in *Maricopa County* did not repudiate this procompetitive agreement for lack of merit (for the Court could not deny these efficiencies occurred given the case's procedural context), but rather because participating doctors voted on the fee schedule themselves.[313] Justice Stevens reasoned that insurers stood to lose a great deal if the foundation's members were allowed to set their own fees.[314]

Unfortunately, the majority's position is based on a notion of "formalistic line drawing" that distinguishes prices set by competitors from those prices established by a third party.[315] One obvious justification for allowing the doctors to vote on the fee schedule is that it was cheaper for the foundation to poll the doctors than for the seven insurance companies underwriting the FMC-sponsored plan to conduct the poll.[316] The insurer's approval of this supposedly threatening arrangement further undermines Justice Stevens' position.[317]

4. *Justice Powell's dissent*

The presence of a vigorous dissent in *Maricopa County* gives the decision added significance.[318] Justice Powell unequivocally adopted

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312. Recall that the district court would have been able to declare the fee schedule illegal *per se* at trial if the discovery process revealed that the procompetitive efficiencies claimed by the Maricopa FMC did not actually exist. *See supra* notes 258-60 and accompanying text.

See Maricopa County, 102 S. Ct. at 2477-78.

Justice Stevens saw the foundation members' ability to set their own maximum fees as providing them with enough bargaining power to more or less dictate their terms to the insurers. *Maricopa County*, 102 S. Ct. at 2478 n.29.

See ANTITRUST ADVISOR, *supra* note 24, §1.29 at 22-23(Court's differentiation between doctors fixing maximum fees as compared to insurers doing same reaches formalistic heights reminiscent of *Schwinn*). *See also supra* notes 269-80 and accompanying text.

316. *See* R. POSNER & F. EASTERBOOK, *supra* note 136, at 14. The majority also recognized that requiring the various insurance companies to establish the fee schedule would be a more protracted (and therefore more costly) process. *See Maricopa County*, 102 S. Ct. at 2478 n.28 (requiring insurance companies rather than foundation to establish maximum fees would be a somewhat "more protracted" process).

317. Justice Powell considered the insurance companies' approval of the fee-setting procedure to be of great significance because he saw the insurers as the parties representing consumer interests. *See id.* at 2481-82.

318. *Id.* at 2483-85.

a "consumer welfare" view of antitrust law[319] and demonstrated how he would perform the *per se* characterization analysis in the case.[320] His dissent graphically illustrates the contrasting *per se* characterization analyses advocated by the Chicago and Harvard Schools[321] and also suggests that *Maricopa County* has effectively overruled *Broadcast Music*

Justice Powell began by accusing the Court of ignoring the benefits which the FMC-sponsored plan provided to consumers of medical services.[322] The Justice stressed that *Maricopa County*'s procedural context required the Court to assume that the FMC-sponsored plan saved consumers millions of dollars.[323] He derided the Court throughout his dissent for its invalidation of a plan that presumably benefited consumers enormously.[324] Justice Powell flatly stated that the Sherman Act was passed to benefit consumers and that the goal of antitrust law is consumer welfare.[325] Given this goal, the Justice considered the "short shrift"[326] given to consumer benefits by the majority to be both inconsistent with *Broadcast Music* and an improper judicial resolution of the case.[327]

The dissent also contained an alternative to the *per se* characterization standard offered by the majority. The majority's *per se* standard, adopted from *Socony-Vacuum*, focused on whether the contested agreement tampered with price structure and dismissed any defenses based on competitive evils or procompetitive justifications.[328] However, Justice Powell's *per se* standard focused on economic efficiency potential as the primary factor to be considered in *per se* analysis, thus reaffirming *Broadcast Music*'s *per se* theory. Justice Powell held that courts were to determine whether an arrangement's

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319. Justice Powell stated: "[T]he antitrust laws are a consumer welfare prescription." *Id.* at 2485 (quoting Reiter v. Sonotone, 442 U.S. 330 (1979)).

At another point, the Justice described the Sherman Act as "a law designed to benefit consumers." Maricopa County, 102 S. Ct. at 2481.

320. *Id.* at 2481-83. Given the uncertain future of *Maricopa County* (it is a 4 - 3 decision), Justice Powell's *per se* characterization analysis is of particular interest: it may well become the Court's standard approach to price fixing cases in the future.

321. *Compare* R. BORK, *supra* note 4, at 1-11, 262-79, *with* L. SULLIVAN, *supra* note 2, §§ 1, 2, 70, 72.

322. *Maricopa County*, 102 S. Ct. at 2480.

323. *Id.* at 2481.

324. *Id.* at 2481-82, 2484-85.

325. *See supra* note 319.

326. *Maricopa County*, 102 S. Ct. at 2480.

327. *Id.* at 2480, 2485.

328. *Id.* at 2474, 2477. *See also supra* notes 263-67 and accompanying text.

purported procompetitive efficiencies were substantial and unattainable in the absence of the agreement.[329] He explained that such an economically-oriented analysis was needed because the Court previously recognized that "departure from the rule of reason standard should be based on demonstrable economic effect rather than formalistic line drawing."[330] Thus, the Justice once again revealed his reluctance to apply the *per se* rule without examining an agreement's purported procompetitive justification and benefit to consumers.[331] This approach stands in sharp contrast to Justice Stevens' exhortation that courts were not to consider procompetitive efficiencies involving price fixing agreements because all such agreements are flatly illegal *per se*.[332] Presumably, Justice Powell, who in *GTE Sylvania* borrowed much of Judge Bork's philosophy,[333] also considers an inquiry into whether an agreement "literally" fixes prices or not to be irrelevant.[334]

Lastly, Justice Powell's burden of proof is noticeably higher than that of Justice Stevens. As has been shown, a *per se* standard based on efficiency creating potential effectively raises the antitrust plaintiff's burden of proof in justifying a conclusion of *per se* illegality.[335] Justice Powell argued that Arizona (the plaintiff in *Maricopa County*) did not meet its burden of proof in the case because the state failed to show that the fee schedule was plainly anti-competitive and without substantial and procompetitive efficiency justification.[336] One may presume that Justice Powell will explicitly address this issue of respective evidentiary burdens in any future cases involving *per se* characterization of an agreement purportedly fixing prices.[337]

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329. *Id.* at 2482.

330. *Id.* (quoting *GTE Sylvania*, 433. U.S. at 58-59).

331. *Id.* at 2483. Justice Powell stated:"[T]he *per se* label should not be assigned without carefully considering substantial benefits and procompetitive justifications." *Id.*

332. *Id.* at 2477. Significantly, several factors given by Justice Stevens as reasons for prohibiting any restriction or tampering with price competition are ignored by Justice Powell in his dissent. These factors are: 1) barriers to entry; 2) the suprmeacy of free market price over individually-set price; 3) restrictions on the freedom of individual competitors and 4) the possibility of maximum prices becoming minimum prices. *See id.* at 2474-75.

333. *See GTE Sylvania*, 433 U.S. at 55-56. *See also* text accompanying note 123.

334. *See* R. BORK, *supra* note 4, at 28. "We should encourage those explicit and ancillary agreed-upon eliminations of rivalry that make the basic integration more efficient." *Id.*.

335. *See supra* notes 199-201 and accompanying text.

336. *Maricopa County*, 102 S. Ct. at 2485. The millions of dollars saved by consumers because of the fee schedule effectively rebutted any such assertion.

337. Such a presumption is based upon the fact that Justice Powell also noted a plaintiff's failure to meet his burden of proof under the increased-efficiency test in *GTE Sylvania*. *See GTE Sylvania*, 433 U.S. at 57-59.

In summary, Justices Powell and Stevens differ in view as to how a *per se* characterization approach should be conducted. Justice Stevens, seeing antitrust law as designed to promote competition,[338] considered all maximum price fixing agreements illegal because of their tendency to raise barriers to market entry,[339] to restrict individual competitor freedom,[340] to substitute individual judgment for market analysis,[341] and to possibly become minimum prices.[342] Once maximum price fixes were so denounced, it was elementary that the Maricopa FMC's fee schedule, which directly fixed maximum prices, would be declared illegal *per se*. Justice Powell, on the other hand, would not have condemned the schedule as illegal *per se* because he views antitrust laws as designed to benefit consumers[343] and the maximum price fixing at issue in *Maricopa County* presumably saved consumers millions of dollars. Justice Powell would therefore deny plaintiff's motion for summary judgment and allow the trial court to conduct an economically-oriented *per se* characterization analysis. This analysis would determine whether purported consumer benefits and other allegedly procompetitive justifications actually resulted from the fee schedule's setting of maximum prices.[344]

VII. CONCLUSION

The most striking conclusion to be drawn from *Maricopa County* is that the case does not eradicate the present confusion in "price fixing" case law. For example, for all its theory and historical analysis, *Maricopa County* does not make any constructive contribution to case law concerning the proper method for characterizing various agreements as "price fixes." *Broadcast Music* addressed this characterization problem by finding that not all price fixes were illegal and by holding that courts should characterize a given agreement as a "*per se* price fix" only if it restricted output and competition.

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338. *See Professional Eng'rs,* 435 U.S. at 687-88 (Congress expected to delineate Sherman Act boundaries through common law: case precedent was a Rule of Reason, which focused on retraint's impact on competition).

Justice Stevens' sympathy for antitrust goals such as removal of barriers to entry, decentralization of economic power, and the right of all businessmen to make their own economic decisions suggests that he is sympathetic to Harvard School analysis and theory. *See supra* note 4.

339. *Maricopa County,* 102 S. Ct. at 2475. 113

340. *Id.* at 2474 (quoting Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)).

341. Id. at 2474-75 (quoting Albrecht v. Herald Co., 390 U.S. 145 (1968)).

342. *Id.*

343. *See supra* note 319 and accompanying text.

344. *Maricopa County,* 102 S. Ct. at 2485 n.13.

Agreements which increased, or potentially increased, economic efficiency escaped an "illegal *per se*" characterization. The majority in *Maricopa County*, however, did not reiterate this statement, even though the case's factual situation closely resembled that found in *Broadcast Music* and thus provided an opportunity for reaffirmance of the latter case. Instead, the Court flatly declared all maximum and minimum "price fixes" to be illegal *per se*.

Maricopa County's extension of the *per se* price fixing rule to all agreements which tamper with price was easy to apply in that case because the contested agreement was a naked price fix. Since *Maricopa County* involved direct maximum price fixing in a horizontal market, the Court's major task was to extend its prohibition on vertical maximum price restraints to horizontal market structures. Once this task was completed, the characterization of the fee schedules as *per se* price fixing was a *fait accompli*. The Court in effect merely characterized the "literal" price fix as a "*per se* price fix."

However, by distinguishing *Broadcast Music* rather than overruling it, Justice Stevens left unanswered the question of how a court should characterize an agreement which indirectly affects prices yet provides substantial economic efficiencies. If all such agreements are illegal *per se*, then Justice Stevens fails to provide a characterization standard which can distinguish between the arrangements in *Broadcast Music* and *Maricopa County*.[345] In short, *Maricopa County* merely states that direct maximum "price fixes" are illegal *per se* and fails to instruct courts as to when and how restraints on price competition should be characterized as "literal," rather than "*per se*", price fixes. The case may thus become more significant for its extension of *Albrecht v. Herald Co.*[346] into the field of horizontal restraints than for any characterization standard it purports to employ.[347]

The majority's use of two apparently conflicting *per se* price fixing standards and the now-uncertain status of *Broadcast Music* make any pronouncement on *Maricopa County*'s ultimate significance premature. The case's parameters will be set by future Court deci-

345. Justice Powell recognized this failure to establish an effective *per se* standard: "One would have expected [the Court] to acknowledge that *per se* characterization is inappropriate if the challenged agreement or plan achieves . . . procompetitive benefits that otherwise are not available. The Court does not do this. And neither does it provide alternative criteria by which the *per se* characterization is to be determined." *Maricopa County*, 102 S. Ct. at 2483-84.

346. 390 U.S. 145 (1968).

347. *See supra* note 256. *See also supra* notes 68-70 and accompanying text.

sions — antitrust is no different from other areas of the law in this regard.

Maricopa County does, however, provide valuable insight into the Court's approach to *per se* characterization. The decision reveals the existence of deep dissention within the Court regarding the characterization process itself. Indeed, a comparison of *Maricopa County*'s two opinions suggests that at present there exists two conflicting approaches to *per se* characterization, with each enjoying considerable support from a substantial portion of the Court. Moreover, the use of two inconsistent *per se* standards in the majority's opinion implies that there is uncertainty within at least one faction of the Court regarding the precise nature and scope of the *per se* characterization process in price fixing cases.

Maricopa County's legacy may well be that it is a microcosm of antitrust's more serious concerns, containing within it the confusion, inconsistency and disagreement found throughout the case law and legal literature in this area. This note has illustrated that the current crisis in antitrust arises from fundamentally incompatible perceptions of antitrust's goals and purpose: *Maricopa County*'s majority opinion representing Harvard School theory, (i.e., "competition" as the sole standard) and the case's dissent advocating the Chicago School's position on *per se* characterization and antitrust policy in general (i.e., consumer welfare as standard).

Unfortunately, we all pay for the ideological struggle the Court finds itself presently engaged in. The Court's issuance of two contradictory decisions within a three year period — *Broadcast Music* and *Maricopa County* — guarantees that confusion and uncertainty will remain in *per se* characterization analysis no matter *which* theory is ultimately accepted in any individual case. Ironically, the *per se* rule, intended to provide certainty and judicial economy, has injected more uncertainty into the law. Judicial resources are also depleted as appellate courts and the Supreme Court are forced to interpret and distinguish cases like *Broadcast Music* and *Maricopa County* in vain attempts to clarify the *per se* characterization process. As long as the Court remains equally divided in its ideological approach to antitrust law, and as long as internally inconsistent opinions such as *Maricopa County* are issued, the current confusion in *per se* analysis will not subside.

ROCCO J. DE GRASSE