

GASOLINE PRICES AND ANTITRUST LAW: FIXING THE PRICE-FIXING DILEMMA OF SHERMAN ACT §1 ANALYSIS

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I. INTRODUCTION

Americans are frustrated because they are feeling the economic pinch that comes with high gasoline prices and because they cannot get to the bottom of why prices are so high. People disagree about whom to blame for high gasoline prices and about how to remedy the problem. Some blame increased demand for oil combined with limited supply.¹ Others blame environmental regulations.² Still others blame collaborations between major oil companies.³ In fact, recent news that one major oil company realized record annual profits has added to the public's frustration⁴ and has led Congress to question oil company executives about the impact of their collaborations on gasoline prices.⁵

If inappropriate collaboration between major oil companies is to blame, then antitrust law is the vehicle for exposing the culprits and remedying public frustration. Unfortunately, the U.S. Supreme Court's antitrust jurisprudence has failed to fuel this vehicle. The Court's scheme for interpreting antitrust law has steered away from Congress' purpose in enacting antitrust laws. The Court's scheme is ambiguous and has left lower courts without a roadmap showing how to navigate antitrust disputes. The Supreme Court needs to tune-up its antitrust jurisprudence by adopting a test that is flexible enough to apply

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¹ See, e.g., Christopher Helman, *Why \$45 Oil Is Good for You*, FORBES, Oct. 18, 2004, at 90, 90-96 (blaming rising gasoline prices on increased demand and limited supply).

² See, e.g., Public Citizen, *Mergers, Manipulation and Mirages: How Oil Companies Keep Gasoline Prices High, and Why the Energy Bill Doesn't Help* (March 2004), <http://www.citizen.org/documents/oilmergers.pdf> (disagreeing with those, including the Bush administration, who claim that environmental regulations are the true blame behind high gasoline prices) [hereinafter *Mergers, Manipulation and Mirages*].

³ See *id.* (blaming rising gasoline prices on the fact that "the largest oil companies have merged with one another, creating just a handful of oil monopolies that control significant chunks of the American oil and gas markets.").

⁴ See Chris Isidore, *Exxon Mobil Sets Profit Record: Nation's No. 1 Oil Company Reports Larger than Expected Jump in 4Q Income to Cap Record Year*, CNNMONEY.COM, Jan. 30, 2006, http://money.cnn.com/2006/01/30/news/companies/exxon_earnings/.

⁵ See Jad Mouawad, *A Senate Panel Interrogates Wary Oil Executives*, N.Y. TIMES, Mar. 15, 2006, at C4.

to a wide variety of antitrust disputes, yet certain enough to guide lower courts towards consistency.

In February 2006, the Court decided *Texaco Inc. v. Dagher*.⁶ In *Texaco v. Dagher*, plaintiff service station owners alleged that Shell and Texaco, who had formed a joint venture, fixed gasoline prices in violation of antitrust law.⁷ Though the district court granted defendants' motion for summary judgment, the Ninth Circuit reversed, finding that defendants' actions constituted price-fixing, a per se violation of the Sherman Act §1.⁸ The Supreme Court framed the issue in *Texaco v. Dagher* as a joint venture "setting" a price for its product.⁹ In an opinion written by Justice Thomas,¹⁰ the Court found that the joint venture's act of setting a price for its product could not be illegal per se.¹¹

The facts giving rise to *Texaco v. Dagher* exposed the problems with the Court's antitrust jurisprudence and provided the Court an opportunity to fix those problems. Since the Court did not fix its antitrust jurisprudence in *Dagher*, the public's frustration over high gasoline prices and judicial uncertainty about Sherman Act §1 analysis continues.

As evidenced in *Texaco v. Dagher*, the Court's current scheme often leads to one of two outcomes: first, the Court's scheme may discount a defendant's legitimate justifications for alleged Sherman Act violations; and second, the Court's current scheme may dissuade a plaintiff from pursuing claims that could hold major corporate defendants accountable for potential Sherman Act violations.¹² These ineffective outcomes have left some people frustrated because they suspect that inappropriate oil company collaborations have led to high gasoline prices.¹³ Under the current interpretive scheme, oil companies may get by with fixing gasoline prices in such a way that would have anticompetitive effects.

The Court could fix this problem by adopting a modified scheme to analyze Sherman Act §1 disputes. This modified scheme should ease the plaintiff's burden of proof without discounting the defendant's legitimate justifications.

Part II of this Note briefly traces the historical development of Sherman Act §1 jurisprudence. This section explores the Court's development of two

⁶ 126 S. Ct. 1276 (2006).

⁷ *Id.*

⁸ *Id.*

⁹ *See id.*

¹⁰ All other members of the Court joined the opinion, except that Justice Alito, who took no part in the consideration or decision of this case.

¹¹ *Texaco*, 126 S. Ct. at 1281.

¹² *See* Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 793-94 (1999) (Breyer, J., dissenting) (finding that the traditional rule of reason requires an antitrust plaintiff to present every possible fact and theory, and that the case never reaches a conclusion); Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 IOWA L. REV. 1137, 1153 (2001) ("The quick look is more favorable to plaintiffs than the traditional rule of reason. Because it is so difficult to make a prima facie case under the rule of reason, a defendant rarely has to prove a justification for its conduct.").

¹³ *See, e.g.*, *Mergers, Manipulation and Mirages*, *supra* note 2 (blaming rising gasoline prices on the fact that "the largest oil companies have merged with one another, creating just a handful of oil monopolies that control significant chunks of the American oil and gas markets").

methods for analyzing §1 disputes and compares the application of these methods in an older line of Supreme Court decisions, from 1940 through 1969, with a more recent line of decisions, from 1979 to 1999. Part III of this Note examines the recent analysis of the Supreme Court and the Ninth Circuit in *Texaco v. Dagher*. Part IV proposes a modified §1 test and argues that the Court should explicitly adopt the modified test.

II. BACKGROUND

The U.S. Supreme Court has struggled with the language of the Sherman Act throughout the twentieth century. At the beginning of the century, the Court provided certainty by interpreting the statute's language literally. By the end of the century, the Court had created confusion by applying multiple tests to various antitrust disputes, depending on the factual context of each dispute.

A. Early History

The Sherman Act provides in §1, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."¹⁴

Congress enacted the Antitrust Act, as the Sherman Act was originally called, in 1890. Shortly thereafter, in 1897, the Court began wrestling with the statute's language in *United States v. Trans-Missouri Freight Association*.¹⁵ The Court construed the statute's language strictly, concluding that the word "every" gave the statute broad application.¹⁶ Under this broad application, the Court concluded that disputed price agreements between competing railroads were illegal regardless of the intentions of the railroad companies.¹⁷

But as early as 1918 the Court began to admit that this broad application of the statute's language was problematic.¹⁸ In *Chicago Board of Trade v. United States*, the Court held that if it read §1 of the Sherman Act literally, then every contract would be found to be a violation because every contract is an agreement that restrains trade.¹⁹ In *Chicago Board of Trade*, the Court found that a Chicago grain market rule, which literally restrained trade by regulating

¹⁴ 15 U.S.C. § 1 (2000).

¹⁵ 166 U.S. 290, 327-28 (1897).

¹⁶ *Id.* However, Justice White, in his dissenting opinion, argued for a narrower application, reasoning that the Antitrust Act was a codification of longstanding common law that included the rule of reason. Justice White concluded that the original statute's language "every restraint of trade" must be construed to exclude reasonable contracts. *Id.* at 343-54 (White, J., dissenting).

The plain intention of the law was to protect the liberty of contract and the freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs, both the liberty of the individual to contract and the freedom of trade? If the rule of reason no longer determines the right of the individual to contract, or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade?

Id. at 355.

¹⁷ *Id.* at 341-42.

¹⁸ See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

¹⁹ *Id.* ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.").

prices while the market was closed, did not violate the Sherman Act.²⁰ The Board had adopted a rule requiring its members who made grain transactions after the market closed for business on a given day to do so only under the market's closing price from that day.²¹ Before the Board adopted this rule, members were free to negotiate prices even for after-hours transactions.²² The United States brought an action against the Board, alleging that its rule was an illegal trade restraint under the Antitrust Act.²³ In its opinion, the Court narrowed its application of the statute by analyzing the reasonableness of the restraint, finding that cases like this one turn on "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."²⁴ The Court found the Board's rule was reasonable under the Antitrust Act.²⁵

As a result of its holding in *Chicago Board of Trade*, the Court has articulated two methods for determining if a restraint is actually illegal under §1 of the Sherman Act: the "per se" rule, which applies to restraints that are so plainly anticompetitive that they are illegal per se; and the rule of reason, which applies to restraints whose competitive effects can only be evaluated by analyzing the specific facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.²⁶ Whether a court analyzes a restraint under the "per se" rule or under the rule of reason, the underlying purpose of the analysis is always to form a judgment about the "competitive significance" of the restraint.²⁷

The rule of reason test is a balancing test that begins with the burden on the plaintiff to establish the anticompetitive effects of the restraint at issue. Part of the plaintiff's burden is to establish that the defendant has sufficient market power to make the restraint truly anticompetitive. A plaintiff's burden of proof is often very heavy because of the necessity to establish the defendant's market power.²⁸ Justice Brandeis described the traditional rule of reason by saying:

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.²⁹

²⁰ *Id.*

²¹ *Id.* at 237.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 238.

²⁵ *Id.* at 239.

²⁶ *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691-92 (1978).

²⁷ *Id.* (citing *Chicago Bd. of Trade*, 246 U.S. at 238).

²⁸ Piraino, *supra* note 12, at 1154.

²⁹ *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 n.15 (1977) (quoting *Chicago Bd. of Trade*, 246 U.S. at 238). The rule of reason was a common law principle that pre-dates the Antitrust Act, and can be traced back at least until the 1711 English case *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711). See *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 687-89.

When analyzing §1 disputes, courts now must make a threshold determination of whether the “per se” rule or the rule of reason applies.³⁰

B. Line of Cases Applying the “Per Se” Rule to Price Fixing

Another line of Supreme Court decisions, spanning the time period from 1940 through 1969, shows a historical trend toward applying the “per se” rule whenever price fixing, or a similar naked restraint, is at issue.³¹ In this line of decisions, the Court steadfastly adhered to its own longstanding precedent by applying the “per se” rule whenever analyzing price fixing under §1 of the Sherman Act.

In *United States v. Socony-Vacuum Oil Company*, the Court held price-fixing agreements to be unlawful per se without requiring specific evidence of anticompetitive effects.³² In *Socony-Vacuum*, the defendant oil companies violated the Sherman Act by conspiring to fix the tank car prices of gasoline.³³ The Court held the agreements to be illegal per se because it wanted to adhere to the same “per se” rule for price fixing it had consistently applied for the preceding forty years.³⁴

³⁰ The Sherman Act clearly made price fixing between separate business entities a “per se” violation. WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE LEGAL AND ECONOMIC PRINCIPLES* 115 (2004); see, e.g., *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 136 (1969); *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 341-42 (1897). However, when separate business entities form a merger, and the merger allegedly fixes prices for its products, courts commonly evaluate these actions under the rule of reason. KLEIN & COFFEE, *supra*; see, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984) (finding that § 1 “leaves untouched a single firm’s anticompetitive conduct (short of threatening monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to §1 liability”). Joint ventures, though, present a middle ground. Joint ventures do not automatically qualify for either “per se” analysis or for rule of reason analysis. When a joint venture allegedly fixes prices, the Court has struggled to determine when to apply the “per se” rule and when to apply the rule of reason. W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful? The Ninth Circuit’s Decision in Dagher*, *ANTITRUST*, Spring 2005, at 53 (citing *United States v. Topco Assocs.*, 405 U.S. 596 (1972), and *United States v. Sealy Inc.*, 388 U.S. 350 (1967), as examples of the Supreme Court applying the “per se” rule to joint ventures; and citing *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979), and *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284 (1985), as examples of the Supreme Court applying the rule of reason to joint ventures). Historically, the determinative issue has been whether the restraint is necessary to allow the joint venture to perform its legitimate functions. See *United States v. Addyston Pipe & Steele Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899). Under the ancillary restraint doctrine, if the restraint is necessary for the joint venture’s legitimate functions, it is called an “ancillary” restraint. The Court has traditionally applied the rule of reason to ancillary restraints. Neal R. Stoll & Shepard Goldfein, “Catch 22” for Joint Ventures, 231 N.Y.L.J. 3 (2004) (citing XI HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1904, at 203 (1998)). On the other hand, if the restraint is independent of the joint venture’s legitimate functions, it is called a “naked” restraint. Stoll & Goldfein, *supra*. The Court has traditionally applied the “per se” rule to naked restraints. *Id.*

³¹ Piraino, *supra* note 12, at 1144; Smith, *supra* note 30, at 53.

³² 310 U.S. 150, 218 (1940).

³³ *Id.* at 166.

³⁴ *Id.* at 218 (citing *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927)).

In *United States v. Sealy, Inc.*, the Court also held price-fixing to be a “per se” violation and refused to inquire into economic justification, market impact, or reasonableness.³⁵ In *Sealy*, the defendant mattress company violated the Sherman Act by conspiring to fix prices for its products and by allocating mutually exclusive territories among its manufacturers.³⁶ The Court reasoned that Sealy’s actions were illegal “per se” under what it described as a “settled doctrine.”³⁷

In *Citizen Publishing Co. v. United States* the Court found that two Tucson, Arizona, newspapers that formed a “joint operating agreement” fixing a common price for both newspapers were guilty of a “per se” violation of §1 of the Sherman Act.³⁸ In *Citizen Publishing*, the *Star* and the *Citizen* newspapers, once “vigorous competitors” in the Tucson newspaper market, agreed to form Tucson Newspapers, Inc., to manage the production and distribution of both newspapers.³⁹ Both the *Star* and the *Citizen* retained their respective news and editorial departments and their respective corporate identities.⁴⁰ The joint operating agreement unified pricing between the two newspapers in an attempt to end competition between them.⁴¹ The newspapers’ combined profits subsequently rose from \$27,531 in 1940 to \$1,727,217 in 1964.⁴² The Court found the agreement illegal per se because the “joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field.”⁴³

The line of cases represented by *Socony-Vacuum Oil*, *Sealy*, and *Citizen Publishing Co.* demonstrates that from 1940 through 1969, the Court applied the “per se” rule whenever §1 defendants had engaged in price fixing.⁴⁴

C. Line of Cases Showing Modern Trend Toward Applying the Rule of Reason

In a more recent line of decisions, spanning the time period from 1979 through 1999, the Court applied the rule of reason to Sherman Act §1 cases it previously would have analyzed under the “per se” rule.⁴⁵ In this recent line of cases, the Court has departed from its automatic application of the “per se” rule

³⁵ *United States v. Sealy, Inc.*, 388 U.S. 350, 357 (1967).

³⁶ *Id.* at 351.

³⁷ *Id.* at 357.

³⁸ 394 U.S. 131 (1969).

³⁹ *Id.* at 133-34.

⁴⁰ *Id.* at 133.

⁴¹ *Id.* at 134.

⁴² *Id.*

⁴³ *Id.* at 136 (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

⁴⁴ See *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 136 (1969); *United States v. Sealy, Inc.*, 388 U.S. 350, 357 (1967); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

⁴⁵ Piraino, *supra* note 12, at 1146; Smith, *supra* note 30, at 54.

to price-fixing disputes.⁴⁶ Further, the Court has implicitly adopted a modification to the traditional rule of reason that it applies in specific circumstances.⁴⁷

Broadcast Music, Inc. v. Columbia Broadcasting System is the first in a series of Supreme Court decisions that represents a trend toward applying the rule of reason even in situations where the Court would have previously applied the “per se” rule.⁴⁸ In *BMI*, the Court held that blanket licenses for songs and other artistic creations were not “per se” violations of §1 of the Sherman Act though they did involve price fixing.⁴⁹ CBS, a major television network, brought an action against BMI alleging, inter alia, that BMI was an illegal monopoly and that its blanket license product fixed prices in violation of the Sherman Act.⁵⁰ The Supreme Court granted certiorari on the issue of whether the blanket license constituted a “per se” violation.⁵¹

The Court justified applying the less stringent rule of reason because it found a practical necessity for the existence of blanket licenses.⁵² The Court characterized blanket licenses as being useful tools that prevented unauthorized copyright instead of being naked trade restraints that stifled competition.⁵³

The Court also justified applying the less stringent rule of reason because all three branches of government had previously approved blanket licenses.⁵⁴ The judicial branch had approved blanket licenses when courts granted consent decrees to BMI in order to regulate blanket licenses.⁵⁵ The executive branch had approved blanket licenses when the Department of Justice approved those judicial consent decrees and filed an amicus brief in *BMI* arguing that blanket licenses were not “per se” violations of the Sherman Act.⁵⁶ The legislative branch had approved blanket licenses when Congress enacted the Federal Copyright Act.⁵⁷

⁴⁶ See *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 762-81 (1999); *Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458-59 (1986); *NCAA v. Bd. of Regents*, 468 U.S. 85, 100 (1984); *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 7 (1979).

⁴⁷ See, e.g., *NCAA*, 468 U.S. at 109 (finding that “when there is an agreement not to compete in terms of price or output, ‘no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement’” (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978))); see also Piraino, *supra* note 12, at 1154. The Court applies the modified analysis whenever “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *Cal. Dental Ass’n*, 526 U.S. at 770.

⁴⁸ Smith, *supra* note 30, at 53 (considering the Supreme Court’s treatment of joint ventures specifically). Other commentators suggest the real transition can be traced to the Court’s decision in *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 (1977), where the Court held that “the legality of non-price vertical restraints is to be judged under a rule-of-reason standard.” See Ardath A. Hamann, *Imposing a Maximum Retail Price: Is It a Per Se Violation of the Sherman Antitrust Act?* 1 PREVIEW U.S. SUP. CT. CAS. 4-7, (Sept. 18, 1997); see also Piraino, *supra* note 12, at 1145.

⁴⁹ 441 U.S. 1, 2 (1979).

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 7.

⁵² *Id.* at 20.

⁵³ *Id.*

⁵⁴ *Id.* at 10-16.

⁵⁵ *Id.* at 12 n.20.

⁵⁶ *Id.* at 14-15.

⁵⁷ *Id.* at 15.

The Court made a monumental shift in its Sherman Act §1 jurisprudence by not automatically finding price-fixing to be illegal per se. The Court parted from seventy-five years of its own precedent by analyzing whether price-fixing was necessary in a particular case. This monumental shift began a new trend that would continue into the following decades.

In his dissenting opinion, Justice Stevens agreed with the outcome, but argued that the Court should have performed the "rule of reason" analysis itself instead of remanding.⁵⁸ Justice Stevens' belief that the Court should have resolved the Sherman Act issue itself suggests that the "per se" test and the "rule of reason" test should not be treated as alternative theories since the Court created these two tests to analyze disputes under the Sherman Act. Instead, Justice Stevens treated the two tests as part of one continuous spectrum of analysis.

In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma* the Court again applied the "rule of reason" test.⁵⁹ In *NCAA*, the Court evaluated an NCAA policy for alleged antitrust violations.⁶⁰ The disputed policy limited the number of televised football games available to broadcasters and consumers.⁶¹ The Court admitted that the policy was the type of restraint that the Court had previously found illegal per se.⁶² Yet, the Court did not apply "per se" analysis.⁶³ The Court justified applying the rule of reason because college football, which requires a league of teams, is the kind of industry in which restraints are necessary for its product, college football games, to be available in the first place.⁶⁴ The Court cited its reasoning in *BMI v. CBS* in support of its decision.⁶⁵

In applying the rule of reason here, though, the Court implicitly made a significant modification by not requiring the plaintiff to establish the defendant's market power⁶⁶ to meet its burden of proof.⁶⁷ The effect was that the plaintiff's burden of proof became much lighter than under the traditional rule of reason:

In the typical rule of reason case, the plaintiff bears the burden at the outset of establishing the anticompetitive effects of the restraint at issue, including proof of the

⁵⁸ *Id.* at 25 (Stevens, J., dissenting).

⁵⁹ 468 U.S. 85, 100 (1984).

⁶⁰ *Id.* at 88.

⁶¹ *Id.* at 99-100.

⁶² *Id.* at 99-100. The Court noted that the District Court even found some of the restraints to be horizontal price fixing, "perhaps the paradigm of an unreasonable restraint of trade." *Id.*

⁶³ *Id.* at 100.

⁶⁴ *Id.* at 101.

⁶⁵ *Id.* at 103.

⁶⁶ The rule of reason test is a balancing test that begins with the burden on the plaintiff to establish the anticompetitive effects of the restraint at issue. Part of the plaintiff's burden is to establish that the defendant has sufficient market power to make the restraint truly anticompetitive. Plaintiff's burden of proof is often very heavy because of the necessity to establish defendant's market power. Piraino, *supra* note 12, at 1154.

⁶⁷ *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 (1984) (finding that "when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'" (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978))).

defendant's market power. Some courts have recently adopted a variation of the rule of reason, called the "quick look," which absolves the plaintiff of such a burden. Under the quick look, the plaintiff need merely prove that a restraint is of a type that is likely to have anticompetitive effects. After such a showing, the burden of proof shifts to the defendant to demonstrate a procompetitive justification for the restraint.

The quick look is more favorable to plaintiffs than the traditional rule of reason. Because it is so difficult to make a *prima facie* case under the rule of reason, a defendant rarely has to prove a justification for its conduct. In quick look cases, however, the defendant has to present some evidence of the procompetitive nature of a restraint in order to avoid its invalidation.⁶⁸

In explaining why it modified the rule of reason, the Court referred to *National Society of Professional Engineers* as precedent that the real test underlying all Sherman Act §1 analysis is the "competitive significance" of the restraint at issue.⁶⁹ The Court explained that because there is no bright line separating the "per se" test from the "rule of reason" test anyway, and because both tests are part of a continuous spectrum of analysis, the Court may modify its own scheme for evaluating Sherman Act §1 issues.⁷⁰ Five years earlier, Justice Stevens came to the same conclusion in his *BMI v. CBS* dissent when he opined that the Court, while rejecting "per se" analysis, should have gone ahead and applied the rule of reason itself instead of remanding.⁷¹

Two years after *NCAA*, the Court again applied its modified "rule of reason" test in *Federal Trade Commission v. Indiana Federation of Dentists*.⁷² In *Indiana Federation of Dentists*, a group of Indiana dentists formed an agreement with each other to withhold patient x-rays from insurance companies who requested the x-rays to evaluate the patient's claims.⁷³ These dentists formed this agreement because they viewed the insurance companies' requests as a threat to the dentists' professional independence.⁷⁴ The Federal Trade Commission alleged that the dentists' agreement suppressed competition in violation of the Sherman Act. The Court analogized the dentists' actions to a "group boycott."⁷⁵ Group boycotts had previously been "per se" violations of the Sherman Act.⁷⁶ Nevertheless, the Court applied the rule of reason, stating that it did not want to expand the "per se" rule to the facts at hand.⁷⁷

Though the Court never used the term "quick look," the Court described its application of the rule of reason to the facts at hand as "not a matter of any

⁶⁸ Piraino, *supra* note 12, at 1153.

⁶⁹ *NCAA*, 468 U.S. at 103 (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692).

⁷⁰ *Id.* at 104 n.26.

⁷¹ See *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 25 (1979) (Stevens, J., dissenting).

⁷² 476 U.S. 447 (1986).

⁷³ *Id.* at 455.

⁷⁴ *Id.* at 449.

⁷⁵ *Id.* at 458.

⁷⁶ *Id.* (citing *United States v. Gen. Motors Corp.*, 384 U.S. 127, 145 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959)).

⁷⁷ *Ind. Fed'n of Dentists*, 476 U.S. at 458-59. The court reasoned that "per se" analysis was not appropriate because it did not want to force the disputed restraints into the "boycott pigeonhole," because it did not want to condemn a professional association's rules without more elaborate analysis, and because the economic impacts of these restraints were not "immediately obvious." *Id.*

great difficulty.”⁷⁸ The Court stated that absent a countervailing procompetitive virtue such as the ones found in *BMI* or *NCAA*, the dentists’ actions illegally restrained trade.⁷⁹ The Court did not require an “elaborate market analysis,” which is often required under the traditional rule of reason, to reach its conclusion of illegality.⁸⁰ Once again, the Court was rejecting “per se” analysis and instead applying modified rule of reason analysis to resolve a Sherman Act issue.

In the 1999 *California Dental Association v. Federal Trade Commission* opinion, the Court described its previous modified rule of reason analysis as a “quick-look” analysis.⁸¹ The Court found quick-look analysis appropriate whenever “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”⁸² The Court applied traditional “rule of reason” analysis, though, because it found that the facts of this case did not qualify for “quick-look” analysis.⁸³ The dispute in *California Dental* arose when a group of California dentists agreed to a code of ethics that contained guidelines concerning appropriate advertising.⁸⁴ The Federal Trade Commission brought a complaint against this group of dentists alleging that the advertising guidelines touched price and quality to an extent sufficient to qualify as unlawful restraints of trade under the Sherman Act.⁸⁵ Though the Ninth Circuit upheld the guidelines, the Supreme Court disagreed, finding that the Ninth Circuit failed to perform a sufficiently thorough analysis of the guidelines’ economic impact.⁸⁶

In his dissenting opinion, Justice Breyer explained why he would have affirmed the Ninth Circuit’s decision and upheld the guidelines. Apparently advocating for a modified analysis, Justice Breyer broke the “rule of reason” test down into four analytical questions: “(1) What is the specific restraint at issue? (2) What are the likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?”⁸⁷ Justice Breyer then argued that his four-question test, and its accompanying

allocation of the burdens of persuasion, reflects a gradual evolution within the courts over a period of many years. That evolution represents an effort carefully to blend the procompetitive objectives of the law of antitrust with administrative necessity. It represents a considerable advance, both from the days when the Commission had to

⁷⁸ *Id.* at 459.

⁷⁹ *Id.*

⁸⁰ *Id.* at 460.

⁸¹ 526 U.S. 756, 770 (1999) (citing *Nat’l Soc. of Prof’l Eng’rs v. United States*, 435 U.S. 679, 679 (1978); *NCAA*, 468 U.S. at 99-100; *Ind. Fed’n of Dentists*, 476 U.S. at 447; *Law v. NCAA.*, 134 F.3d 1010, 1020 (10th Cir. 1998); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3rd Cir. 1993); *Chicago Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992)).

⁸² *Cal. Dental Ass’n*, 526 U.S. at 770.

⁸³ *Id.* at 771.

⁸⁴ *Id.* at 759-60.

⁸⁵ *Id.* at 762.

⁸⁶ *Id.* at 769-81.

⁸⁷ *Id.* at 782 (Breyer, J., dissenting).

present and/or refute every possible fact and theory, and from antitrust theories so abbreviated as to prevent proper analysis. The former prevented cases from ever reaching a conclusion, . . . and the latter called for the criticism that "Government always wins."⁸⁸

In the line of cases represented by *BMI*, *NCAA*, *Indiana Federation of Dentists*, and *California Dental*, the Court has departed from its application of "per se" analysis to price-fixing cases and has, in limited circumstances, used a modified "rule of reason" analysis.⁸⁹ In 1999 Justice Breyer appeared to advocate for more widespread use of this modified analysis.⁹⁰

Over the past one hundred years, the Court's §1 jurisprudence has evolved from literal analysis of the statute's language to multiple methods of analyzing disputes. Confusion has replaced certainty.

III. *TEXACO v. DAGHER*

A. *Facts*

Texaco v. Dagher arose from a group of gasoline station owners alleging that two major oil companies, Shell and Texaco, fixed prices in violation of §1 of the Sherman Act.⁹¹ Shell and Texaco were once "fierce competitors" in the national gasoline market.⁹² In 1998, Shell and Texaco agreed to form two joint ventures: Equilon in the western United States, and Motiva in the eastern United States.⁹³ The joint ventures constituted 15% of the nation's gasoline sales market. In the western states, Equilon had an even higher market share of over 25%.⁹⁴

Either immediately before Shell and Texaco formed the joint ventures or sometime shortly thereafter, "a decision was made that the Shell and Texaco brands would have the same price in the same market areas."⁹⁵ Though Shell and Texaco claimed that these joint ventures would save \$800 million in costs

⁸⁸ *Id.* at 793-94.

⁸⁹ See *Cal. Dental Ass'n*, 526 U.S. at 762-81; *Ind. Fed'n of Dentists*, 476 U.S. at 458-59; *NCAA*, 468 U.S. at 100; *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 7 (1979); see, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 (1984) (finding that "when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement'" (quoting *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)); see also Piraino, *supra* note 12, at 1154.

⁹⁰ See *Cal. Dental Ass'n*, 526 U.S. at 782-94 (Breyer, J., dissenting).

⁹¹ *Dagher v. Saudi Ref. Inc.*, 369 F.3d 1108, 1110 (9th Cir. 2004).

⁹² *Id.*

⁹³ *Id.* at 1111.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1112.

The decision to charge the same price for the two distinct brands "was developed as sort of an operating requirement right from the very start or near to the very start of the alliance." Equilon and Motiva integrated this pricing decision into a project named "The Strategic Market Initiative" (SMI), which sought to develop ways in which the alliance could produce and promote both brands more competitively. There is some evidence in the record establishing that the decision to set one price for the two brands was conceived of in the SMI even before Motiva was formed.

Id.

annually, Equilon raised its prices \$.40 per gallon in Los Angeles and \$.30 per gallon in both Seattle and Portland during a time when crude oil prices reached near-historic lows.⁹⁶

Twenty-three thousand Shell and Texaco service station owners commenced a civil action against Shell, Texaco, and the joint venture in the Central District of California.⁹⁷ The plaintiffs alleged that the defendants fixed prices in what constituted a "per se" violation of §1 of the Sherman Act.⁹⁸ The plaintiffs pleaded, in the alternative, that the defendants violated the Sherman Act based on "quick-look" analysis.⁹⁹

B. District Court Holding

The defendants moved for summary judgment, and the court granted the motion, finding that the rule of reason, not the "per se" rule, governed the Sherman Act analysis of these joint ventures, and that the joint ventures should not be subject to "per se" analysis for setting a price for its products.¹⁰⁰ Because the court viewed the "per se" test and the "rule of reason" test as alternative theories, and because plaintiffs did not make a claim under the rule of reason test, the court granted defendants' motion for summary judgment.¹⁰¹ The plaintiffs appealed the district court's decision to the Ninth Circuit.¹⁰²

C. Ninth Circuit Holding

In an opinion written by Judge Reinhardt, the Ninth Circuit panel noted that price-fixing agreements are illegal per se under the Sherman Act.¹⁰³ The court characterized the defendants' position as asking the court to create an exception to this rule for joint ventures, a position which the court found inconsistent with the Sherman Act.¹⁰⁴

The court found compelling similarities between the facts of this case and the facts of *Citizen Publishing Co. v. United States*.¹⁰⁵ The court found that in

⁹⁶ *Id.* at 1111-13.

⁹⁷ *Id.* at 1113.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Dagher*, 369 F.3d at 1113. A joint venture does not automatically qualify for either "per se" analysis or for rule of reason analysis. Instead, the determinative issue is whether the restraint in question is a naked restraint or an ancillary restraint. Under the ancillary restraint doctrine, if the restraint is naked, then the Court has traditionally applied the "per se" rule. If the restraint is ancillary, then the Court has traditionally applied the rule of reason. Stoll & Goldfein, *supra* note 30.

¹⁰¹ *Dagher*, 369 F.3d at 1113.

¹⁰² *Id.* at 1110.

¹⁰³ *Id.* at 1116.

¹⁰⁴ *Id.* When a joint venture is the defendant in §1 dispute, courts have struggled to determine when to apply the "per se" rule and when to apply the rule of reason. Smith, *supra* note 30, at 53 (citing *United States v. Topco Assocs.*, 405 U.S. 596 (1972), and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), as examples of the Supreme Court applying the "per se" rule to joint ventures; also citing *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979), and *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284 (1985), as examples of the Supreme Court applying the rule of reason to joint ventures).

¹⁰⁵ *Dagher*, 369 F.3d at 1118-19 (citing *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 135 (1969)).

Dagher, as in *Citizen Publishing*, “the confluence of these anticompetitive restraints, in the context of a joint venture between two formerly-vigorous competitors in the market area targeted by the venture, constituted a ‘per se’ violation of the Sherman Act.”¹⁰⁶

Judge Reinhardt also found that the district court failed to consider the disputed facts in a light most favorable to the plaintiffs, as it must when considering defendants’ motion for summary judgment.¹⁰⁷ Specifically, the district court should have considered the timing of the decision to set a common price for Shell’s and Texaco’s products, a disputed issue of material fact, in the light most favorable to plaintiffs.¹⁰⁸

The court also focused on whether the setting of common prices for Shell and Texaco gasoline was “necessary” to the legitimate aims of the joint venture.¹⁰⁹ The court found that the burden of establishing such necessity should fall on the defendants.¹¹⁰

The court concluded that the plaintiffs had provided sufficient evidence of anticompetitive effects, and that defendants had not responded with sufficient evidence of procompetitive justification for initiating the price-fixing scheme.¹¹¹ Consequently, the court found the “per se” rule applicable.¹¹²

In his dissenting opinion, Judge Fernandez characterized the defendants’ actions as those of a joint venture merely setting a price for its product, which was an integral part of running its business.¹¹³ Judge Fernandez argued that such an integral part of running a business cannot be a “per se” violation of the Sherman Act.¹¹⁴

D. Supreme Court Holding

Defendants appealed the Ninth Circuit’s decision, and the United State Supreme Court granted certiorari.¹¹⁵ The Court reversed the Ninth Circuit’s decision using reasoning similar to the Ninth Circuit’s dissenting opinion.¹¹⁶ The Supreme Court explained its own evolution toward rule of reason analysis by saying, “this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.”¹¹⁷ The Court acknowledged that price-fixing is an exception to the presumption that the rule of reason applies.¹¹⁸ But because the Court framed the present issue as a joint venture setting a price for its product, the Court

¹⁰⁶ *Id.* at 1119 (citing *Citizen Publ’g Co.*, 394 U.S. at 135).

¹⁰⁷ *Id.* at 1120.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1121.

¹¹⁰ *Id.* at 1121 n.14.

¹¹¹ *Id.* at 1122.

¹¹² *Id.*

¹¹³ *Id.* at 1127 (Fernandez, C.J., concurring and dissenting).

¹¹⁴ *Id.*

¹¹⁵ *Texaco, Inc. v. Dagher*, 545 U.S. 1138 (2005); *Shell Oil Co. v. Dagher*, 545 U.S. 1138 (2005).

¹¹⁶ *See Texaco Inc. v. Dagher*, 126 S. Ct. 1276 (2006).

¹¹⁷ *Id.* at 1279.

¹¹⁸ *Id.*

presumed that the rule of reason applied to this case.¹¹⁹ Because the Court framed the issue this way, it refused to consider the possibility that Shell and Texaco had decided to fix prices independently from their decision to form a joint venture.¹²⁰

IV. ANALYSIS

A. *Under Traditional §1 Analysis, Framing the Issue is Outcome Determinative.*

As the disagreement between the Supreme Court and the Ninth Circuit illustrates, this case gets caught in the middle ground between the two methods of §1 analysis.¹²¹ The Supreme Court, in its struggle to interpret §1's language, "Every contract . . . in restraint of trade . . . is hereby declared to be illegal,"¹²² has held that §1 cannot mean what its plain language says.¹²³ In an attempt to resolve this interpretive struggle, the Court has adopted a "per se" test and a "rule of reason" test.¹²⁴ This case can arguably fit under either test. Plaintiffs frame the issue as two oil companies fixing a common price for gasoline, which would be a "per se" violation under the Court's historical analysis.¹²⁵ Defendants frame the issue as a joint venture merely setting a price for its product, an activity that can only be analyzed under the balancing test of the rule of reason.¹²⁶ Despite the extensive record, the facts are ambiguous enough to allow the parties to frame the issue either way.¹²⁷ Both parties realize what the Court must now face: the framing of the issue determines the outcome under the Court's traditional §1 analysis.

If the Court had framed the issue of this case as Shell and Texaco agreeing to set a common price for their products, independently from their decision to form a joint venture, then the restraint would have been classified under the ancillary restraints doctrine as a "naked" restraint.¹²⁸ Naked restraints have always qualified for "per se" analysis.¹²⁹ If plaintiffs were able to prove at trial that Shell and Texaco agreed to set a common price for their products independently from the decision to form a joint venture, then the Court would find defendants guilty of a "per se" violation of §1 of the Sherman Act. Accordingly, the Supreme Court would have affirmed the Ninth Circuit. Since the

¹¹⁹ *Id.* at 1279-80.

¹²⁰ *Id.*

¹²¹ *Compare* *Texaco v. Dagher*, 126 S. Ct. at 1280, *with* *Dagher*, 369 F.3d at 1122.

¹²² 15 U.S.C. § 1 (2000).

¹²³ *See* *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691-92 (1978).

¹²⁴ *See id.*

¹²⁵ *Dagher*, 369 F.3d at 1110.

¹²⁶ *Id.* at 1111.

¹²⁷ *See id.* (finding the record in this case to be "voluminous"). *Compare id.* at 1122 (majority opinion), *with id.* at 1127 (Fernandez, C.J., concurring and dissenting).

¹²⁸ If a restraint is independent of the joint venture's legitimate functions, it is called a "naked" restraint. *See* *Stoll & Goldfein*, *supra* note 30.

¹²⁹ The district court here determined that the restraint was naked, but inexplicably refused to apply the "per se" rule, instead granting summary judgment on behalf of defendants. *See* *Stoll & Goldfein*, *supra* note 30.

Ninth Circuit denied summary judgment and remanded, this case would have moved on to trial.

But because the Supreme Court framed the issue in this case as a joint venture making a business decision to price its product, the Court refused to apply the ancillary restraint doctrine to this case.¹³⁰ The Court found that even if it did apply the ancillary restraint doctrine, that the restraint at issue would be classified as an “ancillary” restraint.¹³¹ Ancillary restraints qualify for “rule of reason” analysis.¹³² The court refused to find the joint venture’s decision to set a price for its product to be illegal per se. Because courts view the “per se” test and the “rule of reason” test as alternative theories, the plaintiffs lost because they did not bring an alternative claim under the “rule of reason” test.

However, this analysis is further complicated because courts have applied more than one kind of “rule of reason” test. Courts have applied both a traditional “rule of reason” test and a modified “rule of reason” test. Here, plaintiffs did make a claim, in the alternative, that this case be considered under the “quick-look” approach.¹³³ The quick-look approach is a modified “rule of reason” test.¹³⁴ Solely because it had applied the “per se” rule, the Ninth Circuit refused to perform the alternatively pleaded quick-look analysis.¹³⁵ Thus, once the Supreme Court framed the issue as a joint venture making a business decision to price its product, then it had to determine whether to apply traditional “rule of reason” analysis, or the modified quick-look.

Because the Court decided that the traditional “rule of reason” test applied here, the plaintiffs lost because they did not bring such an alternative claim.¹³⁶ Accordingly, the Supreme Court reversed the Ninth Circuit’s opinion. The defendants prevailed.

If, instead, the Court had decided to apply a modified “rule of reason” analysis, the plaintiffs would have been entitled to this analysis because they raised the quick-look as an alternative. Accordingly, the Court would have remanded to the Ninth Circuit for application of modified “rule of reason” analysis.

Consequently, this case was subject to a complicated procedural quagmire under traditional §1 analysis. This quagmire can be traced back to the Court’s finding that §1 cannot be read literally, which led to the distinction between “per se” and “rule of reason” analysis.¹³⁷ Over time the footing became trickier as the Court distinguished between the traditional and modified rules of reason.¹³⁸ The undesirable result in this case is that issue-framing determined which method of analysis the Court applied, which in turn determined the outcome.

¹³⁰ *Dagher*, 126 S. Ct. at 1279-80.

¹³¹ *Id.* at 1281. If a restraint is necessary for the joint venture’s legitimate functions, it is called an “ancillary” restraint. See Stoll & Goldfein, *supra* note 30.

¹³² *Id.*

¹³³ *Dagher*, 369 F.3d at 1113.

¹³⁴ Piraino, *supra* note 12, at 1144.

¹³⁵ *Dagher*, 369 F.3d at 1116 n.7.

¹³⁶ See *Dagher*, 126 S. Ct. at 1280 n.2.

¹³⁷ See Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 691-92 (1978).

¹³⁸ See, e.g., NCAA v. Bd. of Regents, 468 U.S. 85, 109 (1984); see also Piraino, *supra* note 12, at 1154.

B. The Supreme Court Should Explicitly Simplify and Clarify Its §1 Analysis

1. Problematic Aspects of the Traditional Scheme

The facts in *Texaco v. Dagher* provide a clear illustration of the problems with the Supreme Court's traditional scheme for analyzing alleged §1 violations. If the Court had framed the issue as two oil companies fixing a common price for gasoline, then the plaintiffs would have won. Because the Court framed the issue as a joint venture setting a price for its gasoline, the defendants won. Because the facts were ambiguous enough to allow the Court to frame the issue either way,¹³⁹ the decision of how to frame the issue was outcome determinative.

Until the late 1970s, the Court consistently applied the "per se" rule to price fixing and other naked restraints on trade.¹⁴⁰ Over the past twenty-five years, however, the Court has moved away from "per se" analysis by consistently applying a more elaborate analysis of §1 disputes.¹⁴¹

Justice Breyer, in his dissenting opinion in *California Dental*, explained that the downfall of the "per se" rule is that it, in effect, always allows plaintiffs to win.¹⁴² As the Ninth Circuit points out in *Dagher*, the Court has never explicitly turned its back on the "per se" rule.¹⁴³ As its recent rulings suggest, though, the Court seems to be leaving the rule behind.

When read literally, §1 is itself a "per se" rule.¹⁴⁴ The plain language says "every contract . . . in restraint of trade . . . is declared to be illegal."¹⁴⁵ The Court's determination that §1 cannot mean what its plain language says, because such a reading would invalidate every contract, led to the eventual erosion of §1 "per se" analysis.¹⁴⁶ In the *Broadcast Music, NCAA, Indiana Federation of Dentists* line of cases, the Court eroded the "per se" rule with

¹³⁹ See *Dagher*, 369 F.3d at 1112.

¹⁴⁰ See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 151 (1940) (holding price-fixing agreements to be unlawful per se without specific evidence of anticompetitive effects); *United States v. Sealy, Inc.*, 388 U.S. 350, 355 (1967) (rejecting the rule of reason and holding price-fixing to be a "per se" violation); *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 132 (1969) (finding that newspapers who fixed a common price had committed a "per se" violation).

¹⁴¹ See generally *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756 (1999) (applying traditional rule of reason); *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986) (applying modified rule of reason); *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984) (applying modified rule of reason to horizontal restraints on competition); *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979).

¹⁴² See *Cal. Dental Ass'n*, 526 U.S. at 794 (Breyer, J., dissenting) (finding that the "per se" rule is too abbreviated to allow proper analysis, and that the plaintiff always tends to win).

¹⁴³ See *Dagher*, 369 F.3d at 1119.

¹⁴⁴ See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (holding that if section 1 of the Sherman Act is read literally, the every contract would be found to be a violation since every contract is an agreement that restrains trade).

¹⁴⁵ See 15 U.S.C. § 1 (2004).

¹⁴⁶ See Piraino, *supra* note 12, at 1145-46; Smith, *supra* note 30, at 53.

exceptions and swung its §1 jurisprudential pendulum toward more elaborate analysis.¹⁴⁷

While the “per se” rule is susceptible to being overly broad in favor of §1 plaintiffs, the opposite is true of the rule of reason. A practical problem of proof accompanies the traditional rule of reason.¹⁴⁸ This problem is likely to dissuade plaintiffs from bringing §1 actions because their burden of proof is onerous under the rule of reason. Small business owners, such as the plaintiffs in *Dagher*, will not likely be financially situated to bear their burden of proof when going against large corporate defendants, such as the defendants in *Dagher*. This practical problem of proof may explain why the plaintiffs in *Dagher* failed to plead alternatively for traditional “rule of reason” analysis.

As a hypothetical example, suppose major oil company *A* and major oil company *B* appear to have made an agreement to fix a common price for gasoline in a specific market. *P*, who has modest financial resources, brings suit under §1 of the Sherman Act. If the court automatically applies the “per se” rule because price-fixing is at issue, *P* is likely to prevail. Yet the court may never get to the bottom of the anticompetitive significance of *A*’s and *B*’s actions because the court deemed their actions illegal per se. It is at least plausible that *A* and *B* set common prices and that their actions did not actually effect competition in that particular gasoline market.

If, on the other hand, the court applies the rule of reason to this same hypothetical, then *P* will bear the burden of proving that *A*’s and *B*’s actions actually had a significant anticompetitive effect on the specific market. This proof will likely take an elaborate economic analysis. *P* will likely not be able to bear this burden because *P*’s financial resources are dwarfed by *A*’s and *B*’s. *A* and *B* will be able to afford an adequate defense, but *P* will be left with a practical problem of proof beyond *P*’s ability to bear. Thus, *A* and *B* will likely prevail. Once again the court may never get to the bottom of the anticompetitive significance of *A*’s and *B*’s actions because *P* cannot afford to pursue its claim fully.

This hypothetical illustrates that the current scheme is inadequate to determine the anticompetitive significance of a defendant’s actions.¹⁴⁹ As a result, major oil companies could fix gasoline prices in such a way that would have serious anticompetitive effects, yet the interpretive scheme could prevent plaintiffs, and ultimately the public, from obtaining relief.

In response to this practical problem of proof, courts and commentators have modified the rule of reason.¹⁵⁰ The Supreme Court has implicitly adopted

¹⁴⁷ See *Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458-59 (1986); *NCAA v. Bd. of Regents*, 468 U.S. 85, 100 (1984); *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 7 (1979).

¹⁴⁸ See *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 794 (1999) (Breyer, J., dissenting) (finding that the traditional rule of reason requires an antitrust plaintiff to present every possible fact and theory, and that the case never reaches a conclusion); Piraino, *supra* note 12, at 1153 (“The quick look is more favorable to plaintiffs than the traditional rule of reason. Because it is so difficult to make a prima facie case under the rule of reason, a defendant rarely has to prove a justification for its conduct.”).

¹⁴⁹ See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 691-92 (1978) (citing *Chicago Bd. of Trade*, 246 U.S. at 238).

¹⁵⁰ Piraino, *supra* note 12, at 1144.

a modified rule of reason itself in recent decisions,¹⁵¹ but the Court has only applied the modification when the disputed restraint is obviously anticompetitive.¹⁵² The identifying feature of the modified rule of reason is that it eases the burden of proof on the plaintiff by not requiring the plaintiff to establish the defendant's market power.¹⁵³ This modification often solves a plaintiff's practical problem of proof. When a plaintiff is able to meet the lighter demand of the modified rule of reason, then the burden of proof shifts to the defendant to demonstrate procompetitive reasons for the restraint.¹⁵⁴ However, plaintiffs have not fully realized the benefits of the modified rule of reason because the Court has restricted the test to restraints that are obviously anticompetitive.¹⁵⁵

The Supreme Court should not hesitate to simplify and clarify its §1 scheme. The Court must take action in the interest of better determining the competitive significance of trade restraints. Because the Court created the two traditional methods for evaluating §1 disputes in the interest of determining competitive significance of restraints, it is now time for the Court to modify its scheme for the same reason.¹⁵⁶ The Court has confessed that there is no bright line separating the "per se" rule and the rule of reason anyway.¹⁵⁷ If the Court can develop a more workable scheme for evaluating competitive significance, then it should. Such a development would be a healthy evolution in the Court's Sherman Act jurisprudence.

The current gasoline price situation in the United States illustrates the need for a more workable scheme for evaluating competitive significance. "Per se" analysis, though plaintiff-friendly, fails to get to the bottom of the legitimacy of plaintiffs' claims. Conversely, traditional "rule of reason" analysis leaves plaintiffs with a practical problem of proof beyond their ability to bear, and also fails to get to the bottom of the legitimacy of plaintiffs' claims. Either way, the Sherman Act's purpose of evaluating the competitive significance of the restraint remains unsatisfied. Consequently, if major oil companies are actually fixing prices in violation of the Sherman Act, plaintiffs are left without a remedy, and the public is left to suffer the consequences.

2. Proposed Scheme

The Court can address the practical problem of proof by adopting a common modified scheme for evaluating all §1 disputes. The scheme must relieve

¹⁵¹ See *NCAA*, 468 U.S. at 101; *Ind. Fed'n of Dentists*, 476 U.S. at 455; *Cal. Dental Ass'n*, 526 U.S. at 793 (Breyer, J., dissenting).

¹⁵² See *Cal. Dental Ass'n*, 526 U.S. at 771 (finding that on the facts before it, the Court would apply the traditional rule of reason instead of the "quick-look" approach). The Court applies the modified analysis whenever "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id.* at 770.

¹⁵³ See *NCAA*, 468 U.S. at 109 (finding that "when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'" (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692)).

¹⁵⁴ See Piraino, *supra* note 12, at 1154.

¹⁵⁵ See *Cal. Dental Ass'n*, 526 U.S. at 770.

¹⁵⁶ See *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 691-92.

¹⁵⁷ See *NCAA*, 526 U.S. at 104 n.26.

plaintiffs of their onerous burden of proof whenever possible. It also must be flexible enough to apply to the wide variety of §1 disputes and be certain enough to give lower courts guidance.

The Court should explicitly adopt the following modified test as the standard for analyzing all §1 claims: First, a court must identify the specific restraints at issue.¹⁵⁸ Second, a court must determine whether the restrictions identified have the potential for genuine adverse effects on competition.¹⁵⁹ If not, then the restraint is not a violation of §1. If so, then the burden would shift to the defendant to establish whether these restrictions might be justified by other procompetitive tendencies or redeeming virtues.¹⁶⁰ If defendant does not meet this burden, then the restraint is a violation of §1. If defendant meets this burden, then the burden shifts back to the plaintiff to demonstrate that the proffered justification is invalid.¹⁶¹ If plaintiff demonstrates that proffered justification is invalid, then the restraint is a violation of §1. If plaintiff does not demonstrate that the proffered justification is invalid, then the court must weigh and balance the harm of the restraint against the benefit of the restraint under a full "rule of reason" analysis.¹⁶²

This proposed test is based, in part, on Justice Breyer's dissent in *California Dental*, along with the Court's modified analysis in both *NCAA* and in *Indiana Federation of Dentists*.¹⁶³ The proposed test would successfully alleviate the problematic outcomes of both the "per se" rule and the traditional rule of reason. This proposed test can be applied consistently to all §1 disputes, regardless of whether the "likelihood of anticompetitive effects can easily be ascertained,"¹⁶⁴ because this proposed test includes a safety valve that releases

¹⁵⁸ See *Cal. Dental Ass'n*, 526 U.S. at 782 (Breyer, J., dissenting).

¹⁵⁹ See *id.* at 784; see also *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (determining that the dentist federation's agreement to withhold x-rays from insurance companies is anticompetitive); *NCAA*, 468 U.S. at 104 (determining that the "NCAA's television plan has a significant potential for anticompetitive effects" because it "restrains price and output").

¹⁶⁰ See *Cal. Dental Ass'n*, 526 U.S. at 786 (Breyer, J., dissenting); see also *Ind. Fed'n of Dentists*, 476 U.S. at 459 (finding that the dentist federation's agreement to withhold x-rays from insurance companies had no "procompetitive effect"); *NCAA*, 468 U.S. at 114 (finding that the NCAA's television plan was not justified by any "procompetitive efficiencies").

¹⁶¹ See, e.g., *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, 604 (1988).

¹⁶² See *id.* See also 7 P. AREEDA, ANTITRUST LAW ¶ 1507b (1978).

¹⁶³ Justice Breyer did not label his modified test as a quick-look, and the majority found his modified test to be more than merely a quick-look, because his test included a consideration of the defendant's market power. *Cal. Dental Ass'n*, 526 U.S. at 788-89 (Breyer, J., dissenting). However, the Court's previous modified rule of reason opinions do not require market power analysis. The Court stated in *NCAA* that "the absence of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *NCAA*, 468 U.S. at 109 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)). The Court also reasoned, "[w]e have never required proof of market power in such a case. This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." *NCAA*, 468 U.S. at 110. Thus, the test proposed here leaves out Justice Breyer's consideration of market power.

¹⁶⁴ *Dagher v. Saudi Ref. Inc.*, 369 F.3d 1108, 1116 n.7 (9th Cir. 2004) (quoting *Cal. Dental Ass'n*, 526 U.S. at 770). The Court also noted that the quick look analysis is appropriate

certain cases, where the plaintiff does not demonstrate that defendant's proffered justification is invalid, back into a traditional "rule of reason" analysis.¹⁶⁵

This proposed test is the next logical evolutionary step in the Court's §1 analysis, not a radical departure from previous schemes.¹⁶⁶ The test does what the Court should have done in the first place: it gives lower courts a common framework for analyzing all §1 allegations. Because it provides the flexibility and the certainty needed to analyze §1 claims adequately, this test should be applied to all §1 disputes.

The proposed test provides flexibility sufficient to accommodate the variety of situations that may arise, even situations that obviously justify "per se" analysis or "rule of reason" analysis. First, the test provides flexibility sufficient to encompass obvious situations that used to fall legitimately under the "per se" rule. These obvious situations will still be disposed of quickly under the proposed test. For example, as one commentator hypothesized, if the U.S.'s three major automobile manufacturers all formed a joint venture to sell cars at a single, pre-determined price, courts used to quickly dispose of such outright price-fixing under the "per se" rule.¹⁶⁷ But even under modified rule of reason analysis, a court could easily dispose of this obvious case "in the twinkling of an eye."¹⁶⁸ Second, the test provides flexibility sufficient to encompass obvious situations that legitimately used to require extensive analysis under the rule of reason. These obvious situations will still be analyzed under a careful balancing test because the proposed test provides a safety valve that releases such obvious situations back into the full rule of reason analysis.¹⁶⁹

The proposed test also provides certainty sufficient to allow parties to anticipate which restraints courts will deem illegal. Lower courts will know how to analyze every §1 dispute. Parties will no longer need to guess which outcome-determinative method of analysis a court will apply. Instead, parties can accurately predict the legitimacy of §1 claims based on the proposed test.

3. *Applying the Proposed Test to Texaco v. Dagher*

Compared to the procedural quagmire into which this case sinks under the traditional scheme, the proposed test would have provided solid ground on which to analyze *Texaco v. Dagher*.

First, the Court would have determined what specific restraints were at issue.¹⁷⁰ Right away the Court would have identified the restraint as a common price for Shell and Texaco gasoline resulting from the companies' joint venture. The Court would then have examined all of the facts surrounding the forming of the joint venture and the setting of a common price. The Court

when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." *Id.*

¹⁶⁵ See, e.g., *Mass. Bd.*, 549 F.T.C. at 604.

¹⁶⁶ See *Cal. Dental Ass'n*, 526 U.S. at 793-94 (Breyer, J., dissenting).

¹⁶⁷ See AREEDA, *supra* note 162, at ¶ 1508a.

¹⁶⁸ See *id.*

¹⁶⁹ See, e.g., *Mass. Bd.*, 549 F.T.C. at 604.

¹⁷⁰ See *Cal. Dental Ass'n*, 526 U.S. at 782 (Breyer, J., dissenting); *Dagher v. Saudi Ref. Inc.*, 369 F.3d 1108, 1112 (9th Cir. 2004).

would have considered what the specific restraints were without allowing the rule selected, whether “per se” or rule of reason, to determine the outcome.

Second, the Court would have determined if those restraints had the potential for genuine adverse effects on competition.¹⁷¹ Plaintiffs would have presented the facts that the joint ventures in question had a national market share of 15% of all gasoline sales, and more specifically in the western states, where this dispute originated, Equilon had a market share of over 25%.¹⁷² Because defendants were major oil companies with a significant market share, plaintiffs would likely have succeeded in establishing that the restrictions identified had at least the potential for genuine adverse effects on competition.

Next, assuming plaintiffs met their initial burden of proof, the burden would have shifted to defendants to establish that these restrictions might be justified by other procompetitive tendencies or redeeming virtues.¹⁷³ Defendants made what the Ninth Circuit called a “voluminous record” justifying their actions.¹⁷⁴ Yet, the defendants would have had a high threshold to reach because they raised gasoline prices in certain major markets during a time when crude oil prices hit historic lows.¹⁷⁵ Indeed the Ninth Circuit pointed to the “absence of persuasive evidence showing a procompetitive justification for initiating the price-fixing scheme, when viewed along with the plaintiff’s evidence showing anticompetitive effects” as its basis for deciding this case under the “per se” rule.¹⁷⁶ The proposed test takes this analysis out of the “per se” versus “rule of reason” dichotomy with which the Ninth Circuit was stuck. The proposed rule would adopt this same reasoning of the Ninth Circuit¹⁷⁷ to determine the outcome. If defendants could have met their burden, which they apparently could not have, then the burden would have shifted back to plaintiffs to demonstrate that the proffered justification was invalid.¹⁷⁸ Because defendants apparently could not meet their burden, then the restraint in question would have been found in violation of §1.

In the event that the Court found the defendants could meet their burden, then plaintiffs would have been required to demonstrate that defendants’ proffered justification was invalid in order for the restraint to be in violation of §1.

¹⁷¹ See *Cal. Dental Ass’n*, 526 U.S. at 784 (Breyer, J., dissenting); see also *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 (1984) (determining that the “NCAA’s television plan has a significant potential for anticompetitive effects” because it “restrains price and output”); *Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (determining that the dentist federation’s agreement to withhold x rays from insurance companies is anticompetitive); *Dagher*, 369 F.3d at 1111-13.

¹⁷² *Dagher*, 369 F.3d at 1111.

¹⁷³ See *Cal. Dental*, 526 U.S. at 786 (Breyer, J., dissenting); see also *NCAA v. Bd. of Regents*, 468 U.S. 85, 114 (1984) (finding that the NCAA’s television plan was not justified by any “procompetitive efficiencies”); *Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (finding that the dentist federation’s agreement to withhold x-rays from insurance companies had no “procompetitive effect”); *Dagher*, 369 F.3d at 1111-13.

¹⁷⁴ See *Dagher*, 369 F.3d at 1111.

¹⁷⁵ See *id.* at 1111-13.

¹⁷⁶ *Id.* at 1122.

¹⁷⁷ That reasoning was stated as the “absence of persuasive evidence showing a procompetitive justification for initiating the price-fixing scheme, when viewed along with the plaintiff’s evidence showing anticompetitive effects.” *Id.*

¹⁷⁸ See, e.g., *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, 604 (1988).

If, in such a circumstance, plaintiffs could not demonstrate that defendants' proffered justification is invalid, then a full "rule of reason" balancing analysis would have been required.¹⁷⁹

Though the proposed test still allows a possibility for a full traditional rule of reason analysis at this point, the proposed test is still preferable to the existing scheme. Under the existing scheme, plaintiff's failure to plead the alternate "rule of reason" claim prevented the Court from ever considering the traditional rule of reason.¹⁸⁰ Under the proposed scheme, the traditional rule of reason could have been reached, regardless of whether plaintiff pleaded it, because the modified scheme includes this safety valve. The outcome would have been preferable because, as the Supreme Court has admitted, the "per se" rule and the rule of reason were never meant to be mutually exclusive, but were rather meant to be part of a spectrum that allows a court to "form a judgment about the 'competitive significance' of the restraint."¹⁸¹

V. CONCLUSION

Determining the competitive significance of trade restraints may never be a simple task. Certain restraints may inevitably teeter on the blurry line between clearly anticompetitive practices and clearly procompetitive practices. Courts may always have to exercise some degree of discretion when analyzing such restraints.

The facts of *Texaco v. Dagher* illustrate a larger problem with the Court's traditional §1 analysis. The "per se" rule has been largely abandoned because it turned out to be potentially unfair to antitrust defendants.¹⁸² But the pendulum has swung too far in the opposite direction because the traditional rule of reason creates a potential practical problem of proof for plaintiffs.¹⁸³

The Court should abandon its traditional two methods of analysis and adopt a clearer and simpler test that will ensure that §1's purposes are applied consistently and will encourage plaintiffs to challenge corporations that engage in questionable trade restraints. If the Court had applied such a test in *Texaco v. Dagher*, the Court's decision would have helped the public get to the bottom of why gasoline prices are so high. Under a clearer and simpler test, plaintiffs would be able to expose major oil companies' actions if they are violating §1 of the Sherman Act. If major oil companies are acting legitimately, then the public would instead be able to turn its attention to other potential causes of high gasoline prices and their respective solutions. A clearer and simpler test would also provide guidance to lower courts, leading to certainty for those courts, for businesses, and for the consuming public.

¹⁷⁹ *Id.*

¹⁸⁰ See *Dagher*, 369 F.3d at 1127 (Fernandez, C.J., concurring and dissenting).

¹⁸¹ See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

¹⁸² See *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 794 (1999) (Breyer, J., dissenting) (finding that the "per se" rule is too abbreviated to allow proper analysis, and that the plaintiff tends to always win).

¹⁸³ See *id.* (finding that the traditional rule of reason requires an antitrust plaintiff to present every possible fact and theory, and that the case never reaches a conclusion).