No. 82-914

In the Supreme Court of the United States

October Term, 1982

Monsanto Company, petitioner

v.

Spray-Rite Service Corporation

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Rex E. Lee
Solicitor General

William F. Baxter
Assistant Attorney General

Lawrence G. Wallace
Deputy Solicitor General

Abbott B. Lipsky, Jr.
Deputy Assistant Attorney General

Jerrold J. Ganzfried
Assistant to the Solicitor General

Robert B. Nicholson
Edward T. Hand
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether evidence that some distributors of a product complained to the manufacturer about the pricing activities of a particular distributor, coupled with the manufacturer's subsequent termination of that distributor, is sufficient to permit an inference that the termination was the result of concerted action between the complaining distributors and the manufacturer, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

2. Whether nonprice vertical restrictions can be deemed per se violations of Section 1 of the Sherman Act merely because they are alleged to be part of a resale price maintenance scheme, precluding inquiry into the competitive effect of those restrictions.

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INTEREST OF THE UNITED STATES

The United States, which has primary responsibility for enforcement of the federal antitrust laws, has a substantial interest in assuring that the Sherman Act is construed in a manner that most effectively advances the Act's objective of protecting the Nation's competitive economic system.

STATEMENT

1. Petitioner Monsanto Company ("Monsanto") manufactures chemical products, including agricultural herbicides. Respondent Spray-Rite Service Corporation ("Spray-Rite") was engaged in the wholesale agricultural chemical business from 1955 to 1972; it was a low-margin, high volume business whose owner and president was its sole salesman. Spray-Rite bought herbicides from Monsanto and other manufacturers, and resold them to retail dealers and farmers in northern Illinois and adjacent

areas (Pet. App. A-2; J.A. A-100; Pltff. Exh. 201; Tr. 95, 164, 594).[1] This lawsuit arises out of Monsanto's refusal to renew its distribution agreement with Spray-Rite in 1968 (Pet. App. A-3).

During the period at issue, Monsanto sold its herbicides primarily through a network of about 100 independent, nonexclusive, wholesale distributors, including Spray-Rite (Pet. App. A-2 to A-3). While Monsanto assigned each distributor a geographic area of primary responsibility, the distributors could sell outside their areas, and the areas of responsibility overlapped; for example, 25 Monsanto distributors had primary areas that overlapped to varying degrees with Spray-Rite's (see *id.* at A-2; Tr. 1519-1525).[2]

Monsanto and other firms produce various corn herbicides to improve crop yields (Tr. 3217-3222). By the late 1960's, Monsanto's sales accounted for 15% of the corn herbicide market, while its chief competitor, Geigy, "dominated the market" with a 70% share (Tr. 2881, 3303-3305; J.A. A-114). Monsanto was dissatisfied with this situation and sought to improve its efforts to educate retail dealers and farmers about the technical advantages of its products (Tr. 3236-3245).[3] Accordingly, in 1967 Monsanto informed its distributors, including Spray-Rite, that it would reappoint them only for one-year terms, based on compliance with six criteria, including: (1) whether the distributor's primary activity was soliciting sales to retail herbicide dealers; (2) whether the distributor em-

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[1] In 1968, Spray-Rite styled itself as a "brokerage house." Pltff. Exh. 19; Tr. 976-978.

[2] This was not uncommon. The court of appeals noted that Monsanto assigned approximately 10 to 20 distributors to each area. Pet. App. A-2.

[3] Great care must be taken in the selection and application of herbicides, taking into account the location, soil, weather, and the like; selecting an inappropriate herbicide or misapplying an appropriate one can result either in the failure of the herbicide to deal with the problem it was purchased to solve, or even in serious damage to crops. *E.g.*, Tr. 915-917, 946-952.

ployed trained sales personnel capable of implementing Monsanto's new customer education programs for retail dealers and farmers; and (3) whether the distributor was "exploit[ing] fully" the herbicide market in its area of primary responsibility (Pet. App. A-3; J.A. A-59 to A-61). After Monsanto's market position deteriorated even further in 1968—its herbicide sales decreased 30% from 1967 (Tr. 3243)—Monsanto introduced a new herbicide, reduced the distributor and suggested retail prices of a second herbicide, suggested that distributor profit margins be reduced, changed its shipping policies to provide for free delivery only within the distributor's primary area of responsibility, and began to give cash bonuses to distributors who participated in Monsanto's technical schools or made technical presentations to retail dealers and farmers concerning Monsanto products (Pet. App. A-3). This marketing program seems to have had the desired effect: in the four years following implementation of the new policies, Monsanto nearly doubled its share of the corn herbicide market from 15% to 28%, at the expense of the dominant manufacturer (J.A. A-114 to A-115).

In the fall of 1968, Monsanto informed Spray-Rite that its distributorship would not be renewed. At that time, 80% of Spray-Rite's herbicide sales were sales of Geigy products; only 16% were sales of Monsanto products (see Pet. App. A-3; Tr. 932-942).[4]

Herbicide distributors often engaged in price cutting (*e.g.*, Tr. 2234) and over the years Monsanto had received numerous complaints from its distributors about the low resale prices of other distributors (Tr. 181, 184), including Spray-Rite (Pet. App. A-16).[5] Spray-Rite's president testified that on one occasion Monsanto threatened that "retaliation was going to take place" if he did

[4] Even so, Spray-Rite was Monsanto's tenth largest distributor of one herbicide. Pet. App. A-3.

[5] One Spray-Rite witness testified that "it was standard practice" for Monsanto distributors to complain about one another; "[i]f it didn't happen it would be like snowing in July." Tr. 184.

not follow the suggested resale prices (Tr. 711). But Monsanto did not receive any complaints about Spray-Rite's pricing or discuss Spray-Rite's status with other distributors during the year prior to its decision not to renew Spray-Rite (Tr. 1379-1403). After the nonrenewal in 1968, Spray-Rite continued to sell herbicides, including Monsanto products purchased from other distributors (Pltff. Exh. 133; Tr. 912-915), until it ceased operations in 1972 (Pet. App. A-4).

2. Spray-Rite then sued Monsanto, alleging that the refusal to renew its distributorship, combined with a post-termination boycott by Monsanto and its distributors, had forced Spray-Rite out of business and that Monsanto and its distributors had conspired to implement a resale price maintenance scheme (J.A. A-3). Monsanto denied engaging in resale price maintenance, argued that its marketing program consisted of legitimate nonprice restrictions designed to improve the efficiency of its distribution system, and contended that the termination was a unilateral act prompted by Spray-Rite's failure to satisfy Monsanto's announced distributorship criteria.

In answering three special interrogatories, the jury found for Spray-Rite on each of its three theories of per se violation.[6] The jury returned a general verdict against Monsanto, assessing damages of $3.5 million, which were trebled by the district court. See 15 U.S.C. 15.

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[6] The interrogatories read as follows (J.A. A-27 to A-28):

1. Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices on Monsanto herbicides?

2. Were the compensation programs and/or areas of primary responsibility and/or shipping policy created by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?

3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto's herbicides after 1968?

3. The court of appeals affirmed (Pet. App. A-1 to A-42). First, the court noted that Monsanto had received numerous complaints about Spray-Rite's pricing and subsequently terminated Spray-Rite; the court held that evidence "of termination following competitor complaints is sufficient to support an inference of concerted action" (*id.* at A-15). Second, the court held that Monsanto's marketing program—the territorial assignments, distributor education and compensation programs and shipping policy—was properly deemed per se unlawful, rather than analyzed under the rule of reason, because it was alleged to be "part of an unlawful scheme to fix prices" (*id.* at A-12). Finally, the court ruled that the jury was instructed properly on Spray-Rite's boycott claim and that there was sufficient evidence to support the jury's verdict (*id.* at A-9 to A-11, A-18).[7]

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that evidence of distributor complaints, followed by termination, sufficed to prove concerted action between Monsanto and distributors other than Spray-Rite. This decision undermines the crucial distinction in Section 1 of the Sherman Act, 15 U.S.C. 1, between collective and unilateral conduct. Any manufacturer faces numerous choices in deciding how its product can be marketed in the manner most likely to assure success against rival products. For those companies that choose to sell through distributors, it is the distributors who may have the best perception of how marketing policies fare in practice. Accordingly, the flow of information from distributors to manufacturers can be highly beneficial in devising strategies for interbrand competition. By using such communications as the lever for find-

[7] Monsanto has not sought certiorari on the boycott issue. See Pet. 3-4 n.4. However, the jury's award of damages did not attribute a particular amount to any of the three alleged antitrust violations, nor did Spray-Rite adduce particularized evidence on that subject. Pet. App. A-18 to A-25.

ing a per se violation, the court of appeals would place in jeopardy all manufacturers who follow the helpful, and often procompetitive, practice of listening to their distributors.

2. The court of appeals also erred in holding that a marketing program—which on its face involved nonprice arrangements designed to promote effective interbrand competition—is per se illegal merely because it is alleged to have had an effect on price. This holding is contrary to *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), which held that nonprice measures are subject to analysis under the rule of reason. *Sylvania* recognized that such practices may enhance interbrand competition, which is "the primary concern of antitrust law" (*id.* at 52 n.19), and thus do not warrant per se condemnation. But the decision below would undermine *Sylvania* by avoiding the competitive analysis this Court required merely because an effect on price is alleged. Since even the arrangements involved in *Sylvania* would probably affect price, the decision below would largely undo *Sylvania* as a practical matter.

This suggests a more fundamental reason why the court of appeals' decision should be vacated. There is no sound basis for assuming, as courts have since *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), that resale price maintenance is so invariably anticompetitive as to justify per se condemnation. In many cases, resale price maintenance may have the same effect as the nonprice measures *Sylvania* removed from the category of per se offenses: they may be highly procompetitive and enhance consumer welfare by stimulating interbrand rivalry. Resale price maintenance may be anticompetitive in certain contexts; but abandonment of the per se standard would not require courts, in order to identify those contexts, to engage in the protracted proceedings that the rule of reason is sometimes thought to entail. There are readily ascertainable objective criteria for determining whether, in a particular market, resale price maintenance is likely to have adverse effects. In cases where these criteria are not satisfied there is justification neither for extended factual inquiry nor for automatic condemnation; and in cases where adverse effects may exist, liability will still be imposed. But the overbroad rule that prohibits all resale price maintenance, without regard to its actual impact in the marketplace, is unwarranted; it disserves consumers by precluding beneficial practices along with those that are pernicious.

ARGUMENT

I. EVIDENCE THAT DISTRIBUTORS OF A PRODUCT COMPLAINED TO THE MANUFACTURER ABOUT ANOTHER DISTRIBUTOR, COUPLED WITH THE SUBSEQUENT TERMINATION OF THE LATTER DISTRIBUTOR, IS INSUFFICIENT TO PROVE THAT THE TERMINATION WAS THE RESULT OF CONCERTED ACTION BETWEEN THE COMPLAINING DISTRIBUTORS AND THE MANUFACTURER

The court of appeals held that a terminated distributor can prove the element of concerted action required by Section 1 of the Sherman Act, 15 U.S.C. 1, simply by showing: (a) that the manufacturer received complaints about the plaintiff's pricing from other distributors; and (b) that the manufacturer subsequently terminated the plaintiff (Pet. App. A-15 to A-16). This holding misconstrues the nature of unlawful agreements under the Sherman Act, conflicts with the decisions of other courts of appeals, and threatens seriously adverse consequences to the efficient functioning of vertical distribution systems.

1. The principal concern underlying Section 1 is that firms in direct competition will combine to coordinate their decisions and eliminate rivalry among themselves.[8] Accordingly, a manufacturer's independent decisions about

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[8] See *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977) ("[i]nterbrand competition * * * is the primary concern of antitrust law").

the pricing and distribution of its product do not violate Section 1, for the statute bars only concerted activities in restraint of trade. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). Indeed, a manufacturer's freedom unilaterally to regulate the distribution of its product so as to win customers from its rivals is the very essence of competition.[9] To permit proof of a Section 1 violation to rest merely on complaint-and-termination evidence, as the court of appeals did, undermines Section 1's crucial distinction between collective and unilateral conduct, because such evidence does not in itself identify concerted action that may adversely affect competition.

It is often in a manufacturer's self-interest to terminate a dealer who violates a distributional restriction or otherwise disrupts the manufacturer's sales strategy. As the Seventh Circuit itself recently observed in *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (1982):

> If a supplied wants his distributors to emphasize nonprice rather than price competition, which * * * is the usual reason why he would restrict his distribution, he will be hostile to price cutters because they will make it harder for his other distributors to recoup the expenditures that he wants them to make on presale services to consumers and on other forms of nonprice competition, and of course the undersold distributors will be equally or more hostile.

Such a coincidence of desires, standing alone, can no more support the inference of conspiracy in a dealer termination case than can evidence of consciously parallel conduct support such an inference in a case of horizontal price fixing.[10] Rather, something more is needed

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[9] See *Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra*, 433 U.S. at 56; *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1196 (6th Cir. 1982), petition for cert. pending, No. 82-848.

[10] Compare *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954), with *Eastern States Retail Lumber Dealers Association* v. *United States*, 234 U.S. 600 (1914), and *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208,

to permit the trier of fact to infer that the supplier and complaining distributors had "a common design and understanding, or a meeting of minds in an unlawful arrangement"—the essence of the agreement element of a Section 1 violation. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946).[11]

To infer concerted action (in the absence of direct evidence of collusion)[12] requires a showing that the conduct

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227 (1939). See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 659 (1962).

[11] It is for this reason that four courts of appeals have concluded that evidence of the sort deemed dispositive by the court of appeals here—dealer complaints and subsequent termination—reflects a common occurrence so often devoid of competitive significance that, standing alone, it cannot support a finding that termination was the result of concerted action between the complaining dealers and the manufacturer. *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111, 115-117 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981); *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 856-857 (1st Cir. 1982); *Schwimmer* v. *Sony Corp.*, 677 F.2d 946, 952-953 (2d Cir. 1982), cert. denied, No. 82-277 (Nov. 8, 1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 941-945 (2d Cir. 1981), cert. denied, No. 81-2215 (Oct. 4, 1982); *Davis-Watkins Co.* v. *Service Merchandise*, *supra*, 686 F.2d at 1199.

On the other hand, the Fourth Circuit recently followed the rule enunciated by the Seventh Circuit here. *Bostick Oil Co.* v. *Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir. 1983). And two panels of the Eighth Circuit have reached conflicting results on this issue. Compare *Battle* v. *Lubrizol Corp.*, 673 F.2d 984, 991-992 (1982) (concluding that complaint-and-termination evidence is sufficient to prove agreement) with *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (1982) (concluding that it is not). In October 1982, those two cases were reargued before the Eighth Circuit sitting en banc; a decision is expected soon. The United States filed a brief as amicus curiae in the en banc proceeding in *Battle*, urging that *Battle* be vacated and *Roesch* affirmed.

[12] Mere communication between distributor and supplier, such as occurred here, is not in itself sufficient to prove collusion. Cf. *Smith* v. *Northern Michigan Hospitals, Inc.*, 703 F.2d 942 (6th Cir. 1983) ("Close ties between [alleged co-conspirators] * * * are not, by themselves, sufficient predicates for inferring the existence of a conspiracy to restrain trade"). Nor does such communication involve the danger to competition posed by advance exchange of price

is not in the individual self-interest of the participants, acting independently, and is in their collective and self-interest only when they coordinate their actions.[13] It is "not enough to show that [the complaining distributors], acting separately * * * wanted to get rid of a competitor; there must also be evidence that in terminating [the plaintiff, the supplier] was acceding to their desire rather than acting to promote an independent conception of its self-interest." *Valley Liquors, supra*, 678 F.2d at 744. At most, the evidence deemed sufficient by the court of appeals here is probative only of the existence of parallel desires on the part of Monsanto and some of its distributors to see Spray-Rite terminated, and provides no guidance on whether these parallel desires were the result of collusion.

2. The standard adopted by the court of appeals would impede the flow of information between a manufacturer and its distributors that is crucial to the operation of efficient distribution systems, and thus would injure consumer interests that the Sherman Act is meant to protect.[14] Distributors are in a position to obtain considera-

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information by competitors. Cf. *United States* v. *Container Corp.*, 393 U.S. 333 (1969).

[13] See *Valley Liquors, supra*, 678 F.2d at 744; *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc., supra*, 637 F.2d at 111, 114; *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

[14] See *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc., supra*, 637 F.2d at 111 n.2, citing P. Areeda, *Antitrust Analysis* 560 (2d ed. 1974). Unlike horizontally competing firms, a manufacturer and its distributors must constantly coordinate their activities to assure that their product will reach the consumer in an efficient manner. If the manufacturer cannot rely on its distributors to inform it about the operation of the distribution system, it will have to employ some alternative monitoring system at additional cost. See P. Kotler, *Marketing Management* 553-555 (2d ed. 1972); see also F. Warren-Boulton, *Vertical Control of Markets* 13-21 (1978); O. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* 20-40, 102-103 (1975).

Moreover, a dealer who maintains low prices either is a highly-prized dealer to the manufacturer, often having atypically low costs ble insight into their supplier's distribution system and into inefficiencies that may arise from either the design of the system or the manner in which it is implemented. Distributors who would benefit from a more efficient system have an incentive to communicate their ideas for improvement to the supplier, and the supplier has an obvious incentive to implement efficiency-enhancing ideas, even if they require terminating some distributors. In practical effect, however, the Seventh Circuit's rule could virtually immunize dealers from termination once a competitor has complained. Suppliers who maintain good communications with their distributors would be rendered powerless to take action against disruptive dealers who threaten the efficient operation of their distribution systems, unless the suppliers are willing to run the risk of incurring treble damages with no opportunity to show the procompetitive nature of their actions.[15] This is not, after all, a situation involving communications between competitors—which is the prime concern of Section 1—but between persons who are cooperating in the sale of a single product and who have ongoing contractual relationships.[16]

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and generating substantial sales volumes, or else is a potentially disruptive dealer that may be cutting costs by free-riding on the marketing programs of other dealers. See page 15, *infra*. Even a manufacturer that is making no effort to control resale price has good reasons for monitoring the operations of such price-cutting dealers.

[15] See Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 12-13 (1981). Distributors routinely complain to suppliers about the supposed price-cutting activities of competing distributors; Spray-Rite itself made such complaints to Monsanto. Tr. 181; see note 5, *supra*. Indeed, the supplier's first information about an infraction often will come in the form of complaints by other distributors.

[16] Another adverse consequence of the court of appeals' rule stems from its open-ended nature: so long as termination follows at *any* time subsequent to the complaint, the jury may infer concerted conduct. There was no evidence that Monsanto received any complaints about Spray-Rite during the entire year preceding its termination, see page 4, *supra*; yet the court of appeals held that com-

This Court should reject the court of appeals' extraordinarily broad interpretation of the concerted action requirement, an interpretation that fails to require more than ambiguous evidence, and threatens to disrupt long-established and competitively sound methods of dealer-manufacturer communications.[17]

II. THE COURT OF APPEALS INCORRECTLY HELD THAT MONSANTO'S MARKETING PROGRAM WAS SUBJECT TO ANTITRUST SCRUTINY UNDER THE PER SE RULE

As noted above, at about the time of Spray-Rite's nonrenewal, Monsanto instituted a new marketing program, including territorial assignments for distributors, compensation for distributors who participated in Monsanto's new customer education programs, and free delivery of herbicides to locations within the distributor's primary area of responsibility. The court of appeals erred in ruling that the jury could find this new marketing program to be a per se violation of Section 1 merely because it was alleged to have an effect on price, and thus to be part of a resale price maintenance scheme (Pet. App. A-11 to A-13).[18] By permitting the line between non-

plaints made two to four years previously were sufficient evidence that Monsanto acted, not unilaterally, but in concert with its distributors.

[17] Spray-Rite has contended (Br. in Opp. 19-24), that there was more evidence at trial of the alleged agreement between Monsanto and its distributors than the complaint-and-termination evidence relied on by the court of appeals. On remand, the court of appeals would be free to consider whether there was sufficient evidence in addition to the complaints and termination to support the conclusion that the termination resulted from an unlawful agreement between Monsanto and its distributors.

[18] Spray-Rite also contends (Br. in Opp. 21-23), that it did more than merely allege a connection between the nonprice policies and a price-fixing scheme, *i.e.*, that it proved the connection and that the jury so found. But the court of appeals' analysis, on its stated terms, found the allegation itself to be dispositive (Pet. App. A-13);

price and price arrangements to be blurred in this way, the court of appeals' ruling undermines the approach adopted by this Court in *Sylvania* and threatens to stifle many types of procompetitive nonprice measures taken by manufacturers to improve their products' competitive position. More fundamentally, the court of appeals' decision exposes the difficulties inherent in analyzing "nonprice" vertical restrictions under the rule of reason, while treating vertical price restrictions—resale price maintenance—as unlawful per se.

A. In The Absence of Evidence Connecting Monsanto's Marketing Program to a Resale Price Maintenance Scheme, the Challenged Practices and Restrictions Are Nonprice Vertical Restrictions That Should Be Tested Against the Rule of Reason

1. Although the Sherman Act, read literally, prohibits all restraints of trade that result from concerted action, this Court long has held that it precludes only those restraints that are "unreasonably restrictive of competitive conditions." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 58 (1911); accord, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). The unreasonableness of a restraint of trade must be established by either (1) evidence that the restraint is demonstrably anticompetitive in the circumstances of the case (the rule of reason), or (2) a conclusive presumption of unreasonableness based on the general character of the challenged conduct (the per se rule). See *Professional Engineers*, *supra*, 435 U.S. at 687-692; *Sylvania*, *supra*, 433 U.S. at 49-50; *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958). The rule of reason is the normal test of the legality of a re-

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the court expressly linked the invocation of a per se approach to Spray-Rite's allegations and not to the proof at trial. This statement of the law is incorrect and would be an inappropriate standard for decision in future cases. Should this Court reverse, it would remain for the court of appeals on remand to decide whether Spray-Rite proved its allegations.

straint; the per se rule is employed only in those limited circumstance where courts have had considerable experience with the type of conduct challenged, and consistently have found the conduct to cause a "pernicious effect on competition and [to] lack any redeeming virtue." *Northern Pacific, supra,* 356 U.S. at 5; see *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 8 (1979). In either event, "the purpose of the analysis is to form a judgment about the competitive significance" of the alleged restraint. *Professional Engineers, supra,* 435 U.S. at 692.

2. In *Sylvania,* this Court held that nonprice vertical restrictions present sufficient procompetitive potential to preclude per se treatment. 433 U.S. at 49-50. Although the Court only ten years before in *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), had ruled that distributional restrictions similar to those involved in *Sylvania* were illegal per se, the Court, upon reexamination, overruled *Schwinn* and held that such vertical restrictions do not invariably have the necessary "pernicious effect on competition" to justify per se condemnation. *Sylvania, supra,* 433 U.S. at 58. This Court stated in *Sylvania* (*id.* at 54) that while vertical restrictions "reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers," they also "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." Because of these opposing competitive effects, the Court concluded that antitrust plaintiffs should be required to prove that particular nonprice vertical restrictions are anticompetitive.[19]

As *Sylvania* recognized, many products require considerable pre-sale promotion and post-sale assistance in or-

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[19] On remand in *Sylvania,* the Ninth Circuit held that the nonprice vertical restrictions there were reasonable: "The restraint was likely to promote interbrand competition given the market structure in the television manufacturing industry * * *." 694 F.2d 1132, 1140 (9th Cir. 1982).

der to enhance consumer acceptance and demand. Some manufacturers may determine that their product is most competitive with other brands when these services are offered without separate charge to the consumer, with the cost being calculated into the retail price of the product.[20] In order to persuade dealers to offer such services, manufacturers must either compensate the dealers directly or somehow enable the dealers to earn the higher gross margins necessary to defray the costs attributable to providing the services. Otherwise, dealers offering "free" ancillary services will have their prices undercut by, and lose sales to, dealers who have lower costs because they offer no such services. The prospect of "free-riding" by some dealers on the promotional and educational services of other dealers diminishes the incentives of dealers generally to offer these services in amounts necessary to ensure the most effective distribution. As a result, fewer of the manufacturer's products find their way into the market—to the detriment of consumers.

Sylvania recognized that in some circumstances nonprice vertical restrictions that constrain intrabrand competition are a legitimate and socially desirable way to cure the "free-rider" problem and to promote interbrand competition. See 433 U.S. at 54-55. Because Monsanto's marketing program on its face did not pertain to price, it falls squarely within that class of vertical restrictions that *Sylvania* held to be subject to rule of reason analysis. There is no evidence that, prior to adopting the new marketing program, Monsanto consulted with any distributors concerning its desirability. Rather, Monsanto perceived that demand for its products was unnecessarily

[20] For example, a manufacturer may conclude it would be beneficial for its product to be sold with a service warranty that would be honored by retailers. Should some retailers sell the product without offering repair and maintenance services, consumers would be left with the less convenient alternative of sending the product to the manufacturer or with no recourse at all. The result would be an increase in complaints and the loss of the good-will the manufacturer had hoped to generate.

low because many potential customers understood neither which Monsanto herbicides were appropriate for particular farming needs, nor the proper method of applying the products (Tr. 3237-3238); the dealer and farmer education programs were aimed at solving these problems (Tr. 3239, 3244-3247). After the new program was implemented, Monsanto significantly increased its share of the corn herbicide market (from 15% to 28% in a four-year period) at the expense of the dominant manufacturer (whose market share fell from 70% to 55%) (J.A. A-114 to A-115). This evidence strongly suggests that Monsanto's marketing program had exactly the type of procompetitive effects that *Sylvania* was intended to encourage.

3. Although Monsanto's marketing program had no direct effect on price, Spray-Rite contended below that it had the indirect effect of making it economically undesirable for Monsanto distributors to sell to Spray-Rite, thus preventing Spray-Rite from purchasing sufficient quantities of Monsanto herbicides at low enough prices to engage in price competition.[21] But many restrictions commonly regarded as nonprice vertical restrictions, including the location clause at issue in *Sylvania*, may have an upward effect on the resale price of the manufacturer's products.[22] For example, a manufacturer may create ex-

[21] See Spray-Rite's brief filed in the court of appeals, at 19-25; Tr. 4254-4256 (argument at close of trial). For example, Spray-Rite's expert witness testified that Monsanto's creation of primary areas of distributor responsibility and free delivery of herbicides within those areas had the effect of "precluding" Monsanto distributors from selling to persons outside their areas, including Spray-Rite (Tr. 2668), and that the compensation program encouraged sales to retailers and thereby discouraged sales to nonretailers, such as Spray-Rite. Tr. 2668, 2675-2676; see Pet. App. A-19, A-23.

[22] Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, supra*, 48 U. Chi. L. Rev. at 11-12; Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?*, 67 Va. L. Rev. 1457, 1467-1470 (1981).

clusive territorial distributorships, a practice that is economically indistinguishable from the practice involved in *Sylvania* and one that has been held subject to rule of reason analysis,[23] even though one probable effect of this arrangement is to limit intrabrand price competition.

Any time a manufacturer attempts to ensure that its goods receive a more costly type of treatment at the point of sale—as Monsanto did here—the manufacturer must cope with potential "free riders" who undersell those dealers that comply with the manufacturer's marketing program. To the extent that the manufacturer is successful in eliminating the free-rider problem and encouraging its dealers to provide demand-enhancing services, the vertical restrictions will raise the resale price of the product indirectly, as dealers attempt to recover the additional costs of those services. But although vertical restrictions increase both dealer costs and price, such restrictions will be unprofitable for the manufacturer unless they also increase the quantities of product that dealers sell. This is the critical, procompetitive respect in which such vertical restrictions differ from a mere widening of dealer margins, which would increase price but *reduce* the quantities of product sold. Indeed, the manufacturer usually will anticipate that its marketing program will enable its dealers to increase their prices, precisely so that they can recover their added costs. That is true whether the manufacturer uses restricted sales territories, location clauses, exclusive dealing arrangements, or some other vertical restriction.

But if any dealer who refuses to abide by a manufacturer's marketing plan could establish a per se violation of Section 1 simply by showing that the manufacturer's

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[23] *E.g., Ron Tonkin Gran Turismo, Inc.* v. *Fiat Distributors, Inc.*, 637 F.2d 1376, 1385-1388 (9th Cir.), cert. denied, 454 U.S. 831 (1981); see *Copy-Data Systems, Inc.* v. *Toshiba America, Inc.*, 663 F.2d 405, 408-411 (2d Cir. 1981); R. Posner, *Antitrust Law, An Economic Perspective* 160 (1976); Baker, *supra,* 67 Va. L. Rev. at 1515-1518.

"nonprice" arrangement has lessened price competition in some way, then the rule of *Sylvania* would be seriously undermined.[24] After all, Spray-Rite conceded at trial that it had not attempted to prove that Monsanto's marketing program violated Section 1 when analyzed under the rule of reason (Tr. 3982-3984). In this context, the court of appeals' transmutation of those practices into per se violations solely on the basis of a claim that they were part of a price-fixing scheme, as shown by their effect on price, effectively negates *Sylvania*'s careful treatment of nonprice vertical restrictions and threatens to chill the efforts of manufacturers to implement numerous procompetitive vertical marketing decisions.[25]

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[24] Indeed, under the decision below, a dealer could immunize itself against termination by underselling its competitors, even if this is accompanied by a variety of departures from the manufacturer's nonprice policies. Should the dealer be terminated, it could contend that this action was triggered by its price-cutting and, hence, that the termination was part of a price-fixing scheme. Under the Seventh Circuit's holding, this would suffice to establish per se liability. Even a distribution plan that would be lawful under *Sylvania* could be held hostage by such tactics.

[25] The court of appeals concluded that *Sylvania* was not controlling (Pet. App. A-12); instead, the court relied (*ibid.*) on *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967). *Sealy*, however, involved horizontal restraints, as this Court expressly stated. *Id.* at 352. The decision in *Sealy* correctly recognizes that a distinction exists between horizontal and vertical cases, with a different standard for determining liability applicable to each. *Id.* at 354. As noted above (page 15, *supra*), there was no evidence that Monsanto adopted the programs here as a result of horizontal collusion among its distributors.

In contrast to the court of appeals' rule here, two other courts have held that the fact that a distribution restriction indirectly exerts some pressure on dealers' prices is not enough to transform a nonprice arrangement into resale price maintenance. *Butera* v. *Sun Oil Co.*, 496 F.2d 434, 437-438 (1st Cir. 1974); *JBL Enterprises, Inc.* v. *Jhirmack Enterprises, Inc.*, 519 F. Supp. 1084, 1088-1089 (N.D. Cal. 1981), aff'd, 698 F.2d 1011 (9th Cir. 1983).

B. The Court of Appeals Should Not Have Presumed Monsanto's Marketing Program to Have Been Unlawful Even If It Was Adopted as Part of a Resale Price Maintenance Scheme

Even if the evidence shows that Monsanto adopted the challenged marketing program as part of a resale price maintenance scheme, this Court should still vacate and remand because resale price maintenance should not be deemed per se unlawful.

1. The Court should take this opportunity to consider whether resale price maintenance, alone among vertical restrictions, should always be deemed unlawful, as the Court first ruled 70 years ago in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 404-409 (1911). As discussed below, the logic of *Sylvania* compels the conclusion that resale price maintenance—like other vertical restrictions—is unsuitable for per se treatment.[26] It is true that Monsanto has denied engaging in resale price maintenance; but the per se unlawful status of that practice has been universally assumed by courts for so long and the consequences of being adjudged to have engaged in the practice are so severe—treble damages and possible felony prosecution—that few antitrust defendants can be expected to concede participating in such an agreement, a concession that is necessary as a matter of litigation strategy if they wish to argue that the practice was procompetitive.[27] For 70 years, then, it has been unlikely that the per se status of resale price maintenance would be placed directly in issue by an antitrust

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[26] The similarities in purpose and effect between resale price maintenance and nonprice vertical restrictions led Justice White to observe in his concurring opinion in *Sylvania* that the "effect * * * of the Court's opinion is necessarily to call into question" the per se rule against resale price maintenance. 433 U.S. at 70.

[27] For this reason, antitrust defendants have not given the Court any occasion to look carefully at the actual competitive effects of resale price maintenance. See, *e.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 36-38 (1960); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944).

defendant. At the same time, the record here suggests that resale price maintenance may be competitively justified in certain cases, see pages 21-23, *infra*, and the court of appeals' decision clearly illustrates the risks of failing to perform any competitive analysis at all.

Nor should the longevity of the *Dr. Miles* rule shield it from inquiry about whether it in fact furthers consumer welfare. This Court often has recognized the broad mandate that Congress has given it in interpreting the Sherman Act so as to promote competition,[28] and the Court has not been reluctant to reconsider previous antitrust decisions whose economic rationales have been called into question.[29]

2. This Court has always regarded the rule of reason as the normal test of the legality of an alleged restraint; per se rules are invoked only where economic and judicial experience have shown that certain practices invariably have a "pernicious effect on competition" and lack "any redeeming [competitive] virtue." *Sylvania, supra*, 433 U.S. at 49-50; see pages 13-14, *supra*. The Court recognized in *Sylvania* that this policy is particularly appropriate in the case of vertical marketing arrangements between manufacturers and distributors of a product, for such arrangements typically are conducive to intense interbrand competition. See 433 U.S. at 51-53. Accordingly, a per se rule against resale price maintenance can be justified only if there is some persuasive basis for suppos-

[28] *E.g., Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip. op. 12); *Professional Engineers, supra*, 435 U.S. at 688. See *United States* v. *Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943) (3-judge court), aff'd, 326 U.S. 1 (1945) (in deciding Sherman Act cases, the courts have "a legislative warrant, because Congress * * * has delegated to the courts the duty of fixing the standard of each case").

[29] See, *e.g., Sylvania, supra*, 433 U.S. at 58-59 (overruling *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)); *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 22-25 (1964) (effectively overruling *United States* v. *General Electric Co.*, 272 U.S. 476 (1926)).

ing that the practice reduces output, retards innovation, or otherwise interferes with Sherman Act goals. But the Court has never analyzed resale price maintenance in terms of its actual economic effects, much less found that those effects are so necessarily anticompetitive as to justify a per se ban. Such an analysis would show that resale price maintenance, like the nonprice vertical restrictions in *Sylvania*, can have significant procompetitive effects.

3. a. Resale price maintenance is not likely to be used by manufacturers merely as a way to raise resale prices; there are simpler—and safer—ways to do that.[30] Rather, a manufacturer who employs resale price maintenance usually will be attempting to provide to distributors an incentive to handle its product in a way that the manufacturer expects will be advantageous in interbrand competition. See generally Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & Econ. 86, 89-96 (1960); R. Posner, *Antitrust Law, An Economic Perspective* 148-149 (1976). Resale price maintenance can have the same types of procompetitive effects recognized in *Sylvania* as possible consequences of nonprice vertical restraints. By eliminating intrabrand price competition, the manufacturer may enable its distributors to provide costly promotional, warranty, or other ancillary services and thereby increase the attractiveness of the product. Indeed, it is the indirect lessening of price competition by nonprice vertical restrictions that eliminates the free-rider problem and gives such restrictions their procompetitive potential. See pages 15-16, *supra*. Price-related vertical restrictions in general, and resale price maintenance in particular, accomplish directly what nonprice vertical restraints accomplish indirectly: both types of

[30] If mere elevation of resale price were the manufacturer's purpose, the manufacturer could simply raise its own price to the distributor and keep the higher revenues commensurate with that higher price.

practice are designed to increase both price and sales volume.[31]

There often will be several ways in which a manufacturer can preserve his distributors' service incentives in the face of potential free riders; as this Court recognized in *Sylvania*, exclusive territories are one effective and reasonable method. See 433 U.S. at 54-59. But, as Professor (now Judge) Posner has explained, resale price maintenance

> is more flexible than exclusive territories as a method of limiting price competition among dealers, and it may be the only feasible method where effective retail distribution requires that dealers be located close to one another; any free-rider or other arguments that are available to justify exclusive territories are equally available to justify resale price maintenance.[32]

In this case, assuming that Monsanto sought to restrict the freedom of its distributors to set resale prices, the record indicates that such a restriction had significant procompetitive effects. Monsanto had an apparently good reason to desire that expert point of sale advice be available to dealers and farmers who purchased its herbicides (see note 3, *supra*). Moreover, Monsanto was in the process of introducing a new herbicide (see Pet. App. A-3) whose commercial success might depend on careful and

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[31] This Court has recognized that resale price maintenance can increase output by inducing dealers to engage in "demand-creating activity" (such as product promotional activities) that may, in certain cases, outweigh the loss of sales that might have been made in the absence of resale price maintenance. *Albrecht* v. *Herald Co.*, 390 U.S. 145, 151 n.7 (1968). See *Sylvania*, *supra*, 433 U.S. at 69-70 (White, J., concurring).

[32] Posner, *supra*, 48 U. Chi. L. Rev. at 9. See Telser, *supra*, 3 J.L. & Econ. at 91-92. The likelihood of a free-rider problem is increased where, as in Monsanto's distribution system, numerous distributors serve the same area, so that the promotional efforts of one distributor will benefit others in its area.

expert point-of-sale instruction.[33] The evidence shows that Monsanto's new policies apparently had the desired effect, not of decreasing quantities sold as a mere price increase would do, but of increasing demand and making Monsanto's herbicides more competitive in the interbrand market. See page 3, *supra*.

b. Of course, resale price maintenance also can cause adverse competitive effects at which the antitrust laws properly are aimed. But the existence of the conditions under which such adverse effects might occur usually are ascertainable through examination of a limited set of objective factors, and, when such effects are demonstrated, the practice will be unlawful under the rule of reason. Virtually all of the adverse competitive effects of resale price maintenance will occur: (1) where a group of manufacturers attempts to use the practice to police and strengthen a cartel among themselves; or (2) where one or more of a manufacturer's distributors, in order to exercise market power or form or police a cartel, coerce the manufacturer (and perhaps other suppliers) to impose an inefficient resale price maintenance system—one that reduces quantities sold—for the benefit of the coercing distributors.

The first concern cannot arise unless the market structure indicates some reasonable likelihood of collusion. If, for example, concentration at the manufacturing level is low or if only a small fraction of output is sold subject to vertical price arrangements, allegations that such arrangements are being used to facilitate manufacturer collusion are implausible on their face. In other situations, market characteristics such as minimal entry costs, high entry and exit rates, or particular product characteristics, may minimize the probability that collusion could occur even in the presence of a "facilitating" vertical price arrangement. In at least some cases, these market charac-

[33] Cf. Telser, *supra*, 3 J.L. & Econ. at 95-96; Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. Chi. L. Rev. 825, 840-843 (1955).

teristics will so thoroughly negate the possibility of an anticompetitive effect arising from the challenged practice that further inquiry is unnecessary.

Similarly, market characteristics may negate the possibility of an anticompetitive effect resulting from dealer coercion: if the coercing dealers, individually or collectively, lack market power in the resale market, they will be unable to prevail against the manufacturer's own interests in maintaining an efficient distribution system. And even if the dealers have the market power necessary to subvert the manufacturer's distribution system, they will have no incentive to do so unless the manufacturer itself has market power that the dealers hope to exploit—for without market power, the manufacturer cannot succeed in sustaining a higher price for the benefit of its dealers without disproportionately large losses of volume.[34]

4. Given the actual competitive effects of resale price maintenance, there is no basis for this Court to assume, as it has since the *Dr. Miles* decision in 1911, that resale price maintenance is so unfailingly anticompetitive as conclusively to be presumed unlawful in all situations. See, *e.g.*, *Rice* v. *Norman Williams Co.*, No. 80-1012 (July 1, 1982); *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980). See generally Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, 1960 Sup. Ct. Rev. 258.

a. Indeed, the Court's few discussions of the basis for the per se ban during the last 70 years have not been consistent in justifying the rule. In *Dr. Miles*, the Court first relied on the common law proposition that "a general restraint upon alienation is ordinarily invalid." 220 U.S. at 404. The Court then concluded that resale price maintenance is a practice in which the manufacturer has little economic interest; rather, "the advantage of established

[34] Conversely, if the market characteristics allow the possibility of anticompetitive effects and no free-rider problem is apparent, then in the absence of a showing by the defendant that the particular resale price maintenance system promotes competition, it should be deemed unlawful.

retail prices primarily concerns the dealers" and thus is equivalent to a horizontal price fixing agreement among dealers. 220 U.S. at 407-408.[35] But this explanation cannot be supported: a price-fixing combination at the retail level would tend to reduce quantities sold and thereby damage a manufacturer's objectives—an economic effect that would bear little resemblance to the consequences of resale price maintenance sought by a manufacturer who chooses to institute such a system. See pages 21-22, *supra*; R. Posner, *Antitrust Law, supra*, at 152-153.[36]

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[35] In analogizing resale price maintenance to a horizontal arrangement among dealers, the Court observed that such behavior has for its "sole purpose the destruction of competition and the fixing of prices." 220 U.S. at 408. This logic has no place in a case involving a vertical arrangement that on its face involves nonprice measures to which the per se test does not apply. See *Sylvania, supra*. Such measures do not have for their "sole purpose" the fixing of prices.

[36] Justice Holmes dissented from the *Dr. Miles* decision on the ground that resale price maintenance had not been shown to be anticompetitive on balance, see 220 U.S. at 411-413, and (with Justice Brandeis) continued to dissent from decisions presuming resale price maintenance to be unlawful. *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, 100 (1920); *FTC* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 456-457 (1922). In his dissent in *Dr. Miles*, Justice Holmes urged that the

> point of most profitable returns [to the manufacturer] marks the equilibrium of social desires and determines the fair price in the only sense in which I can find meaning in those words. The [manufacturer] knows better than we do what will enable it to do the best business. * * * I cannot believe that in the long run the public will profit by * * * permitting [retailers] to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which * * * the public should be able to get.

220 U.S. at 412. More recent observers have expressed the same view. *E.g.*, R. Bork, *The Antitrust Paradox* 33, 288-290 (1978).

The *Dr. Miles* majority's reliance on the Elizabethan law of restraints on alienation has been criticized for decades. See Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945, 983 (1928); R. Bork, *The Antitrust Paradox, supra*, at 284-285. As this Court noted in *Sylvania*: "We quite agree * * * that 'the state of the common law 400 or even 100 years ago is irrelevant to the issue [of]

And in any event, a dealer cartel would be per se unlawful even in the absence of a hard and fast rule on resale price maintenance.[37]

Many years after *Dr. Miles*, in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), the Court justified the condemnation of resale price maintenance on the ground that the practice "was being used to [deprive] independent dealers of the exercise of free judgment." 377 U.S. at 16. Condemned in *Dr. Miles* because it was thought to be indistinguishable from a retailer cartel, the practice now was characterized as a manufacturer's device for exploiting dealers. And in *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), the Court found that a system of maximum resale pricing intended to prevent price gouging by distributors was per se unlawful because it subjected the marketplace to the "perhaps erroneous judgment of a seller" in setting the price level and tended to "acquire all the attributes of an arrangement fixing minimum prices." 390 U.S. at 152-153; footnote omitted.[38] But neither *Dr. Miles* nor *Simpson* had suggested that the antitrust laws were intended to prevent sellers from making mistakes in pric-

the effect of the antitrust laws upon vertical * * * restraints in the American economy today." 433 U.S. at 53 n.21.

[37] While it is theoretically possible that a group of distributors might fix a price at the same level that a manufacturer would choose to have his goods resold, this is highly unlikely. The manufacturer would attempt to choose a resale price level that would stimulate demand-enhancing promotional or service activities by its dealers and thus would increase output; his interest in maximizing profits and society's interest in enhancing output (and promoting interbrand competition) generally will coincide. By contrast, if the dealer cartel were to set the price, it would find that a still higher price, causing a reduction in demand from that which would result from the manufacturer's preferred price, would yield greater profits to the cartel members; the cartel would attempt to maximize its profits at the expense of restricting overall output of the product below the socially optimal level. Thus, horizontal dealer price-fixing poses great dangers not present in resale price maintenance by a manufacturer and therefore is properly subject to per se prohibition.

[38] See Baker, *supra*, 67 Va. L. Rev. at 1486 n.96.

ing, and such a purpose is antithetical to the very notion of competition; if sellers are to be free to compete with one another, they must have the freedom to make mistakes, and sellers should pay the price for those mistakes in the marketplace, not in treble damage actions.

b. Although the *Sylvania* Court itself suggested possible reasons why resale price maintenance might be treated differently from "nonprice" vertical restraints, see 433 U.S. at 51 n.18, the Court neither ruled on that question nor reexamined the conflicting justifications posited in *Dr. Miles*, *Simpson*, and *Albrecht*. None of the concerns expressed in *Sylvania* justifies the continued characterization of resale price maintenance as a per se offense.

First, the Court noted the possibility that industrywide resale price maintenance might facilitate cartelization. But while that concern might be borne out in a particular case, see pages 23-24, *supra*, it is properly addressed on a case-by-case basis, since cartels—whether at the manufacturer or dealer level—are per se illegal in themselves; such a concern provides little justification for an absolute ban.[39] Second, the Court suggested that resale price maintenance might reduce competition among competing brands. But at least in cases where a court finds that market and product characteristics negate the possibility that resale price maintenance resulted in anticompetitive effects, per se condemnation of the practice would unjustifiably deprive consumers of the benefit of intensified interbrand competition.

Third, *Sylvania* cited Congress' repeal in 1975 of the Miller-Tydings and McGuire Acts (the "Fair Trade" laws) that had permitted resale price maintenance at the option of individual states. But there is no incongruity between Congress' action eight years ago and a more flexible treatment of resale price maintenance under the Sherman Act. In repealing the broad per se legality afforded by the Fair Trade laws and once again sub-

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[39] *See* R. Bork, *The Antitrust Paradox*, *supra*, at 292-294; *Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 7-8 (1977).

jecting resale price maintenance systems to antitrust scrutiny, Congress did not delineate the standard for such scrutiny.[40] Nor do the views of some legislators in 1975 concerning the competitive effects of resale price maintenance offer much assistance in discerning the meaning of a statute enacted 85 years previously.[41] It thus remains for this Court to "give shape to the statute's broad

[40] Both the House and Senate reports on the 1975 legislation indicate Congress' awareness that by repealing the Fair Trade laws, they were remitting resale price maintenance to *Dr. Miles'* per se ban. See H.R. Rep. No. 341, 94th Cong., 1st Sess. 3 (1975) ("House Rep."); S. Rep. No. 466, 94th Cong., 1st Sess. 1-2 (1975). But the legislative history suggests that Congress merely intended to end a special "exemption from the Federal antitrust laws" that had existed for many years and that could no longer be justified, see House Rep., *supra*, at 5; it does not suggest that in returning resale price maintenance to its pre-Fair Trade status as a per se offense, Congress also intended to freeze that status and deprive the courts of their long-acknowledged flexibility to interpret the Sherman Act's general language in accordance with improved understanding of commercial realities.

[41] " '[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 (1980); see *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *United States* v. *United Mine Workers*, 330 U.S. 258, 281-282 (1947). This principle is fully applicable to post-passage congressional views about the scope of the antitrust laws. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-349 (1963).

Congress' views about resale price maintenance—and *Dr. Miles*—have varied over the years. In 1937, after prolonged debate on the competitive effects of resale price maintenance, the Miller-Tydings bill was passed to place "the stamp of approval upon price maintenance transactions under State [fair trade laws], notwithstanding the Sherman Act of 1890." 81 Cong. Rec. 8138 (1937) (statement of Rep. Dirksen); see H.R. Rep. No. 382, 75th Cong., 1st Sess. 2 (1937); 81 Cong. Rec. 7495-7496 (1937) (statement of Sen. Tydings); 81 Cong. Rec. 8140 (1937) (statement of Rep. Culkin). Moreover, almost immediately after this Court narrowly construed the Miller-Tydings exemption in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), an overwhelming majority of both houses of Congress passed the McGuire Act—after another lengthy debate on the competitive virtues of resale price maintemandate"[42] by determining whether a per se rule should be applicable, based on the predictable competitive effects of the practice. In the case of resale price maintenance, both the economic evidence and the adverse consequences of the opposite course demonstrate that resale price maintenance should not be treated differently from all other vertical arrangements between manufacturers and their distributors.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ABBOTT B. LIPSKY, JR.
Deputy Assistant Attorney General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ROBERT B. NICHOLSON
EDWARD T. HAND
Attorneys

MAY 1983

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nance—to overrule *Schwegmann* and permit State fair trade laws to bind even those dealers who refused to sign resale price maintenance agreements. See H.R. Rep. No. 1437, 82d Cong., 2d Sess. 1-2 (1952); H.R. Rep. No. 1516, 82d Cong., 2d Sess. 4-7, 15 (1952); 97 Cong. Rec. 13404 (1951) (statement of Rep. McGuire); 98 Cong. Rec. 8718-8743 (1952) (Senate debate).

[42] *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters, supra,* slip op. 12; *Professional Engineers, supra,* 435 U.S. at 688.

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