Antitrust per se or Rule of Reason: The Right of Engineers to Formulate Bidding Policies as a Learned Profession - National Society of Professional Engineers v. United States

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Recommended Citation
Susan J. Bevan, Antitrust per se or Rule of Reason: The Right of Engineers to Formulate Bidding Policies as a Learned Profession - National Society of Professional Engineers v. United States, 28 DePaul L. Rev. 1141 (1979)
Available at: https://via.library.depaul.edu/law-review/vol28/iss4/12

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ANTITRUST PER SE OR RULE OF REASON: 
THE RIGHT OF ENGINEERS TO FORMULATE 
BIDDING POLICIES AS A LEARNED PROFESSION—
NATIONAL SOCIETY OF 
PROFESSIONAL ENGINEERS V. UNITED STATES

One reason Congress passed the Sherman Antitrust Act was to assure a system that would allocate and utilize resources most efficiently. In pertinent part, the Act prohibits contracts, combinations and conspiracies in restraint of trade. Neither statute nor legislative history adequately defines "restraint of trade." Early decisions narrowly construed the legislation, but a need for flexibility in applying the Act resulted in judicial formulation of a standard of reasonableness to be applied in assessing the impact of an alleged restraint. Thus, certain activities that initially would have been

1. One method by which the Act has achieved maximum economic value for consumers is through the application of per se rules of illegality to combinations that restrain trade. As Professor Bork of Yale University explained:

[D]eviant strains in the law have usually been characterized by a willingness to give operative significance to conflicting aims, such as the welfare of particular producer groups. Failure by both courts and commentators to recognize the existence of separate themes, defined roughly by the values they implement, has been responsible for much of the confusion for which antitrust law is so justly noted.

Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 YALE L.J. 775, 781-82 (1965) [hereinafter cited as Bork].

2. The Sherman Act provides:

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


Since its enactment, there have been few amendments to the Act, the force and effect of the law being substantiated by judicial decisions.


4. Bork, supra note 1, at 785.

5. Id. Further, in drafting the Act, the legislators expressed a preference for free enterprise and unrestricted competition. 21 CONC. REC. 2457, 2459, 2461, 2462 (1890) (remarks of Sen. Sherman); Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1956); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944). Congress also invested the federal courts with a new jurisdiction to create a federal common law of antitrust within the general purview of prior common law. 21 CONC. REC. 2456, 2461 (1890) (remarks of Sen. Sherman); Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911).

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1896), and Standard Oil Co. v. United States, 221 U.S. 1 (1911), are good illustrations of judicial interpretation of the Sherman
prohibited presently may survive judicial scrutiny if found to be neither a per se violation of the Act nor an unreasonable restraint of trade under the rule of reason test. Accordingly, often a defendant will attempt to demonstrate that a challenged restraint is not unreasonable and therefore not a violation of the Act.  

Recently, in *National Society of Professional Engineers v. United States* (NSPE), the Supreme Court affirmed the District of Columbia District Court's finding of a per se violation of the Act. Although the defense argued that the Society, as a learned profession, was entitled to preferential treatment in deference to the members' specialized knowledge, the Court rejected its contention that application of the rule of reason could be advanced in a defense which asserts that, given circumstances peculiar to a profession, competition itself may be unreasonable. The majority then used the case as a forum for a discussion of the rule of reason, but failed to articulate specific standards with which to guide future applications of the rule.

This Note discusses the Court's attempt in NSPE to clarify the rule of reason. It will demonstrate that the Court's treatment of alleged antitrust

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Act. In *Trans-Missouri*, Justice Peckham articulated the rule of reason:

> Proceeding, however, upon the theory that the statute did not mean what its plain language imported, and that it intended in its prohibition to denounce as illegal only those contracts which were in unreasonable restraint of trade, the courts below have made an exhaustive investigation as to the general rules which guide courts in declaring contracts to be void as being in restraint of trade, and therefore against the public policy of the country.

166 U.S. at 328 (emphasis added).

Justice White, ten years after his dissents to the early Peckham opinions articulating the rule of reason analysis, wrote the majority opinion in *Standard Oil*. Justice White said:

> Thus not specifying but indubitably contemplating and requiring a statute, it follows that it was intended that the rule of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

221 U.S. at 60. See note 58 infra. See also text accompanying notes 26-30 infra.

6. 435 U.S. at 689.


8. Id. at 696.

9. Id. at 696-99.

10. Id. at 681. See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), in which the Court stated that the balancing test is the essence of the rule of reason analysis: "The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences." Id. at 59 n.16. It is achieved by "analyzing the facts peculiar to business, the history of the restraint and the reasons why it was imposed." Id. at 692. See also note 27 infra.

In Note, *The Antitrust Liability of Professional Associations after Goldfarb: Reformulating the Learned Professions Exemption in the Lower Courts*, 1977 DUKE L.J. 1047 [hereinafter cited as DUKE NOTE], the author points out that, with respect to the "new" learned profession exemption, "[a]nticompetitive activities, with the possible exception of price fixing, will be sub-
violations, in the learned professions arena, has been reduced to an expeditious characterization of the activity early in the analysis, thus precluding a full examination of any potential benefits. Finally, this Note will indicate that the current trend away from application of the rule of reason to a learned profession has been particularly unjust to those professions. The failure to accord them special treatment prevents a flexible approach to considerations, both pro and anticompetitive, often inherent in pronouncements of an organization.  

FACTS, PROCEDURAL HISTORY, AND NATURE OF THE CASE

The United States brought a civil antitrust action seeking an injunction against the National Society of Professional Engineers (Society) for anticompetitive practices resulting from members' adherence to section 11(c) of the Society's Canon of Ethics. The canon prohibited member engineers from supplying price information to prospective customers, which limited the selection of an engineer to considerations of reputation and background. The Government alleged that this practice suppressed price competition among member engineers and deprived customers of the benefits of free and open competition.
The Society claimed that the canons protected the public interest by minimizing the risks attendant upon inadequate engineering design. The District Court for the District of Columbia characterized the canon's prohibition of competitive bidding as price fixing. Consequently, it held that there was no need to consider the facts that the Society offered in justification of the canon, as price fixing is a per se violation of the Sherman Act. The Court of Appeals for the District of Columbia affirmed the district court, but went beyond a mere examination of the canon and its operation in fact. The appellate court affirmed the district court's decision and stated that mere "price fixing" was not the only practice condemned as a per se violation, but that rather, any "combination formed for the purpose and with the effect of fixing or stabilizing prices is illegal per se." The Supreme Court granted certiorari to consider the petitioner's contention that the district court erred in finding that an ethical canon prohibiting price bidding by engineers was a per se violation of the Sherman Act. The Court affirmed the lower court's decisions not to examine the factual basis for the Society's proffered justification.

THE NATURE OF ANTITRUST ANALYSES

As the Supreme Court recounted in NSPE, there exist two complementary categories of antitrust analyses. Manifestly anticompetitive conduct is

17. Brief for Petitioner at 25. The Society argued that selection of engineers by competence rather than by fee bidding is also in accordance with United States Government policy:

[Regular competitive negotiation ... does not provide an optimum method of procuring [architectural/engineering] services for the Government or anyone else. . . .

[Savings . . . reflected . . . means that the Government would tend to obtain lower quality plans and specifications which could mean high construction and maintenance costs and, generally, lower quality building and other facilities.

Id. See also id. at 23, in which it was pointed out that selection of engineers by competence is a method preferred by the engineers themselves. Those who testified stated that they refused to engage in fee bidding because it was not sound engineering practice. An engineer's authority to make such an observation is based on a premise that engineering is a learned profession, possessing certain characteristics, i.e., "a body of specialized and organized knowledge, a group of practitioners, an established intellectual discipline, and traditional ethical principles." Id. at 7.


19. Id. See text accompanying notes 26-39 infra.


21. Id. at 983.


23. 404 F. Supp. at 461.

24. 435 U.S. at 681.

25. Id. at 684.

26. Id. at 692.
considered a per se violation. Such an activity is not entitled to further examination for any redeeming purpose or motive. \(^{28}\) Courts have no obligation to document the precise harm caused and no anticompetitive legitimate business intention will serve as an excuse. \(^{29}\) Broad per se generalizations about particular commercial practices are based on prior experiences \(^{30}\) that have established with certainty the types of acts to be proscribed. A per se finding of unreasonableness therefore relieves the court of burdensome investigatory requirements.

Where an activity's anticompetitive effects can be determined only after complex analysis, the rule of reason is applied. \(^{31}\) Under this analysis, the court evaluates a defendant's assertion of a legitimate reason for any conduct which is not overtly or admittedly anti-competitive. The determination of the reasonableness of a certain activity may vary according to the industries

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28. United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 489 (1950). The members of the Washington, D.C., Real Estate Board were charged with combining and conspiring, in violation of the Sherman Act, to fix commission rates for their services as brokers in dealing with real property.

29. In Northern Pac. R.R. v. United States, 356 U.S. 1 (1958), the Supreme Court affirmed the district court's judgment that the railroads' preferential routing agreements violated section 1 of the Sherman Act. The railroad required, in deeds to persons who owned land originally granted to the railroad, that commodities produced or manufactured on such land be shipped via Northern Pacific's lines, provided the rates were equal to competing carriers. The Court noted:

[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 without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved ... in an effort to determine ... whether a particular restraint has been unreasonable. ... 


30. In Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977), the Court said that the district court apparently tried to delineate between per se and non-per se situations on the basis of whether or not there was a sale transaction or a non-sale transaction. Id. at 54. It recognized that generalizations of per se rules provide guidelines for the business community and minimize the burdens inherent in rule of reason trials. But it also realized that such advantages do not justify the creation of per se rules. Id. at 50 n.16. If this were so, "all of antitrust law would be reduced to per se rules, thus introducing an unintended rigidity in the law." Id.

31. 435 U.S. at 691. The Court stated that "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." Id.
involved.\textsuperscript{32} Selected categories, such as learned professions,\textsuperscript{33} have been accorded special treatment\textsuperscript{34} in consideration of unique attributes.\textsuperscript{35} As a result, when a professional association has engaged in an activity historically classified as a per se violation, courts have deferred to the professionals' specialized knowledge and have weighed the additional social, moral, or economic factors that could have motivated the professionals in acting as they did.\textsuperscript{36} This has given learned professions the opportunity to present evidence that is subjected to a rule of reason balancing test even though the activity would be otherwise evaluated under per se rules.\textsuperscript{37} Courts concede that this special treatment is warranted because particular state regulations imposed on such professions may be incompatible with certain competitive practices of professional activities.\textsuperscript{38} For example, professional recommen-

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Latitude has also been granted to labor unions in the form of an exemption when the union acts in its own self interest and does not combine with any non-labor group to achieve its end. United Mine Workers v. Pennington, 381 U.S. 657 (1965). Some special interest groups are categorically exempted, such as agricultural and fishing marketing associations. Some practices in banking and insurance industries, and export trade associations are also exempted. C. KAYSEN & D. TURNER, ANTITRUST POLICY 42 (1959). Often public utilities, due to their composition as natural monopolies, will also be given latitude with respect to antitrust regulations. \textit{Id.}

\textsuperscript{33} By definition, professional societies, like trade associations, typically possess inherent barriers to market entry. J. BURNS, A STUDY OF ANTITRUST LAWS 41 (1958). As a group of individuals joined by common interests, such an association's exclusivity is a key factor in accomplishing mutual goals and benefits. Accordingly, many agreements essential to the creation of trade (such as communications within an industry designed to promote its orderly function) are not necessarily illegal simply because they incidentally restrain trade. \textit{Id.} at 39.

\textsuperscript{34} The Supreme Court has noted that it is common to impose restraints upon the conduct of business, such as those applied by the Chicago Board of Trade with respect to its members. Chicago Bd. of Trade v. United States, 246 U.S. 231, 241 (1918). The Court supported the defendant's appeal to shorten the working day or at least to minimize the most stressful period. \textit{Id.} at 241.

\textsuperscript{35} Brief for Petitioner at 7.

\textsuperscript{36} See DUKE NOTE, supra note 10, at 1051.

\textsuperscript{37} See Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626, 632 (9th Cir. 1977). See also note 113 infra.


A justification for the learned profession exemption is found in the underlying purpose of the Act itself: to free competition in business and commercial transactions. See 11 LOY. L.A.L. REV. 183, 196 (1977). The traditional argument for exempting professional activities from antitrust regulation is based on the rationale that competition is inconsistent with the practice of a profession because the goal of professionals is to provide those services needed by the community, rather than to generate profits.
\end{quote}
dations or guidelines that ban solicitation and advertising have been allowed to survive where the public benefit outweighed the competitive harm.\(^{39}\)

In addition to giving special consideration to groups with particular attributes, the Court also has attempted to shape the standards which define a valid defense under the rule of reason. In an early decision, *United States v. Socony-Vacuum Oil Co.*, \(^{40}\) Supreme Court Justice Douglas wrote a "per se" opinion that rejected as a defense a need to eliminate "competitive evils."\(^{41}\) He stated that the law did not permit an inquiry into the reasonableness of price fixing agreements, despite an asserted economic justification.\(^{42}\) Similarly, the Court rejected a rule of reason analysis in *NSPE*, and noted that the rule could not be invoked to justify activities that suppress competition.\(^{43}\) The *Socony* and *NSPE* decisions indicate that a challenged restraint that has an economic impact, such as on prices, will be scrutinized more closely at the *initial* labeling of the activity. Hence, if an activity is characterized as a per se violation at the outset, a defense of reasonableness will not stand, and a rule of reason analysis will not be applied.\(^{44}\)

**The Supreme Court's Analysis in NSPE**

Before determining which of the two categories of antitrust analysis would be applied, the *NSPE* Court attempted a threshold determination as to whether the Society's canon amounted to price fixing.\(^{45}\) An agreement to fix prices is defined for purposes of antitrust analysis as an agreement that "interfer[e] with the setting of price by free market forces."\(^{46}\) Such an agreement is illegal on its face and is a traditional per se violation of section 1 of the Sherman Act.\(^{47}\) In *NSPE*, although the Court rejected the Government's contention that the canon amounted to "price fixing as such,"\(^{48}\) it

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This defense was pleaded in *Goldfarb*, in which a wholesale exemption for the legal profession was requested. In an often-quoted statement from *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952), the Court said: "[I]n some instances the State may decide that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." *Id.* at 336.

39. See Ill. Rev. Stat. ch. 38, § 60-5(12) (1977). The original application of the rule of reason was perceived by Justice Peckham to outlaw only those agreements having as their main purpose the suppression of competition and to uphold those agreements where the elimination of competition was merely collateral or incidental to a legitimate end the parties were pursuing. Bork, *supra* note 1, at 789-90.

40. 310 U.S. 150 (1940).
41. *Id.* at 220.
42. *Id.* at 224 n.59.
43. The Society argued that the restraint on price competition ultimately inures to the public benefit because it prevents inferior work and insures ethical behavior. 435 U.S. at 693-94.
44. See note 54 infra.
45. 435 U.S. at 693-94.
47. DUKE NOTE, *supra* note 10, at 1062.
48. 435 U.S. at 692 (emphasis added).
found that the agreement by which engineers refused to discuss prices was obviously anticompetitive. Therefore, although the Court did not place the activity strictly within the confines of the per se category of price fixing by defining the engineers' activity as price fixing, it nevertheless affirmed the lower courts' findings of a per se violation and rejected any further considerations that a rule of reason analysis would entail. By finding the canon obviously anticompetitive and in restraint of trade on its face, the Court relieved the Government of the evidentiary burden of demonstrating the anticompetitive character of an agreement through the "elaborate industry analysis," which the rule of reason balancing test requires. The result is that the avoidance of extensive proof requirements correlativelly lessens the administrative burden on the courts.

In holding that the Society's agreement reflected an actionable restraint of trade "on its face," the NSPE Court substantially lessened the Government's initial burden. The Society argued that the lower courts' perfuntory determinations resulted in an incorrect application of the appropriate antitrust standard. The court of appeals affirmed the district court's use of per se rules that focused on those practices that themselves work to restrain trade, as opposed to considering only the effects of the particular re-

49. Id. It is to be observed, however, that the Court tested the activity according to price fixing standards. This is significant in supporting a contention that it was seeking an expeditious determination of the controversy. Clearly, the conduct could have been considered a concerted refusal to deal, which is also a per se violation. However, not all group refusals can be classified as having as their purpose the increase of the group's profits. There could be legitimate economic aims requiring a judicial examination to assess any other objectives other than increased profits, such as social or moral considerations.

The leading case on group refusals to deal is Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941). Textile manufacturers solicited agreements from buyers of materials that they would not deal in textiles that copied designs of other members of the Guild. The Court upheld the findings of the Federal Trade Commission. The FTC had concluded that the practices of the combination constituted an unfair method of competition in violation of the Sherman Act.

50. 435 U.S. at 692.

51. Antitrust actions are often encumbered by each side's presentations to either establish or refute the anticompetitive character of the challenged agreement. The difficulty of establishing this element often causes an action to fail.

52. 435 U.S. at 696. If a per se violation is found, the evidence requirements are eliminated. There are three fundamental per se violations of the Sherman Act: price fixing, market division, and group refusals to deal. The Court pointed out that while the Society was not guilty of price fixing as such, the agreement effectively acted as a ban on competitive bidding which is illegal. 435 U.S. at 692, quoting United States v. Container Corp. of America, 393 U.S. 333, 337 (1969), for the proposition that "an agreement that 'interferes' with the setting of price by free market forces' is illegal on its face."

53. Brief for Petitioner at 50.

54. Several cases have been decided solely on the character of the restraint. These generally involve per se violations of antitrust laws. For example, in United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950), the Court stated:

It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a
The Supreme Court has underscored the distinction between the categories of an antitrust analysis, and has agreed that it is the result of the restraint that is at issue, not the method. It affirmed the finding of a per se violation, however, on the basis that the ban on competitive bidding was overtly anticompetitive. It then followed a line of precedent that has refused to honor agreements effecting a direct and immediate restraint on interstate price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve.

In American Medical Ass'n v. United States, 317 U.S. 519 (1943), the Court found the AMA guilty of a conspiracy to restrain trade in violation of the Sherman Act. The AMA had expelled members who had participated in a free clinic, contrary to their rules of ethics. The Court held that it was irrelevant whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical or hospital services in the market. Id. at 529.

55. In National Soc'y of Professional Eng'rs v. United States, 555 F.2d at 982, the court of appeals held that sound antitrust doctrine does not require the balancing of benefits accruing from competitive restraints in a cost-benefit analysis. Usually, in examining the end result, as opposed to the method of restraining, the court will focus on the actual harm suffered by the consumer.

56. In Standard Oil Co. v. United States, 221 U.S. 1 (1911), the Court noted: "[T]he real point is not the instrumentality or the scheme used to suppress the competition, but whether competition is thus suppressed and trade restrained and monopolized." Id. at 23. The Court found that combinations of businesses that refined crude oil and shipped the products interstate were an unreasonable restraint of trade. Id. at 75-77. The Court held that the trust agreement had the effect of forming a monopoly, which had deleterious results on competition in violation of the Sherman Act. Id. The remedy was dissolution of the combination by court order.

Justice White's classic enunciation of the main premise of the rule of reason analysis was presented in Standard Oil. Although the Court found that the combination could not withstand the Sherman Act challenge, the decision survived as the framework for application of the balancing test.

As the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provisions necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated.

Id. at 60.

Justice Harlan's dissent in this case emphasized Justice Peckham's literal interpretation requirement. If the courts were allowed to determine which contracts in restraint of trade were illegal, and which were reasonable and therefore legal, judicial legislation would result. Id. at 88.

In NSPE, the Court tried to reconcile the method and result approaches by saying that the rule of reason does not mean that any argument may support a challenged restraint because it is in the "realm of reason." 435 U.S. at 688. Rather, the Court stressed that the true function of the rule is to focus on the impact the restraint has on competitive conditions. Id.
commerce by suppressing competition. The Court also noted that where an agreement's competitive effect can be ascertained only after a complex analysis, the rule of reason would be applied. The decision demonstrated that the mere existence of negative effects of competition is not sufficient to mandate the application of the rule's balancing test.

Additionally, although the Society's status as a learned profession apparently was instrumental in garnering review by the Supreme Court, the Court declined to consider further the Society's proffered justifications. The district court refused to consider the possible consequences with which the Society was faced in deciding whether to adopt the canons. The Supreme Court summarily determined that the lower court was correct in refusing to consider any factual basis for the Society's justification before rejecting it. The majority apparently was not influenced by the status of the engineers, and held that notwithstanding the engineers' rank as a learned profession,

57. In Goldfarb v. Virginia State Bar, 421 U.S. 773, 785, 786 (1975), the Court conceded that there may be legal services that have no nexus with interstate commerce and are therefore outside the Sherman Act. This Note will not discuss the interstate character of an activity causing it to fall initially within the scope of the Sherman Act, as the Society did not pursue it as a defense. Generally, however, the rule is that congressional power to regulate exists when conduct exerts a substantial economic effect on interstate commerce. In Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626, 629 (9th Cir. 1977), in a discussion of dental fee schedules, the court noted that an interstate violation must be found. The validity of a fee schedule may depend upon its relation to activities having only a de minimis effect upon commerce. As with other learned professions, however, "[f]requently the practice of law entails the making of decisions in one state which significantly affect commercial transactions in others." Branca & Steinberg, Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb, 24 UCLA L. REV. 475, 479 (1977).

In United States v. National Soc'y of Professional Eng'rs, 404 F. Supp. at 459, the court dismissed the defense that the engineer's activities did not fall within the scope of the Act by not having a sufficiently interstate personality. It said that, due to their nature, engineering services are at the "very backbone of the major portion of the nation's commerce." Id. at 460.

58. In Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), Justice Peckham stated that it was not enough that the mere tendency of the contract worked to restrain competition; he would uphold those contracts in which the elimination of competition was only collateral and incidental to a legitimate end the parties were pursuing:

[W]here the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition among them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made.

Id. at 244. In Addyston, the defendants entered into an agreement prohibiting competition between them within a specified area with regard to the manufacture and sale of cast-iron pipe. The stated purpose of the combination was to enhance price. Id. at 243. Justice Peckham established price fixing and market divisions as per se offenses against the antitrust laws. See Bork, supra note 1, at 783.

59. 435 U.S. at 697.

60. Id. at 693-94.

61. Id. at 681.

62. Id.
the defense relied upon by the Society could not support a rule of reason analysis. In reproach of the Court's failure to consider the engineers' learned standing, Justice Blackmun asserted in a concurring opinion that "there may be ethical rules which have a more than *de minimis* anticompetitive effect and yet are important in a profession's proper ordering." Thus, a restraint practiced by members of a learned profession might survive scrutiny under a rule of reason analysis even though the same restraint would be viewed as a violation of the Sherman Act in another context. Justice Blackmun also found that the Society's ethical canon was overly broad. He was unable, however, to approve the Court's intimation that "any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act." Although he did not indicate that a rule of reason had to be applied, he stated that *Goldfarb* left the Court broader flexibility in applying the Act to self-regulating professions than was exhibited by this decision.

The Society contended that the canon's price discussion prohibition was reasonable because competition among professional engineers was contrary to the public interest. Specifically, the Society maintained that the competitive pressure resulting from awarding work to the lowest bidder would compel engineers to sacrifice quality and safety precautions, thereby jeopardizing public health, safety, and welfare. The Society suggested that a rule of reason analysis required the examination of an activity, although it may have an anticompetitive facade, for potential benefits.

63. Id.
64. Id. at 700 (Blackmun, J., concurring).
65. Id. at 699.
66. Id.
67. Id.
68. Id. at 684. See also notes 32, 33, & 38 supra.
69. Id. at 685.
70. Id.
71. Brief for Petitioner at 28. The Society had asked the Court to consider its evidence demonstrating that to allow competitive bidding on projects affecting the public sector (and hence public safety) would cause engineers to underbid each other to a point where subsequent compliance with the quoted price would result in inferior workmanship and the use of substandard materials. Similarly, the "Call" rule of the Board of Trade prohibited members from bidding at a price other than that established on the close with respect to transactions concerning commodities "to arrive" (i.e., those in transit to Chicago), during the hours between the closing of one business day and the opening of the next. See Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). The "true test" of illegality was first applied here by Justice Brandeis and has been used recently in Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977).

Historically, antitrust cases have examined the activities engaged in by the offending party, as opposed to any meretricious consequences that might result. See, e.g., Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977); *Goldfarb* v. Virginia State Bar, 421 U.S. 773 (1975); *Boddicker* v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir. 1977). In *Goldfarb*, the Court decided that the Sherman Act applied to certain anticompetitive conduct by lawyers and denied the Virginia Bar an exemption for professional fee control activities. 421 U.S. at 493. The *Boddicker* court stated that the challenged practice must serve the public interest in order to overcome its anticompetitive effect. 549 F.2d at 632. Finally, in *Continental T.V.*, the Court held
The Court rejected the defense and held that the purpose of a rule of reason analysis is to form a judgment about the competitive significance of a restraint, not to decide whether a policy that affects competition may have legitimate public or industrial interests at its core. While the Court noted that special considerations often are afforded learned professions such as the Society, it did not specifically discuss the limits and relevant considerations of granting an exemption. The Court's conclusion suggested that the Society could adopt some other ethical guideline to achieve the desired objective of avoiding deceptively low bids.

Finally, it is paradoxical that the Court acknowledged that professional services and the nature of their competition differ from other business serv-

that a departure from the rule of reason analysis must be based on demonstrable economic effect. 433 U.S. at 58-59.

72. Brief for Petitioner at 21. The engineers argued that compliance with the Government's request would increase engineering costs. Because several engineering firms would be required to commit much of their resources to complete a bid, covering the costs of such efforts would necessitate charging higher prices.

73. 435 U.S. at 692.

74. See, e.g., Chicago Bd. of Trade v. United States, 246 U.S. 231, 240-41 (1918). The Court stated that it is common to impose restraints upon the conduct of business as the Board of Trade did with respect to its members. Id. at 241. In this case, the Court supported an appeal to "shorten the working day or, at least, limit the period of most exacting activity." Id. The Court also considered the motive behind the restraining activity: "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." Id. at 238.

75. Id. at 696, citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975). The Goldfarb Court, however, left room for special treatment of learned professions:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

421 U.S. at 788 n.17.

The Goldfarb "situation" concerned the inability of individuals in need of a title examination, a prerequisite to concluding a real estate transaction, to find a lawyer who would perform the service for a lower fee than that quoted in the recommended fee schedule published by the county bar. The Court found that the industry-wide adherence constituted price fixing, and that status as a learned profession did not automatically exempt the bar association from the scope of the Sherman Act. Id. at 781, 783, 787. This case marks the commencement of an apparent trend to make learned professions vulnerable to the requirements of compliance with antitrust rules under the Sherman Act. See generally Bates v. State Bar, 433 U.S. 350 (1977); Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir. 1977). For a discussion of NSPE's impact on the learned profession exemption, see Note, 62 MARQ. L. REV. 260 (1978).
ices, yet it required that the same standards be met by the engineers as any other group, professional or not, that perpetrates restraints on trade. The difficulty of reconciling the need for according learned professions special considerations with the need to circumscribe economic disparities caused Justice Blackmun to question whether, in light of their unique personalities, enough latitude has been given to professional associations with respect to antitrust litigation.  

**COMMENTS AND CRITICISMS**

The analysis undertaken in *NSPE* to determine whether the engineers' ethical standards of conduct constituted Sherman Act violations represents the Court's disposition to apply a per se approach rather than a rule of reason analysis when reviewing intraprofession regulations. Such an approach, by characterizing restrictive activities in per se terms, favors an expeditious judicial determination, reduces the plaintiff's initial burden of proving a violation and limits the available defense. Alternatively, the rule of reason, which has enjoyed a sporadic popularity in its application to learned professions, is currently in disfavor with the Court, due to the extensive evidentiary requirements it entails. The seminal case contouring the rule of reason analysis is *Chicago Board of Trade v. United States*, and it remains convincing precedent for the application of the rule to cases involving the pronouncements of organizations in specialized professions.

76. 435 U.S. at 699.
77. Id. at 696. The Court indicated that the ethical canon effectively excludes competition, because there is adherence by virtually all engineers. Id. The Society had specified that the canon was appropriately limited only to those projects where the public would be endangered if the principle was disregarded. Brief for Petitioner at 15. They argued further that competition was not eliminated, because a client dissatisfied with the fee proposed is free to choose and negotiate with any additional number of engineers until the client and the engineer reach satisfactory understanding. Id.
78. Justice Blackmun questioned whether the Court has left enough room for a "realistic application of the Sherman Act to professional services." Indeed, it is this question that the Court has yet to resolve. 435 U.S. at 701 (Blackmun, J., concurring).
79. See Bork, *supra* note 1, at 782.
80. *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918). Justice Brandeis' decision stands as a basis for the determination of antitrust cases on a rule of reason analysis:

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the 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.

*Id.* at 238.
The Society maintained that the benefits required to be shown under a rule of reason would have been discovered if the Court had adhered more closely to the test formulated by Justice Brandeis in Chicago Board of Trade. There, the Court upheld a rule prohibiting Board of Trade members from making purchases between trading sessions at a price other than that established by the closing bid. The rule was found to be a reasonable regulation, not inconsistent with the Sherman Act, for it merely restricted the period of price-making and affected only a small part of all grain transactions. Justice Brandeis indicated that private regulation of competition may be legitimately directed at both economic and non-economic goals. He suggested that courts should consider a number of relevant facts such as the nature, effect, history, and reason for adopting the restraint and the purpose or end sought. Additionally, he required an examination of the facts peculiar to the business and its condition before and after the restraint was in effect, as well as the evil believed to exist.

Similarly, NSPE represents a situation whereby the restrictive rule promulgated by an association was ostensibly in the public interest because its objective was to minimize the risk that inferior engineering work would endanger safety. The Chicago Board of Trade defense argued that their rule not only enhanced competition, but that it also helped to break up a monopoly among Chicago warehousemen. The case illustrated that a practice that superficially restrained trade could, when examined in light of surrounding circumstances, actually promote competition.

Although the Society relied on the Chicago Board of Trade decision in defense of its canon, it was nonetheless denied the balancing test because its affirmative defense confirmed rather than refuted the anticompetitive purpose and effect of the agreement. The NSPE decision demonstrates that the Court can limit its examination of alleged anticompetitive restraints by characterizing or labeling an activity early in the analysis. This restrictive definitional treatment absolves the Court from the responsibility of applying the rule of reason and results in an immediate determination of the controversy.

Recent Decisions in the Law

NSPE is preceded, however, by contemporary decisions revealing a trend to limit the availability of the rule of reason. Recently, codes prescribing

81. Id. at 237.
82. Id. at 235.
83. Id. at 240.
84. Id. at 238.
85. 435 U.S. at 681.
86. 246 U.S. at 238.
87. Id.
88. 435 U.S. at 693.
ethical behavior among members of learned professions have become susceptible targets for antitrust attacks. In addition to curtailing the use of the rule of reason, several of these cases also have restricted the availability of the learned professions exemptions.

The landmark case of Goldfarb v. Virginia State Bar\(^9\) established the pattern for future antitrust determinations involving learned professions.\(^91\) Although the Goldfarb Court did not apply a rule of reason analysis, neither did it eliminate completely the impact of the learned profession exemption thereunder.\(^92\) Goldfarb did, however, indicate that activities directed primarily at prices (such as fee controls) were outside the protection afforded by the learned profession exemption.\(^93\) Goldfarb, along with NSPE and Bates, proves that few exceptions and deviations from the Sherman Act are tolerated by deferring to the "heavy presumption against implicit exceptions."\(^94\) The cases also reinforce the notion that a valid defense under a rule of reason analysis requires a careful and accurate assessment of the industry involved.\(^95\)

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92. Id. See also DUKE NOTE, supra note 10, at 1047, 1049.
94. The NSPE Court noted that sound antitrust doctrine does not require an examination of any benefits that may accrue from competitive restraints. 435 U.S. at 696-97. It stated that "[e]ven assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." Id. at 695. Instead, an argument that competition should be balanced against the public good is properly addressed to Congress, and therefore it does not warrant a rule of reason analysis.

Conversely, Justice Holmes, in Northern Sec. Co. v. United States, 175 U.S. 211 (1899), where Justice Peckham rejected the contention that some restraint of competition might actually enhance the economic good to the benefit of the public. He stated that it did not matter that trade continued and that contracts were made, albeit at higher prices, because the effect was such that there was a restraint on trade at the expense of competition because of an advanced price. Id. at 245.

With the rule of reason analysis, the courts make two inquiries: first, whether competition is actually increased as a result of the "restraint," and the effect the restrictions actually have on the industry; and second, whether it is intended to capitalize distribution, or rather promote the manufacturer's own interests. Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U. Chi. L. Rev. 1, 16-17 (1977). Posner indicates that the attempt to apply a rule of reason analysis is an exercise in futility because few cases have utilized the analysis as the determinative legal standard. Id. at 14.

The NSPE decision apparently adopts this belief. By rejecting the rule, the Court ignored the possibility that the activities could, in fact, enhance competition, as the engineers claim. The engineers point out that to require price bidding on projects will actually increase costs (hence prices), an anti-competitive result. Brief for Petitioner at 21. However, in order for this result to surface, the court would need to examine the evidence under a rule of reason analysis.
Goldfarb tested the Lawyer's Code of Professional Responsibility, and the opinion articulated a basis for special treatment of learned professions under antitrust laws. The Virginia State Bar lost on appeal to the United States Supreme Court. The Court held that industry-wide adherence to a recommended minimum fee schedule constituted price fixing. By referring to a mandatory fee schedule as price fixing, the Court's semantic delineation automatically placed the activity within the scope of per se definitional treatment.

Similarly, in United States v. Container Corp. of America, the Court characterized as price fixing an activity that was merely an agreement to exchange price information. The Court applied a per se label to the reciprocal exchange of price information between competitors in the corrugated container industry. It held that because there were few sellers in the market, the exchange of such data, by stabilizing prices, had an anticompetitive effect. The concerted action was held to have established a combination or conspiracy in violation of the Sherman Act, even though no overt agreement to adhere to a price schedule was present.

The trend continued with the decision in Bates v. State Bar, where the Court held that the Arizona State Bar Association could not punish individual lawyers who violated a state supreme court disciplinary rule prohibiting the publication of advertisements. The Bates Court held that the
practice of preventing individuals from advertising had a tendency to limit competition. The Court’s acknowledgement of a state action exemption for the bar association exemplified that, although no per se violation of the Sherman Act was found, there still remained a reluctance to engage in a complex rule of reason analysis.

Continental T.V., Inc. v. GTE Sylvania, Inc., is another case analogous to NSPE. While the Court stressed the importance of the effect of the restraint, its analysis focused on classifying the method of restraint. The questioned activity was allowed to stand in Continental T.V., but the decision indicated that a full rule of reason analysis was curtailed as a result of the Courts’ initial finding that the restraint was a vertical one reducing intrabrand competition. This illustrates that the court preferred an expeditious determination of the antitrust complaint in order to avoid the extended evidentiary requirements of a complete rule of reason analysis.

Finally, in Boddicker v. Arizona State Dental Association, tying arrangements between local dental associations and the national association were challenged by dentists who did not want to join the national group. The ninth circuit court first held that the activities in question were subject to a Sherman Act analysis, then it dealt with the question of the applicability of the learned profession exemption. Because it was not obvious to the court that the arrangements at issue were designed to improve dental services to the public, the case was remanded for further consideration of the

106. Id. at 384.
107. Id. at 362-63. To be shielded from antitrust scrutiny under the state action doctrine, a state must compel the restrictive activity. The activity must be completely under the authority of the state and supervised by state officials. Dougherty, An Antitrust Perspective on the Legal Profession, 29 OKLA. L. REV. 638, 641 (1976).
108. 433 U.S. 36 (1977). In Continental T.V., the Court applied a rule of reason analysis to police anticompetitive effects resulting from non-price vertical restrictions. Id. at 59.

In overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), Continental T.V. criticized the Schwinn decision for “formalistic line drawing.” The Continental T.V. Court held that any departure from the rule of reason standard had to be based upon a demonstrable economic effect. 433 U.S. at 58-59. In Schwinn, the Court found illegal a vertical distribution restraint whereby a retailer was required to purchase bicycles only from a Schwinn-approved territorial distribution scheme.
109. Id. at 58-59.
110. Id. at 54. The Court affirmed the holding of the Ninth Circuit Court of Appeals, that nonsale vertical restrictions should be analyzed under a rule of reason test. Id. at 59. The result provides some consideration for the possible benefits of interbrand competition. Id. at 54.
111. 549 F.2d 626 (9th Cir.), cert. denied, 434 U.S. 825 (1977).
112. A tying arrangement exists when a seller conditions the sale of a product upon a buyer’s agreement to purchase additionally needed items that are also available from other suppliers. Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 5-6 (1957).
113. Boddicker v. Arizona State Dental Ass’n, 549 F.2d 626, 630-32 (9th Cir. 1977). The court relied on Goldfarb to determine the appropriateness of exempting the practice of dentistry from the Sherman Act.
114. Id. at 632.
public service aspect and the extent to which the activities suppressed com-
petition.115

The foundation of the Boddicker decision is that “a particular practice . . .
must serve the purpose for which the profession exists, to serve the public;
. . . those which only suppress competition between practitioners will fail to
survive the challenge.”116 The court’s implications with respect to the
interaction of learned professions and the Sherman Act suggested the proc-
ess by which the Supreme Court could have analyzed subsequent decisions.
Boddicker can be interpreted to mean that although a learned profession is
not necessarily exempt from the Act, it will be entitled to special treatment
with respect to allegedly anticompetitive activities.117 When a challenged
restraint is found to be a per se violation, the rule of reason should be
applied to provide extra consideration of professional motives.118 As NSPE
has shown, however, this approach has not been implemented, and the
ninth circuit, by compelling the application of the rule of reason balancing
test, stands as the exception to the trend.

Thus, the relief that the rule of reason provides has been denied by the
Court’s cursory approach to antitrust complaints in recent years. By rejecting
the well-reasoned decision of the Chicago Board of Trade, the Court pre-
vents a full examination of the potential benefits that a learned profession
can provide if they are given an opportunity to present evidence which jus-
tifies their activities.

Impact

The most recent case dealing with the practices and policies of learned
professions, NSPE demonstrates the current trend to narrowly interpret the
Sherman Act where learned professions are involved. Finding a per se viola-
tion early in the scrutiny of a challenged restraint allows the Court to make
an immediate determination of the case, and thus to avoid the more probing
rule of reason analysis. The use of a per se language to define a challenged
activity adds a new dimension to antitrust litigation involving learned profes-
sions and their right to self regulation.119 The fact that NSPE involved a
learned profession and a restraint of trade that was found to be a per se
violation is significant. It indicates that the Court, by failing to apply a rule
of reason analysis, ignored the value of any noneconomic benefits that such

115. Id. The court reversed a summary judgment and remanded so that further proceedings
could determine the validity of the defendant’s claim that the arrangements in question actually
did promote improved dental services to the public.
116. Id.
117. See Duke Note, supra note 10, at 1051.
118. Id.
119. Id. at 1044, 1047. The restraining activity must not relate to price control or stabiliza-
tion, and the regulated profession must not be commercial to qualify for treatment under the
learned profession exemption.
an analysis would afford. The use of the per se approach denies a full evaluation of the challenged activities. Further, the value of the special treatment once accorded the professions will be completely nullified if the Court refuses to weigh any additional factors that may have been considered at the time the ethical guidelines were formulated.

In *NSPE*, the district court held that application of the rule of reason would undermine the *Goldfarb* denial of total or partial exemptions for learned professions.\(^{120}\) Apparently, neither the nature of an occupation nor any of its alleged public service aspects will guarantee sanctuary from the Sherman Act.\(^ {121}\) Although the *NSPE* Court articulated a rule of reason analysis, the affirmation of a per se violation left the parties in the same relative positions as in the lower courts.\(^ {122}\)

To determine the status of learned professions and their entitlement to either a rule of reason analysis or an exemption, evaluations should focus on grounds other than price. The *NSPE* Court, however, relied on analysis by analogy with previous cases that necessarily focused on price. Addressing only the price fixing aspects of a learned profession's challenged restraint leads to spurious resolutions of these cases because any restraints that can be categorized as price fixing will generally result in a finding of a per se violation.

The application of broad per se principles in antitrust law severely inhibits the learned professions' freedom to formulate self-regulating ethical norms. Although the *NSPE* appellate court indicated that it did not intend to imply that there was no room in antitrust law for ethical rules of practice for learned professions, it refused to sanction any rule that promoted anticompetitive conduct.\(^ {123}\) The *NSPE* decision not only advances the trend favoring tighter control over the deviations that have been permitted under a rule of reason analysis, but it also implicitly enlarges the scope of activities that are to be regulated by the Sherman Act.

**CONCLUSION**

In *NSPE*, the Supreme Court was presented with a defense asserting that anticompetitive practices engaged in by a learned profession could be justified under an application of the rule of reason. The Court denied the appli-

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\(^{120}\) United States *v.* National Soc'y of Professional Eng'rs, 404 F. Supp. at 461.

\(^{121}\) *Id.* Congress did not intend the broad interpretation of the Sherman Act exemption that would result if applied indiscriminately to learned professions. It may be urged that competition is inconsistent with the practice of a profession, as the goal of a profession is to provide services to the community. This illustrates the *Goldfarb* distinction between trades, businesses, and other occupations. Such a differentiation is a prerequisite to a Sherman Act analysis. The Sherman Act covers commercial activities, defined as those activities done in exchange for money, which includes most professional activities. *Duke Note, supra* note 10, at 1055.

\(^{122}\) Brief for Petitioner at 40.

\(^{123}\) United States *v.* National Soc'y of Professional Eng'rs, 555 F.2d at 982.
cation of the rule, and thus furthered the trend to analyze learned professions' allegedly anticompetitive activities within the narrow confines of per se terminology. Such an approach threatens the flexibility that is needed in determining which activities have detrimental effects on competition.

In Boddicker, although the Ninth Circuit Court of Appeals laid a foundation for according learned professions special treatment in traditional per se areas, the Supreme Court rejected this more liberal approach when it decided the NSPE controversy. The Court required a strict interpretation of the Sherman Act, yet it failed to illustrate standards by which learned professions could formulate guidelines for their standards of ethics. Hence, the decision will cause learned professions to review the nature and extent of any practices to which the entire profession adheres, yet it will not enable them to fully ascertain those practices that will survive judicial scrutiny.

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