
Donald L. Beschle
The John Marshall Law School, dbeschle@uic.edu

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Current Topics in Antitrust

"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality

by

DONALD L. BESCHLE*

Introduction

The brevity of the substantive provisions of the Sherman Act has not led to simplicity or even clarity in the development of antitrust law. From the earliest days of antitrust analysis, two general schools of thought have competed. One reads the broad provisions of the Act in light of common-law precedent which judged covenants in restraint of trade by determining whether they were reasonable in relation to the benefits they provided to the parties and the community. This school of thought calls for the consistent application of such a "rule of reason" in all Sherman Act cases. The Act, according to this view, did not alter the substantive common law of trade restraints, but merely gave federal


1. 15 U.S.C. §§ 1-7 (1982). The substantive prohibitions, in their entirety, are:

Sec. 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.

Sec. 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

courts jurisdiction to develop the common-law rules and apply them to businesses engaged in interstate commerce.\(^3\)

The opposing view sees the Sherman Act as a tightening of common-law rules. This view emphasizes the plain language of the Act, which avoids any use of terms such as "unreasonable" in defining illegal conduct, and the strong antimonopoly sentiment which gave rise not only to the Sherman Act but to most subsequent legislation dealing with the problem of firms with market power.\(^4\) Advocates of this position have called for unambiguous and consistent condemnation of practices seen as restraints of trade. The earliest substantive antitrust decision of the Supreme Court, *United States v. Trans-Missouri Freight Association*,\(^5\) endorsed this view that the Sherman Act altered the substantive law of restraint of trade, making all such restraints, not just those found "unreasonable," illegal.\(^6\)

Those arguing against the consistent use of the rule of reason have always been somewhat at a disadvantage. Although their alternative of

\(^3\) [Senator Sherman] stated on several occasions that the object of the bill was to make the common law against monopolies and restraint of trade applicable on the federal level. The common law as it had been applied in Britain and in the several states was to be the main guide of the national courts in drawing the line of demarcation between lawful and unlawful combinations.


\(^4\) Early histories of the Sherman Act show members of Congress vying with one another to see whose denunciations of late nineteenth-century trusts could be more florid. See generally A. Walker, *History of the Sherman Act* 1-46 (1910). In adopting an amendment to Senator Sherman's original bill, "the Senate expressed its purpose to regulate international and interstate commerce, in such thorough detail as to prohibit every combination of capital, skills or acts which might be made for the purpose of securing unity of action between previous competitors." *Id.* at 24. Writing in 1910, Walker concluded that § 1 of the Act was meant to exclude only those restraints which had trivial effects on "public or private welfare." *Id.* at 56 (emphasis added). In the language of modern debate about the purpose of the Act, Walker seems to say that it was meant to protect both competition ("public welfare") and competitors ("private welfare").

\(^5\) 166 U.S. 290 (1897). The Court had dealt with the Sherman Act earlier, in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), but only to the extent of ruling that, within the confines of late nineteenth-century constitutional jurisprudence, manufacturing was not "interstate commerce" and, therefore, not within the scope of the Sherman Act.

\(^6\) The Court stated:

A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade... . When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

*Trans-Missouri*, 166 U.S. at 328.
absolute condemnation holds, as one of its principal attractions, the promise of simplicity and clarity, a rule condemning all acts belonging to a certain class does not eliminate the need for analysis. It merely shifts the crucial point in the analysis to the decision whether the specific act in question belongs to the illegal class. And when the term used to describe the illegal activity also, in some sense, describes activity clearly not meant to be condemned, the decision whether to apply the clear and absolute rule may become so unclear and qualified as to make the utility of the absolute condemnation questionable, if not illusory. For example, "restraint of trade," given its literal meaning, describes all contracts. Every contract limits the freedom of the contracting parties and is meant to give them some advantage over others. When Justice Peckham wrote in *Trans-Missouri* that the Sherman Act condemns all restraints of trade, he must have had a more limited definition of the term in mind.

It was not a Supreme Court decision, but rather an opinion by the Sixth Circuit Court of Appeals which first gave some definition to the activity unconditionally condemned in *Trans-Missouri*. In *United States v. Addyston Pipe & Steel Co.*, Judge Taft drew a distinction between "contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose of the contract, and was necessary to the protection of the covenantee in the carrying out of that main purpose," which might be upheld under the rule of reason, and "contracts having for their sole object the restraint of trade." It was the latter type of agreement that would always be an illegal restraint of trade under the Sherman Act. As early as *Addyston Pipe*, then, it was clear that rigorous and absolute antitrust prohibitions did not eliminate the need for analysis of a particular agreement. On the contrary, absolute condemnation was possible only after a determination that the agreement had been properly classified.

In 1911, the Supreme Court explicitly adopted the rule of reason as the basic tool of antitrust analysis. Chief Justice White, who had dissented from the Court's hard line in *Trans-Missouri*, wrote for the Court

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7. 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).
8. *Id.* at 283. Judge Taft expressed skepticism about the wisdom of too flexible a rule: It is true that there are some cases in which the courts ... have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint is in the public interest, and how much is not.

The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it.

*Id.* at 283-84.
in *Standard Oil v. United States*:

And as the contracts or acts embraced in [the Sherman Act] were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce . . . it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated . . . . [I]t follows that it was intended that the standard of reason which had been applied at the common law and in this country . . . was intended to be the measure used . . . .

Although it could be argued that *Standard Oil* was entirely consistent with earlier cases and did no more than elaborate on the common-law framework set forth by Judge Taft in *Addyston Pipe*, the reaction to *Standard Oil* was nonetheless sharp. Most saw it as a rejection of the stringent attitude of *Trans-Missouri* and a victory for corporate interests, even though the defendant was found to have violated the rule of reason. Calls arose for new legislation providing tighter and clearer antitrust restrictions. The Clayton Act of 1914, which focused on particular practices and at least appeared to require special scrutiny for those practices, was largely a response to such demands. It was soon evident, however, that even the relatively specific provisions of the Clayton Act would be applied only after some analysis of the anticompetitive effects of the practices at issue.

The rule of reason has remained the core principle of antitrust analysis. The rule weighs the anticompetitive effects of a challenged practice against its procompetitive effects. But the indefinite nature of

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9. 221 U.S. 1 (1911).
10. Id. at 60.
11. The most influential proponent of the position that *Standard Oil* is part of a consistent line of cases dating from *Trans-Missouri* and including *Addyston Pipe* is Judge Robert Bork. The connecting thread, states Bork, is the "guiding policy" of consumer welfare. See R. Bork, *The Antitrust Paradox* 22-41 (1978).
14. Each of the substantive provisions of the Clayton Act (§ 2 concerning price discrimination, § 3 concerning tying arrangements and exclusive dealing agreements, § 7 concerning mergers) prohibits that activity only when its effect "may be substantially to lessen competition." 15 U.S.C. §§ 13, 14, 18 (1982). Analysis is, of course, required to establish whether the challenged activity in each instance does threaten to do so.
15. This is a more limited inquiry than the broad common-law balancing test, which allowed consideration of the likely injury to the public without specifically limiting the ques-
this standard and its perceived leniency toward questionable practices
has led to persistent calls for more precise and stringent rules. These
calls usually take the form of advocating that certain types of behavior be
labelled “per se” violations of law.

The most commonly articulated arguments for labelling certain con-
duct per se illegal under the antitrust laws emphasize the costs of the
imprecision of the rule of reason. Judicial administration, it is argued, is
much simpler under a per se rule, and businessmen may plan their activ-
ity with much greater certainty. Of course, such efficiency gains would
be easily outweighed if the per se concept were applied so broadly as to
inhibit conduct which might benefit the community. Advocates of per
se categorization would guard against such a result by reserving the per
se label for practices shown to be invariably anticompetitive. The per se
rule would apply only to activity which would always fail rule of reason
analysis and therefore would not require its detailed application. Under
this reasoning, per se analysis is merely a more efficient way of imple-
menting the rule of reason.

Behind the debate over the efficiency costs of either applying or re-
jecting per se rules, there appears to be a less explicit but still obvious
clash between two general positions. The debate assumes that per se
treatment is the best, and possibly the only, way in which to enforce the
antitrust laws vigorously. To be for rigorous enforcement, then, is to
favor frequent use of per se categorizations. Conversely, the rule of rea-
son is seen as the refuge of those who would just as soon see the statutes
lie dormant or, if used at all, be applied only in the most egregiously
anticompetitive situations. To favor the rule of reason, then, is to favor
lax enforcement of the Sherman Act, and vice versa. On both levels, that
of specific analysis of the consequences of per se treatment and that of the
per se/rule of reason controversy as a forum for argument over the wis-
dom of vigorous enforcement of the statutes, the conflict has raged for
decades.

This Article argues that the defenders of per se analysis have as-
signed themselves an impossible task. Arguing that types of activity can

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16. The rationales favoring per se rules are set forth in Note, Fixing the Price-Fixing
17. These “invidious consequences of the per se rule” are examined in id. at 715-27.
18. Thus, per se categorization should be limited to those practices which are “notori-
ously hostile to competition.” L. SULLIVAN, ANTITRUST 196 (1977).
be identified as invariably anticompetitive is futile; counterexamples can almost always be put forward. Consequently, defenders of per se categorization are reduced to one of two unattractive alternatives. First, they can concede that per se categories may in some instances prohibit procompetitive activity, but argue that the overall benefits of per se categorization justify the result. Such an argument is unsatisfying because it explicitly sacrifices particular blameless defendants in order to search for an increase in general welfare. Second, per se defenders can narrow their categories to eliminate procompetitive counterexamples. This strategy, however, threatens to destroy those categories entirely. And if most of the once-condemned activity is returned to the realm of the rule of reason, the insight that certain types of behavior are particularly dangerous is lost.

The solution to this dilemma is to abandon the phrase "per se illegal," with its unrealistic connotations of absolute prohibition, yet retain a stringent test for particularly suspect activity. This new test must place a heavy burden of justification upon the defendant, yet not make justification impossible when the defendant's activity is clearly procompetitive. To abandon per se illegality with no alternative but rule of reason analysis would be to send an unwise message of government tolerance of practices threatening competition. But an alternative approach does exist.

Rather than defend the absolutism of per se illegality, this Article argues that antitrust analysts should adopt a rule of strict antitrust scrutiny. Particular practices, including those currently subject to per se rules, should place the burden on the defendant to show first, that they were adopted to achieve demonstrable procompetitive ends and second, that they are narrowly tailored to achieve those ends. Unless the defendant can carry this burden, these practices should be declared illegal. Such an analysis preserves the valid insight of per se analysis that certain types of behavior are particularly suspicious without maintaining an indefensible attitude of absolutism with respect to those practices.

This Article begins by sketching the history of the concept of per se illegality: its growth from 1940 until the mid-1970s, its retreat during the last decade, and the continuing attacks on it which threaten the existence of the concept as a form of analysis separate from rule of reason principles. The alternative approach of strict antitrust scrutiny will then be explained and the application of that concept to various types of antitrust behavior discussed. Strict antitrust scrutiny, it will be shown, is a far better way of approaching suspect anticompetitive conduct than either the lenient rule of reason or the unrealistically absolute concept of per se illegality.
I. Per Se Rules: Creation and Development

A. Expansion of the Per Se Concept: 1940-1974

(1) Horizontal Price Fixing

The term "per se" was first used to categorize antitrust violations in 1940, in *United States v. Socony-Vacuum Oil Co.* 19 Defendant oil companies had established a program under which they bought up low-priced "distress" gasoline from independent refiners, thus maintaining higher prices for their own products. In response to defendants' arguments that the agreements were reasonable in the context of the Depression-era oil market, the Court held: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." 20 When such an agreement was found to exist, it was irrelevant that the defendants lacked sufficient market power to actually achieve their goals. 21

Although *Socony-Vacuum* was the first case to use the term "per se," the Court stated that forty years of precedent dealing with price-fixing schemes had established that such schemes invariably violated the Sherman Act. However, since the earlier cases involved agreements between defendants whose combined market shares were of near-monopoly size, 22 one could argue that only similar price-fixing agreements should be invariably condemned.

Even disregarding the issue of market control, the *Socony* Court's reference to forty years of unbroken precedent for finding price-fixing agreements per se illegal seems disingenuous because the Court took pains to distinguish two significant Supreme Court decisions in which defendants were exonerated, under the rule of reason, for behavior which

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20. *Id.* at 223.
21. This was the principal point discussed in the Court's famous "footnote 59." *Id.* at 224-26 n.59. Drawing not only on prior antitrust precedent, but also on general principles of criminal law, the Court pointed out that the crime of conspiracy could be committed by defendants who were incapable of actually carrying out their ultimate purpose.
22. *Id.* at 218. Among the most notable were *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899). The defendants in *Trenton Potteries* manufactured 82% of all United States bathroom pottery fixtures. 273 U.S. at 394. Although the defendants in *Addyston Pipe* controlled only 30% of the overall tonnage of their product in the country, 85 F. at 279, they controlled "two-thirds of the output" in their own region. *Id.* at 291-92. In *Trans-Missouri*, the Court stated: "It is true that, as to a majority of those living along its line, each railroad is a monopoly." 166 U.S. at 335.
was clearly, in some sense, price fixing. In Chicago Board of Trade v. United States, the Court upheld a Board rule which froze certain grain prices from the close of the trading day until the market opened the next morning. Explicitly employing the rule of reason, the Court found that the Board rule "improve[d] market conditions" by creating a more efficient public market, and that the restraint "had no appreciable effect on general market prices." And in Appalachian Coals, Inc. v. United States, the Court upheld an arrangement whereby 137 coal producers organized an exclusive sales agent, which would fix the price of the producers' coal so as to eliminate "destructive trade practices."

After Socony-Vacuum, however, it was easy to overlook these cases as either having been implicitly overruled or, at most, having little or no relevance beyond their own facts. For more than three decades, the classification of horizontal price fixing as a per se violation of the Sherman Act was unshaken. The only important question in this area appeared to be just how far the concept should extend. Any agreement explicitly touching on price was clearly illegal; how far removed from price an agreement could be and still constitute price fixing remained uncertain.

(2) Vertical Price Fixing

Vertical price fixing, also known as resale price maintenance, is a

24. 246 U.S. 231 (1918).
25. Id. at 240. Essentially, held the Court, the rule was a device to facilitate, not impede, market functions. By forcing disparate sellers and buyers into a coherent public market, "all price determination was made under the most public and competitive of circumstances." H. Hovenkamp, Economics and Federal Antitrust Law 120-21 (1985). Professor Hovenkamp notes that some scholarship has cast doubt on whether these were the actual, primary motives of the members of the Board of Trade. It has been argued that the rule may have been a device for maintaining fixed brokerage commissions by discouraging "cheating" by brokers on sales away from the public market. See Zerbe, The Chicago Board of Trade Case, 1918, 5 Res. L. & Econ. 17 (1983).
27. Id. at 359.
28. Appalachian Coals was, of course, decided during the depths of the Depression, when legislative approaches to economic questions turned away from competitive markets and toward encouraging, if not enforcing, cooperation. It can be maintained, then, that the case has no relevance outside of such a drastic situation, "where Congress has expressly or impliedly pointed in other legislation to a relevant goal other than competition." L. Sullivan, supra note 18, at 182.
29. For example, agreements to standardize product quality can be considered price fixing, see National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965), as might an agreement to limit the manner in which prices are advertised. See United States v. Gasoline Retailers Ass'n, 285 F.2d 688 (7th Cir. 1961); United States v. Nu-Phonics, Inc., 1979-1 Trade Cas. (CCH) ¶ 62,652 (E.D. Mich. 1979).
practice by which a manufacturer controls the price at which his buyer will later resell at the wholesale or retail level. The Supreme Court first condemned vertical price fixing in the 1911 case of Dr. Miles Medical Co. v. John D. Park & Sons Co.\textsuperscript{30} Although the Court did not use the term "per se," neither did it employ rule of reason balancing. Rather, the Court simply held that "agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void."\textsuperscript{31}

This rule of invariable illegality for resale price maintenance agreements did not meet with the nearly unanimous approval accorded the similar treatment of agreements between competitors. The Miller-Tydings Act of 1937\textsuperscript{32} and the subsequent McGuire Act\textsuperscript{33} permitted states to, in effect, opt out of the national rule prohibiting resale price agreements, and many states did so. However, general dissatisfaction with the effects of legal vertical price fixing led to the repeal of those statutes in 1975; at that point, it was held, the "per se" rule of Dr. Miles was restored nationwide.\textsuperscript{34}

(3) Horizontal Market Division

While price fixing between competitors eliminates price competition between them, it does not necessarily eliminate all competition between the parties to the agreement. Price fixers can continue to compete with respect to other aspects of the sale. When competitors carve out parts of a market and assign them to a particular seller, however, all competition between the conspirators is at an end. It would seem to follow that, if

\textsuperscript{30} 220 U.S. 373 (1911).
\textsuperscript{31} Id. at 408. The Court drew heavily upon common-law precedents dealing with restraints on alienation of property.
\textsuperscript{33} Pub. L. No. 542, 66 Stat. 631 (1952), \textit{repealed by} Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801. The McGuire Act closed a large loophole in the original Miller-Tydings scheme. Miller-Tydings permitted states to permit voluntary agreements fixing resale prices, but it did not authorize states to compel retailers, aside from the terms of their own agreements, to adhere to manufacturers' resale prices. See Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). Large retailers who wished to cut prices, who were precisely the retailers at whom the Miller-Tydings Act was aimed, could avoid its effect by using their bargaining power and simply refusing to accede to contractual price agreements. The McGuire Act permitted states to adopt systems whereby a manufacturer's agreement with one dealer concerning resale prices would bind not only that dealer, but all dealers within that state.
\textsuperscript{34} See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984). Of course, even prior to repeal of the Miller-Tydings Act, the per se rule was applied to resale price maintenance schemes not protected by state law. See, e.g., Simpson v. Union Oil Co., 377 U.S. 13 (1964).
price fixing between competitors is per se illegal, then market division among competitors would be similarly condemned.\textsuperscript{35}

A number of earlier cases found per se violations in schemes that included aspects of horizontal market division. These schemes, however, were usually accompanied by price-fixing agreements.\textsuperscript{36} Until 1972, it could be argued that horizontal market division was per se illegal only when accompanied by more direct price restraints. Then, in \textit{United States v. Topco Associates},\textsuperscript{37} the Supreme Court held that a system of exclusive territories set up by a cooperative association of small supermarket chains, unaccompanied by any agreement concerning prices, was per se illegal.\textsuperscript{38} The Court rejected arguments that the defendants lacked sufficient market power to make the restraint truly anticompetitive, and that the defendants actually needed the territorial arrangement to compete successfully with the larger supermarket chains. In a footnote, the Court defended not only the application of the per se rule to the case, but also the idea of per se treatment itself:

Without the \textit{per se} rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make per se rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.\textsuperscript{39}

\textbf{(4) Vertical Market Division}

As late as 1963, the Supreme Court refused to classify vertical market division as a per se violation of the Sherman Act.\textsuperscript{40} Arguments that

\footnotesize{\textsuperscript{35} See L. SULLIVAN, \textit{supra} note 18, at 224-29. On the other hand, market division presents unique problems of implementation. Some markets may not lend themselves to territorial divisions, and such schemes are often more obvious than price fixing. \textit{See H. HOVENKAMP, \textit{supra} note 25, at 88-89.}

\textsuperscript{36} \textit{E.g.}, United States v. Sealy, Inc., 388 U.S. 350 (1967); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899). In at least one early case, a scheme arguably constituting a division of markets was upheld under the rule of reason. \textit{National Ass'n of Window Glass Mfrs. v. United States}, 263 U.S. 403 (1923).

\textsuperscript{37} 405 U.S. 596 (1972).

\textsuperscript{38} \textit{Id.} at 608. The basic purpose of the association was to create sufficient scale economies to permit Topco “private-label” products to compete with similar products available at national supermarket chains. \textit{Id.} at 599 n.3.

\textsuperscript{39} \textit{Id.} at 609-10 n.10. After the invalidation of Topco's territorial restrictions, the company implemented a less rigid system of "areas of primary responsibility" enforced by "profit pass-over" provisions which was upheld against the government’s antitrust challenge. \textit{United States v. Topco Assocs.}, 1973-1 Trade Cas. (CCH) ¶ 74,485 (N.D. Ill.), \textit{aff'd per curiam}, 414 U.S. 801 (1973).

\textsuperscript{40} \textit{White Motor Co. v. United States}, 372 U.S. 253 (1963). The case was not a strong
such agreements between manufacturers and dealers limiting the dealers' freedom could be procompetitive, at least when used by firms without substantial market power, caused the Court to hesitate before extending the per se rule to these types of restraints. But four years later, vertical market division joined the list of practices held to be invariably illegal.

In *United States v. Arnold, Schwinn & Co.*, the Court held that a system of customer and territorial restraints imposed by a manufacturer on wholesalers and retailers was per se illegal. Once title had passed to the buyer, "[s]uch restraints are so obviously destructive of competition that their mere existence" should constitute a violation. As with the horizontal market restrictions in *Topco*, the possibility that nonprice restraints on firms downstream in the distribution chain might indeed promote interbrand competition was not permitted to offset the obvious elimination of intrabrand competition among the manufacturer's dealers.

(5) Boycotts

Courts and commentators have often noted that the per se rule prohibiting concerted refusals to deal is the most difficult to enunciate with clarity. It has long been obvious that not every agreement to withhold some form of contract with another is per se illegal. Sometimes such boycotts are held to be legal; on other occasions they are invalidated only after rule of reason analysis.

Since 1959, however, it has been clear that certain types of boycotts are per se illegal. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, the Court found a Sherman Act violation in a conspiracy organized by a department store chain to pressure appliance manufacturers to cut off a competing retailer. In reaching its decision, the Court did not require proof of specific adverse effects on the market, or of the market power possessed by the boycotters. "Group boycotts, or concerted refusals by endorsement of rule of reason treatment of such agreements. Rather, the Court held that it lacked sufficient experience with vertical territorial restrictions to decide whether per se treatment would be appropriate. Three Justices dissented, arguing for affirmance of the district court's application of the per se rule. *Id.* at 275 (Clark, J., dissenting).

42. *Id.* at 379.
43. See, e.g., Alpha-Sentura Business Servs., Inc. v. Interbank Card Ass'n, 1979-2 Trade Cas. (CCH) ¶ 62,960 (D. Md. 1979) (permitting a concerted refusal of credit card companies to deal with "adult" book stores).
44. See, e.g., Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) (holding certain aspects of the National Football League's college draft, under which all teams not holding draft rights to a college player will not negotiate for that player's services, to be illegal under rule of reason analysis).
traders to deal with other traders," stated the Court, "have long been held to be in the forbidden [per se] category."

At least that type of boycott presented in Klor's, directed at the business relationships maintained by a competitor, is a per se violation. Concerted activity intended to deprive a competitor of a desired trade relationship will be found invariably anticompetitive, or at least invariably lacking in positive effects. No rule of reason analysis is necessary.

(6) Tying Arrangements

Tying arrangements are illegal, as violations not only of the Sherman Act, but also of section 3 of the Clayton Act. It has long been obvious, however, that the per se rule with respect to tying arrangements is, in at least one respect, quite different from other per se rules: the tying arrangement is a per se violation only if the defendant has some sort of market power.

The prohibition against tying arrangements has always focused on the coercion of the buyer by the seller to take an unwanted second product. If the buyer purchases both in the absence of coercion, how-

46. Id. at 212. The Court cited several cases in which such boycotts were treated harshly, but without the explicit use of per se language or evidence of actual market impact, including Eastern States Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). Klor's, 359 U.S. at 212 n.5.

47. A tying arrangement is an "agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

48. 15 U.S.C. § 14 (1982). The section prohibits the sale of any commodity "on the condition, agreement, or understanding that the ... purchaser thereof shall not deal in the ... commodities of a competitor ... [of the] seller." While a tie-in is not an explicit agreement not to purchase from a competitor, as is a requirements contract, the practical effect of precluding a competitor from a sale of the tied product is sufficient to fall within the statute.

49. Although § 3 deals only with the actions of a seller or lessor of two products, it is possible for a buyer to violate § 1 of the Sherman Act by analogous coercive activity, referred to as coercive reciprocity. In such a case, a buyer with purchasing power, rather than the power created by its own products, coerces a seller by conditioning his purchases of the seller's product on the seller's purchase of goods or services provided by the buyer. See L. SULLIVAN, supra note 18, at 492-95. While there is far less case law on such arrangements than there is on traditional ties, there is authority that such cases should be analyzed just as Clayton Act cases are, with liability depending upon a showing of economic power in one market, and a not insubstantial amount of commerce in the other. See Betaseed, Inc. v. U & I, Inc., 681 F.2d 1203 (9th Cir. 1982).

50. Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984).
ever, there can be no anticompetitive effect; such a result is evidence of no more than the exercise of consumer choice. To demonstrate coercion, it is necessary to show that the seller has some type of market power in one (the "tying") product. Such market power can be demonstrated either by market share or by demonstrating that the product is in some way uniquely desirable.

If the central feature distinguishing per se violations from rule of reason cases is that the former can be committed regardless of the market power of the defendant, then tying arrangements are either per se in name only, or the phrase is being used much differently than the way in which it is used elsewhere. In any event, by the late 1970s it was established that conditioning the sale of one product on the purchase of another is a per se violation when the seller has market power in the former and a not insignificant amount of commerce is involved with respect to the latter product.

(7) Other Cases

Although the six categories listed above were the only ones specifically labelled as per se antitrust violations, the appeal of the per se concept was evident elsewhere in Sherman and Clayton Act decisions. For example, in striking down mergers as violating section 7 of the Clayton

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51. Id. at 12-13. Although the cases usually speak of the requirement of market power in the tying product as being indistinguishable from "coercion," some have stated that the two are separate elements of the offense. See H. Hovenkamp, supra note 25, at 214-15.

52. See, e.g., Moore v. James H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977).

53. "In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." United States Steel Corp. v. Fortner Enters., 429 U.S. 610 (1977). Prior to Fortner, the mere fact that a product was unique was often thought sufficient, and courts accordingly found that patented, copyrighted, or trademarked goods, because of their legal status, had sufficient power to satisfy this requirement. See, e.g., United States v. Loew's, Inc., 371 U.S. 38 (1962); Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972). Such decisions were often criticized on the grounds that legal monopolies do not necessarily create economic monopolies or even economic power, since, for example, one patented or trademarked product may be considered by consumers to be a perfectly acceptable substitute for another. See H. Hovenkamp, supra note 25, at 218-19. Recently, courts have shown some tendency to question whether the patent or copyright at issue confers actual competitive advantage. See, e.g., In re Data Gen. Corp. Antitrust Litig., 490 F. Supp. 1089 (N.D. Cal. 1980).

54. See supra notes 19-22 and accompanying text.

55. The requirement of a not insubstantial amount of commerce in the tied product is a much easier element to establish than is market power in the tying product. It must be established that "a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie." Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 501 (1969). As little as $50,000 worth of business in the tied product has been found sufficient. Aamco Automatic Transmissions v. Taylor, 407 F. Supp. 430 (E.D. Pa. 1976).
Act, the Court became so deferential to the government, at least in cases involving the merger of actual competitors, that it appeared to adopt, at least implicitly, a per se rule against any merger of competitors who had significant market shares.\footnote{56}

In United States v. Container Corp. of America,\footnote{57} the Supreme Court invalidated a system of information exchange between defendants concerning their prices. The Court's language was interpreted by some as a declaration that such exchanges were per se violations, at least when undertaken by a group which, in the aggregate, possessed market power.\footnote{58} In the early 1970s, traditional per se rules were applied against members of the learned professions for the first time. The decisions came as a shock to most professionals, who had long believed that their self-regulation of colleagues and concerted activity regarding pricing of their services were exempt from the antitrust laws, or at least entitled to deferential treatment.\footnote{59} Finally, decisions under the Robinson-Patman Act,\footnote{60} which prohibits anticompetitive price discrimination by sellers of commodities, set such low thresholds for finding anticompetitive effects\footnote{61} that they could be interpreted as a movement toward a per se rule for violations of the Act.

B. The Retreat of the Per Se Concept: 1974-1986

During the late 1970s, the expansion of the application of per se rules came to an abrupt halt. Indeed, the concept itself came under at-
tack. The boundaries of most per se categories narrowed, and for the first time a category of behavior once designated per se illegal was returned to the realm of the rule of reason.

The first indications of the contraction of per se rules came at their fringes. Types of behavior thought by many to be very nearly per se illegal, although they had never been so designated, no longer were invariably invalidated. In United States v. General Dynamics Corp., the Supreme Court held that a merger between competitors with very large shares in the coal market did not violate the Clayton Act. In marked contrast to prior merger decisions, the Court went far beyond the market shares involved to investigate the particular effect the merger would have on the relevant market. The Court concluded that the unique characteristics of the coal market made the high market shares involved in the merger deceptive, and not valid evidence that the merger would injure competition. The days when merger jurisprudence could be summed up with the statement "the government always wins" were clearly over. The rule of reason, although never explicitly abandoned in merger cases, was reaffirmed as the appropriate standard of analysis for even the most suspect of such cases.

The contraction of the per se approach became more apparent in lower courts' refusal to abandon the rule of reason. Despite the stringent language of the Supreme Court in Container Corp., lower courts did not respond by applying per se analysis to programs in which competitors exchanged price information. Container Corp. was interpreted as continuing the use of the rule of reason in such cases. Similarly, lower courts refused to read Supreme Court decisions involving the Robinson-Patman Act harshly. Rather, they imposed strict standards of proof on plaintiffs who alleged that systems of price discrimination threatened to harm

63. "In this case, the District Court assessed the evidence of the 'structure, history and probable future' of the coal industry, and on the basis of this assessment found no substantial probability of anticompetitive effects from the merger." Id. at 498.
64. The Court based its decision primarily on three "clear and significant developments in the industry." First, coal was losing its ability to compete with other energy sources; second, electric utilities had become clearly the most significant consumers of coal; and third "and most significantly," almost all coal purchased by utilities was sold under long-term requirements contracts. Id. at 498-99. The high market share of coal sold thus did not reflect a high degree of control over price or demand.
65. To Justice Stewart, that statement was "[t]he sole consistency . . . in litigation under § 7." United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).
66. United States v. Container Corp. of Am., 393 U.S. 333 (1969); see supra notes 57-59 and accompanying text.
competition. This retreat from broad application of the per se concept has not been limited to the periphery of prior use of that concept. Even the most firmly established per se categories have been reexamined.

(1) Horizontal Price Fixing

Although the rule of per se illegality for horizontal price fixing remains in force, the way in which that rule is viewed was seriously altered by the Supreme Court's 1979 decision in Broadcast Music, Inc. v. Columbia Broadcasting System. In that case, the Court refused to find the use of "blanket licenses" by the major associations of music copyright owners to be per se illegal price fixing.

The Court held the per se rule inapplicable, although it found that the defendants' activity was "price-fixing in the literal sense: the composers and publishing houses . . . joined together into an organization that sets its price for the blanket license[s] it [sold]." The Court reasoned that price fixing in its literal sense is not necessarily price fixing of the kind invariably condemned by the Sherman Act. Even though competitors had a hand in setting prices, the Court found unique features of the blanket license system which indicated that the program might have redeeming competitive virtues: it was created to ensure that copyright owners would be compensated efficiently for the use of their works.

68. For example, some courts have interpreted Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967), discussed supra note 61, to require a showing that prices are not only discriminatory but also below cost to support a "primary line injury" case, that is, a case in which the competitive harm is to competitors of the seller. See cases collected in ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 231-34 (2d ed. 1984).
69. 441 U.S. 1 (1979).
70. Holders of the blanket license have the right to perform any and all of the compositions owned by the [association's] members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are usually a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used.
71. Id. at 8. However, the Court stated that this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. . . . Literalness is overly simplistic and often overbroad.
72. Per se treatment, according to the Court, should be limited to practices "'plainly anticompetitive' and very likely without 'redeeming virtue.'" Id. at 9.
73. Id. at 20-21. The Court noted that ASCAP had been organized "because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses." Id. at 4-5.
created something which was, in itself, a valuable new product desired by many purchasers, and the alternative of negotiating separate licenses with the individual copyright owners was available for any purchaser who desired it.

In essence, the Court restated the *Socony-Vacuum* definition of per se price fixing: an agreement with the purpose and effect of stabilizing prices. But the Court was uncharacteristically willing to entertain the argument that literal price fixing could be adopted for procompetitive purposes and have no anticompetitive effect. In such a case, it would not be the type of activity invariably condemned by the Sherman Act.

Reaction to *Broadcast Music* was sharp. Although some went so far as to characterize it as overruling *Socony-Vacuum*, most saw the decision not as an abandonment of the per se concept, but as a serious rethinking of its application. Per se analysis did not make all questions concerning the purpose and effect of a challenged restraint irrelevant; instead, it shifted the point at which those questions were asked. The procompetitive effects of behavior would now be examined, not as an argument to justify price fixing, but rather to determine whether the behavior at issue really was price fixing. This initial question, while still less broad than full rule of reason analysis, certainly appeared to make the supposedly simple matter of the application of per se rules into something akin to a "mini-rule of reason."

In 1982, the Court appeared to reverse direction once again. In *Arizona v. Maricopa County Medical Society*, the Court considered an agreement by members of a medical society which set maximum fees the members could claim for services provided to policyholders of certain

74. "The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts: it is, to some extent, a different product." *Id.* at 21-22.

75. *Id.* at 11.

76. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); see *supra* notes 19-29 and accompanying text.

77. *See Note, Maricopa County and the Problem of Per Se Characterization in Horizontal Price-Fixing Cases*, 18 VAL. U.L. REV. 1007, 1012 n.28 (1984) ("*Broadcast Music* was thought to have tacitly overruled in part the Court's holding in *Socony-Vacuum*."").

78. At least in theory, per se analysis is unconcerned with the market power of defendants, a subject which can be enormously difficult and time-consuming to litigate. This is not to say, of course, that matters touching on the defendant's market power will not creep into the per se analysis of the defendant's "purpose and effect." *See generally L. Sullivan, supra* note 18, at 192-97.


insurance plans. The defendants contended that the agreement amounted to price fixing only in the literal, rather than the legal, sense of the term. As in Broadcast Music, the price-fixing aspects of the agreement were merely ancillary to the procompetitive aims of the Society, specifically, to create an efficient system of delivering a desirable product, the sponsored insurance plan.

Somewhat surprisingly, in light of Broadcast Music, the Court rejected the argument and held the arrangement per se illegal. The Court found this agreement "fundamentally different" from that considered in Broadcast Music, primarily because the members of the Society did not, by virtue of their agreement, create a new product, but merely affected the price of a preexisting product, whether defined as medical care or insurance. Not only the dissenters, but also many commentators found the distinction less than persuasive. Some thought that Maricopa was merely an aberration, a throwback to pre-Broadcast Music attitudes, which would soon be seen as unimportant. Others went to the other extreme, and speculated that Maricopa represented a return to the mainstream of Sherman Act jurisprudence. It was Broadcast Music, in this view, which was the aberration.

81. Id. at 335. The plans involved were those approved by the foundation established by the Society. "To obtain this approval the insurers . . . agree to pay the doctors' charges up to the scheduled amounts, and in exchange the doctors agree to accept those amounts as payments in full for their services." Id. at 341.
82. Id. at 355. The Society also argued, more broadly, that the per se rule should not be applied to an agreement to fix maximum prices Id. at 342-48.
83. The Society contended the plan made possible "a uniquely desirable form of insurance coverage . . . . The features of the foundation-endorsed insurance plans that they stressed were a choice of doctors, complete insurance coverage, and lower premiums." Id. at 351.
84. Id. at 356-57.
85. "The members of the foundations sell medical services. Their combination does not permit them to sell any different product. Their combination has merely permitted them to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care." Id. at 356 (footnote omitted). Broadcast Music was also distinguished on the grounds that, in that case, individual composers retained the right to negotiate individual licensing agreements for their own compositions. The arrangement in Maricopa restrained each doctor in his individual price negotiations. This was not, then, the establishment of a valid joint venture, but rather an agreement "among independent competing entrepreneurs." Id. at 357.
86. See, e.g., Gerhart, The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School, 1982 SUP. CT. REV. 319, 319-20 ("[I]n Arizona v. Maricopa County Medical Society, the Court missed a significant opportunity to complete its methodological framework, and in doing so, made antitrust analysis once again confused and haphazard."); Note, supra note 16, at 722 ("In sum, there is no principled way to distinguish Maricopa from Broadcast Music.").
87. This position could draw support from the fact that Maricopa was a 4-3 decision.
88. See, e.g., Note, supra note 77, at 1051 (The decision was a "[r]evitalization of Socony-Vacuum and repudiation of Broadcast Music.").
While Maricopa was a clear indication that the age of per se analysis is not over, it did not put an end to the changes in the application of that analysis. This was clearly demonstrated in NCAA v. Board of Regents of the University of Oklahoma, in which the Court considered a plan under which member colleges marketed television rights to their football games. The Association set the price for such sales, limited the "production" of the product by limiting the number of televised games, and prohibited member schools from independently selling television rights to their own games. The Court found the plan illegal under rule of reason analysis, rather than under the per se test usually applied to price fixing and restrictions on output.

The Court found that it was dealing with "an industry in which horizontal restraints on competition are essential if the product is to be available at all." Any type of league sport requires some sort of agreement among the competing members of the league as to how their "product" will be marketed. A wide range of agreements might be justifiable in such a context, and antitrust analysis should consider the league's arguments in justification of the restraints. The Court's definition of its holding in Broadcast Music was "that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive." Defendants must, at least in some cases, be given the opportunity to establish that the challenged arrangement is such a case.

The proposition that horizontal price fixing is per se illegal remains the law. But our understanding of that statement has undergone serious change in the last decade. It is now more clear than ever that the process of categorizing conduct as price fixing may allow defendants to raise arguments which cannot be raised to justify a practice already characterized as price fixing. Maricopa and other cases indicate that the Court has not exactly become permissive with respect to this classic type of restraint, but the rule against it is no longer as rigid as it once was, or at least was once thought to be.

89. "We have not wavered in our enforcement of the per se rule against price fixing." Maricopa, 457 U.S. at 347.
91. Id. at 100, 103.
92. Id. at 101.
93. Id. at 103.
94. See Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980). In Catalano, the Supreme Court reversed the Ninth Circuit Court of Appeals and applied a per se test to invalidate an agreement by beer wholesalers to eliminate short-term credit given to retailers. The Ninth Circuit had accepted the defense that the long-run effect of such a move would be procompetitive in eliminating an entry barrier to potential market participants. Id. at 645.
(2) Vertical Price Fixing

As a result of the decades of "fair trade" legislation, fewer significant cases have dealt with agreements fixing resale prices than with price-fixing agreements by competitors. Since the 1975 repeal of the Miller-Tydings Act, the Supreme Court has held to its position that vertical, as well as horizontal, price fixing is subject to per se prohibition. Despite urgings by the Solicitor General, as amicus curiae, the Court recently refused to reconsider the per se status of resale price maintenance in *Monsanto Corp. v. Spray-Rite Service Corp.* In a footnote, the Court rested its refusal on the failure of either party to press for such a decision at any stage of the lawsuit. It is, therefore, possible to interpret *Monsanto* in two different ways. On the one hand, despite much urging, the Court declined an opportunity to remove this per se prohibition. On the other hand, it avoided a strong endorsement of present law, suggesting that, if faced squarely with the issue in the future, it might respond favorably to arguments against per se treatment for resale price maintenance.

Nevertheless, as with horizontal price fixing, the Court has narrowed somewhat the definition of the offense while retaining its per se illegality. The most significant problem in classifying a practice as resale price maintenance has been distinguishing illegal agreements from permissible unilateral refusals to deal by sellers. Under the longstanding *Colgate* doctrine, a seller may state that he will not deal with any buyer who resells at a price other than that suggested by the seller, but he may not go further, either by extracting an actual commitment by the buyer

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95. *See supra* notes 32-34 and accompanying text.
97. The Solicitor General and several other amici suggest that we take this opportunity to reconsider whether "contract[s] . . . or conspirac[ies]" to fix resale prices should always be unlawful. They argue that the economic effect of resale price maintenance is little different from agreements on nonprice restrictions . . . They say that the economic objections to resale price maintenance . . . can be met easily in the context of rule-of-reason analysis.

Certainly in this case we have no occasion to consider the merits of this argument. This case was tried on per se instructions to the jury. Neither party argued in the District Court that the rule of reason should apply to a vertical price-fixing conspiracy, nor raised the point on appeal. In fact, neither party before this Court presses the argument advanced by amici. We therefore decline to reach the question, and we decide the case in the context in which it was decided below and argued here.

*Id.* at 761 n.7.
98. The urging came not only from the Justice Department, *id.*, but also from many academics. *E.g.,* H. Hovenkamp, *supra* note 25, at 247-65. Richard Posner goes even further, arguing that such agreements, in the absence of horizontal pressure, should always be permitted. *See Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6 (1981).*
to adhere to the prescribed price, or by enlisting others to maintain a scheme of enforcement. A series of Supreme Court decisions had so narrowly construed this Colgate exception, however, that it was nearly useless as a guide for action by sellers and was thought by many to be very nearly dead.

In Monsanto, however, the Court for the first time since Colgate issued an opinion which seemed to strengthen the doctrine. Although the defendant in that case was found to have gone beyond Colgate by engaging in concerted activity, the Court clearly stated that a seller could, at least, listen to unsolicited dealer complaints about the price-cutting behavior of other dealers, and act on them by refusing to deal with the price-cutters. While this dictum may not extend the scope of permissible seller behavior very far, it is consistent with the Court's recent approach in applying the per se rule to cases involving horizontal price fixing. The practice will continue to be declared per se illegal, but the Court seems much more willing than before to consider arguments that the particular behavior at issue should not be characterized as price fixing at all.

(3) Horizontal Market Division

The rule of Topco, holding that market division by competitors is per se illegal, has also remained a correct formal statement of the law. The Supreme Court has decided no significant case of this nature since Topco. But significant activity over the last decade in lower federal courts indicates that the pattern evident in price-fixing cases of narrowing the scope of the rule while refusing to abandon it altogether, also prevails in market division cases.

Relatively clear-cut instances of horizontal market division, whether

100. Id. at 306-07.

The FTC presented the Supreme Court with an opportunity to eliminate the Colgate doctrine, at least as it pertains to pressure on current, rather than prospective, dealers. The Commission, in Russell Stover Candies, Inc., 100 F.T.C. 1 (1982), found illegal resale price maintenance to exist on facts which did not go beyond the commonly understood bounds of the Colgate exception. The Commission would have retained Colgate only for the initial selection of dealers: "It does not mean that compliance with a pricing policy in order to avoid termination... does not give rise to an agreement." Id. at 46-47. The Commission was reversed by the Eighth Circuit, Russell Stover Candies, Inc. v. FTC, 718 F.2d 256 (8th Cir. 1983), which felt constrained by Colgate, and stated that only the Supreme Court could change the doctrine.

102. Monsanto, 465 U.S. at 763.
103. United States v. Topco Assocs., 405 U.S. 596, 608-10 (1972); see supra notes 37-39 and accompanying text.
involving territories,\textsuperscript{104} customers,\textsuperscript{105} or types of products,\textsuperscript{106} are classified as such and condemned per se. Such classification, however, is often avoided, generally in one of two ways. First, a defendant may argue that the restriction is minimal, far less restrictive than the clear identification of exclusive customers or the delineation of airtight territories, and necessary to bring about procompetitive results.\textsuperscript{107} In such a case, the restraint will be held not to rise to the level of horizontal market division, and thus will not be subject to per se treatment.\textsuperscript{108}

Second, a defendant may argue that the market division is essentially vertical, rather than horizontal. If the restraint is imposed, as in \textit{Topco}, by an entity which might be seen as independent of its members, or by a company engaged in dual distribution,\textsuperscript{109} it may be classified as either horizontal or vertical market division. From 1972 to 1977, this classification made no practical difference, since both practices were per se illegal. Today, however, it is of great importance. Because the Court's approach to vertical marketing schemes has shifted, as discussed in the following section, per se condemnation of a market division agreement can be avoided by establishing that the challenged arrangement is essentially vertical.

\textbf{(4) Vertical Market Division}

The most dramatic move in the recent retreat from per se analysis involves the treatment of vertical market division. For the first—and thus far, the only—time in the history of the Sherman Act, a class of activity once labelled per se illegal has been returned to the realm of the rule of reason. Ten years after \textit{Schwinn} established per se treatment for

\begin{itemize}
\item \textsuperscript{105} \textit{E.g.}, United States v. Koppers Co., 652 F.2d 190 (2d Cir.), \textit{cert. denied}, 454 U.S. 1083 (1981).
\item \textsuperscript{106} \textit{E.g.}, SKF Indus. Inc., 94 F.T.C. 6 (1979).
\item \textsuperscript{107} In Dreiling Motor Co. v. Peugeot Motors of Am., Inc., 605 F. Supp. 597 (D. Colo. 1985), an agreement plaintiff characterized as a horizontal division of markets was found to be nothing more than a procompetitive agreement to cooperate in the distribution of noncompeting products.
\item \textsuperscript{108} But rule of reason treatment does not always lead to exoneration. In \textit{Los Angeles Memorial Coliseum Comm'n v. NFL}, 726 F.2d 1381 (9th Cir.), \textit{cert. denied}, 469 U.S. 990 (1984), the court refused to apply per se analysis to NFL restrictions on moving teams into another team's territory, but nevertheless found the agreement illegal under rule of reason analysis.
\item \textsuperscript{109} That is, one which sells both at the wholesale and retail levels, and therefore is not only a supplier, but at least a potential competitor to its dealers. \textit{See, e.g.}, American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975).
\end{itemize}
plans by which a manufacturer divided customers or territories among its dealers, the Supreme Court reversed itself in *Continental TV, Inc. v. GTE Sylvania, Inc.*

**GTE Sylvania** differed from *Schwinn* in at least two significant respects. Unlike Schwinn, GTE Sylvania did not impose strict exclusive territories on its dealers, but rather required that they operate only out of locations approved by the manufacturer. Most would agree that, all else being equal, this type of restriction is less dangerous than the more rigid division of territories or customers. Another distinction between the cases was that the defendant in *GTE Sylvania* was a struggling company with a small market share, rather than the strong force which Schwinn was in the bicycle market. The Ninth Circuit had focused on these distinctions in holding that GTE Sylvania’s activity should not be classified as *Schwinn*-type per se market division. This approach of narrow categorization is, of course, consistent with the Supreme Court’s treatment of other per se rules.

The Supreme Court, however, did not endorse the cautious approach of the court below, but rather explicitly overturned the rule of *Schwinn*. The Court found that legitimate, procompetitive reasons often justified vertical market divisions. Such schemes might be used, for example, to encourage dealers to engage in more vigorous competition with other brands. Although these restrictions would, by definition,

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112. *Id.* at 38.
113. *Id.* at 38 n.3.
114. GTE Sylvania, Inc. v. Continental TV, Inc., 537 F.2d 980, 988-97 (9th Cir. 1976), *aff’d on other grounds*, 433 U.S. 36 (1977). The Court of Appeals held that *Schwinn* “is readily distinguishable” from *GTE Sylvania*. *Id.* at 996.
115. 433 U.S. at 57-59.
116. [N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer’s goodwill and the competitiveness of his product. Because of market imperfections such as the so-called “free rider” effect, these services might not be provided by retailers in a purely competitive
reduce intrabrand competition, the Court held that only case-by-case rule of reason analysis could determine whether this reduction of intrabrand competition would exceed any benefits gained through increased interbrand competition. It was simply unclear that even airtight territorial or customer restrictions would invariably result in net reductions in competition.\(^{117}\)

It requires no careful analysis, then, to categorize vertical nonprice restrictions on resale as falling within or without the realm of per se analysis.\(^{118}\) Here, the Supreme Court has gone all the way to restoring the use of the rule of reason.

(5) Boycotts

In recent boycott cases, the Supreme Court has followed its general approach of the last decade in dealing with per se categories. It has retained the black letter rule of per se illegality, but has engaged in analysis similar to the rule of reason when categorizing the conduct at issue. With respect to boycotts, the Court seems more candid (or more self-aware) of what it is doing. The Court's language now states that "certain types" of boycotts are illegal per se. Other types, then, must be judged under the rule of reason.

The basic identifying marks of the per se boycott continue to be those evident in *Klor's*: a per se boycott is one aimed at depriving a competitor of a valuable trade relationship.\(^{119}\) But the Supreme Court's most recent boycott decision, *Northwestern Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,\(^{120}\) indicates that the Court will apply a high standard in determining the value of the relationship severed by the boycott. In *Northwestern*, the Court ruled that expulsion from a cooperative purchasing association made up of competing stationers did not place the victim "at a severe competitive disadvantage."\(^{121}\) To determine whether

\(^{117}\) The disadvantage of expulsion was the loss of the advantages arising from membership in the cooperative, that is, lower prices.
a boycott will have an anticompetitive effect warranting per se condemnation requires an examination of market structure; the boycotters must have "market power or unique access to a business element necessary for effective competition to receive per se treatment."\textsuperscript{122} Despite the Court's explicit endorsement of continued use of the per se concept as applied to boycotts,\textsuperscript{123} it seems clear that the determination of whether a boycott in fact falls into the per se category is approaching the complexity of full rule of reason analysis.

Antitrust doctrine with respect to boycotts has also had to take account of the extension of limited first amendment protection to commercial speech.\textsuperscript{124} While this protection will not immunize the classic boycott carried out for anticompetitive reasons, a court must at least consider a defendant's plausible argument that the boycott is motivated by legitimate concerns unrelated to the suppression of competition.\textsuperscript{125} This consideration of motive moves the classification of boycotts yet another step closer to an analysis resembling full application of the rule of reason.

(6) Tying Arrangements

Cases involving tying arrangements have followed the general pat-
tern of retaining the black letter rule of per se illegality while at the same
time narrowing the scope of activity subject to the rule. It has, of
course, long been the rule that tying arrangements are per se illegal only
when the seller has market power in the tying product.\footnote{126} In this sense,
tying arrangements have always presented more difficult classification
problems than other per se violations.

In recent years, even the per se rule against tying arrangements, al-
ready somewhat narrow, has been applied less frequently. In \textit{Jefferson
Parish Hospital District v. Hyde},\footnote{127} the Court held that a thirty percent
market share was inadequate to demonstrate market power in the tying
product sufficient to trigger per se illegality.\footnote{128} Writing for the Court,
Justice Stevens emphasized that the per se rule with respect to tying ar-
rangements applies only when significant evidence, apparently apart
from market share, exists that consumers are coerced into the dual
purchase. While this "coercion" test can be seen as merely a restatement
of the requirement that the defendant be shown to have market power in
the tying product, some have seen it as a new, independent prerequisite
for establishing a per se violation.\footnote{129} In any event, \textit{Hyde} is yet another
instance of the narrowing and refinement of per se categories.

Even more striking than the Court's opinion in \textit{Hyde} is the concur-
ing opinion of Justice O'Connor, joined by three other Justices.\footnote{130}
These Justices advocate abandoning the per se concept for tying arrange-
ments altogether. Since the per se rule for ties, unlike other per se cate-
gories, has always required examination of market power, "[t]he time has
. . . come to abandon the 'per se' label and refocus the inquiry on the
adverse economic effects, and the potential economic benefits, that the tie
may have."\footnote{131} The disagreement among the Justices over the continued
use of the per se label is sharp and obvious. It is also indicative of the
extent to which per se analysis has been redefined. However, just what
practical analytical difference the choice of labels would have is not clear.

\footnote{126} See \textit{supra} notes 47-55 and accompanying text.
\footnote{128} \textit{Id.} at 26-27.
\footnote{129} Professor Hovenkamp points out that the various circuit courts describe the test for
finding an illegal tying arrangement to be either a three-, four-, or five-part test, with evidence
of actual coercion one of the parts not always articulated by the courts. At the same time, even
if not separately articulated, all courts do recognize that some type of coercion must be present
\footnote{130} Justices Powell, Rehnquist, and Chief Justice Burger joined in Justice O'Connor's
opinion. 466 U.S. at 32 (O'Connor, J., concurring).
\footnote{131} \textit{Id.} at 35 (O'Connor, J., concurring).
II. The Continuing Controversy over Per Se Analysis

There is little reason to believe that the dispute over the use of per se antitrust rules is over, or that the law in this area has become settled. Attacks on per se rules continue, drawing strength from recent judicial opinions. While the attacks have prompted some vigorous defenses of per se rules, the momentum appears to remain with those who would limit or eliminate per se categories, if not the entire concept of per se antitrust illegality.

The most vigorous of the continuing attacks has been directed against the use of per se analysis to assess vertical relationships. The abandonment of per se treatment for vertical customer and territorial restrictions has spurred frequent calls for rule of reason treatment of resale price maintenance and tying arrangements. It requires little reflection to recognize serious tension between rules subjecting resale price maintenance to per se illegality and judging vertical nonprice restraints under the rule of reason. The same arguments put forward to demonstrate that the overall effect of the latter may be, in a significant number of cases, procompetitive may be used to defend the former as well.

In GTE Sylvania, the Supreme Court determined that a manufacturer’s decision to allocate customers or territories might often result in gains in interbrand competition sufficient to offset the loss of competition among dealers in the manufacturer’s brand. The benefits from exclusive territories or customers might be an inducement to dealers to take on a product with a weak market position, and might also encourage dealers to provide services or advertising, secure in the knowledge that all the goodwill which they generate for the product will be of benefit to them rather than to any “free rider” competitors. The use of such arrangements might also allow the manufacturer to more rationally plan its mar-

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134. This has led many, including the Solicitor General, to urge abandonment of the per se rule for resale price maintenance. See supra notes 96-98 and accompanying text.


136. The “free rider” problem is explained by H. Hovenkamp, supra note 25, at 252-58, who asserts that “[m]ost instances of RPM or vertical territorial division” can be explained as an attempt “to avoid one of the many variations of the ‘free rider’ problem.” Id. at 252.
ket coverage. In light of these arguments, the Court refused to maintain a blanket condemnation of such practices.

Similar arguments can be made concerning resale price maintenance. Competition from discount dealers may act as a disincentive to dealer advertising, the provision of services, or other investments in the goodwill of a particular brand. Freedom from intrabrand price competition might also be used to recruit dealers for a new product, or one with a weak market position. Other reasons for resale price maintenance, apart from any intention to monopolize, have also been suggested, such as a manufacturer's desire to maintain a "prestige image" for its product.

Although an occasional commentator has argued that the distinction between resale price maintenance and other vertical restraints can be supported and that vertical price restraints should therefore be viewed with suspicion, most are of the view that this inconsistency cannot be justified, at least not upon neoclassical microeconomic premises. Most of those who have recognized the conflict have called for the abolition of per se categorization of resale price maintenance. Few commentators advocate resolving the conflict by returning nonprice vertical restrictions to per se status, although some do advocate the use of a limited per se rule. This limited rule would be invoked only against restraints imposed by firms with a significant market share, or perhaps only against the most dangerous of vertical nonprice restraints, strict assignment of territories or customers. At the other extreme, some have argued that not only are all types of vertical restraints often procompetitive, but they are beneficial in the overwhelming majority of cases. Therefore, according to this line of thought, not only are such restraints inappropriate subjects for per

137. See supra note 116.
139. See L. SULLIVAN, supra note 18, at 384.
140. See Gerhart, The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis, 1981 DUKE L.J. 417. The argument is that even with fixed retail prices, dealers may try to offer attractive, but low-cost, services to consumers, and take a free ride on other dealers who are providing those services that the manufacturer actually wants provided. See also Pitofsky, supra note 132.
141. The division between "price" and "nonprice" restrictions is, of course, somewhat artificial. "Nonprice" restrictions will not only have an impact on price, but are often intended to eliminate discount competition. See Pitofsky, The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 COLUM. L. REV. 1 (1978).
143. This distinction between Sylvania and Schwinn was initially pointed to by the Ninth Circuit and was adopted by Justice White in his concurring opinion in Sylvania. 433 U.S. at 60-63 (White, J., concurring).
se illegality, they should actually be declared per se legal.144

None of these positions has been accepted by the courts, possibly due to the apparent intent of Congress to maintain strict sanctions against resale price maintenance.145 However, if antitrust theorists continue to criticize the anomaly of treating only one form of vertical restraint as per se illegal, the most likely way this conflict will be resolved is by the Supreme Court reversing its position on vertical price fixing. With respect to tying arrangements, legislative support of unwavering prohibition is less recent, if not less clear, and the Court has already come close to abandoning the per se concept. Four Justices already support rule of reason treatment for such practices.146 Given the likely changes in the composition of the Court in the near future, rule of reason analysis may be adopted as the test for tying arrangements as well as other vertical restraints.147

Less attention has been paid in recent literature to per se rules involving boycotts and horizontal market division. With respect to boycotts, this sanguinity may reflect the perception that the surviving per se rule is so limited that it has relatively little impact on antitrust enforcement.148 Few significant cases have involved horizontal market division, unaccompanied by price fixing, since the unambiguous classification of such practices as per se illegal in 1972.149 Still, some have criticized the application of per se rules in these cases. Topco remains, in the view of some, a classic example of how horizontal market division can occasionally have procompetitive results.150

Only with respect to the classic per se offense, horizontal price fixing, has criticism been rare. Nevertheless, an occasional voice has been raised to argue that per se analysis should be abandoned even with re-

144. See Posner, supra note 98, at 22-26.
145. The 1975 repeal of the Miller-Tydings Act and the McGuire Act is one indication of legislative hostility to resale price maintenance. See supra notes 32-34 and accompanying text.
147. The two most prominent critics of per se treatment for vertical restraints, Judges Robert Bork and Richard Posner, are among the most frequently mentioned potential nominees to any further Supreme Court vacancy during the Reagan Administration. See, e.g., Dworkin, Reagan's Justice, 31 N.Y. Rev. of Books, Nov. 8, 1984, at 27; The Next Nominee?, 7 Nat'l L.J., Nov. 26, 1984, at 1, col. 2.
148. See supra notes 119-25 and accompanying text.
149. United States v. Topco Assocs., 405 U.S. 596, 608-10 (1972); see supra notes 35-39 and accompanying text.
150. "Unlike horizontal interbrand restraints subject to the per se rule, these 'horizontal' restraints were primarily intrabranch restraints and were ancillary to the integration of grocery stores in a joint buying agency, providing a justification that should have taken the restraints out of the per se rule." Gerhart, supra note 86, at 325-26.
spect to this "hard core" Sherman Act violation. Although there is little reason to believe that courts will seriously reconsider the designation of horizontal price fixing as per se illegal, the mere existence of such arguments indicates the strength of the movement against per se analysis. Even when criticism of per se rules does not lead to their explicit abandonment, it helps to create an atmosphere in which the surviving per se rules are continually narrowed through judicial circumscription. The expanded use of the rule of reason leads, then, to more permissive judicial treatment for those types of conduct once treated as clearly anticompetitive.

Of course, the critics of per se analysis have not had the field entirely to themselves. Those advocating strict application of the Sherman and Clayton Acts have counterattacked, putting forward both relatively narrow defenses of particular per se rules and broad defenses of the concept of per se illegality. Some advocates of broad application of per se rules argue that economic efficiency is the dominant goal of antitrust analysis and attempt to demonstrate that efficiency is not promoted by practices traditionally labelled per se illegal. Others contend that efficiency must yield to, or at least share the spotlight with, other values that call for strict application of antitrust prohibitions even in the face of possible efficiency losses from such enforcement.

It is not surprising that defenders of the per se concept are losing ground, both in the academic literature and in the courts. This situation, however, is much less a reflection of any defect in the general position advocating vigorous antitrust enforcement than an indication of a fundamental flaw in the concept chosen to implement that position. From the earliest days of antitrust, advocates of vigorous enforcement have made strong and appealing arguments for listing certain types of conduct as

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152. The Vertical Restraint Guidelines, issued by the Justice Department in January 1985, illustrate the advance of permissive attitudes. Reacting to *Sylvania*, which held that vertical restraints may promote competition, the Department has declared that "vertical restraints generally have a procompetitive or competitively neutral effect." Department of Justice, Antitrust Division, Vertical Restraints Guidelines § 3.2, 50 Fed. Reg. 6263, 6267 (1985). Thus, a judicial declaration that a practice is not always illegal quickly becomes an enforcement policy under which that practice is presumed to be legal.

153. *See* *e.g.*, Pitofsky, *supra* note 132 (defending per se treatment of resale price maintenance).

154. *See* *e.g.*, Redlich, *supra* note 132.

155. *See* *e.g.*, Louis, *Vertical Distribution Restraints After Sylvania: A Postscript and Comment*, 76 Mich. L. Rev. 265 (1977) (criticizing *Sylvania* for not recognizing that some non-price vertical restraints are more anticompetitive than others).

clearly and invariably forbidden.\textsuperscript{157} Not only would this categorization make enforcement of the antitrust laws quicker and more certain, it would also serve to deter far more anticompetitive behavior. Certainty and judicial economy are no doubt valid concerns, and vigorous enforcement of the antitrust laws is certainly consistent with the spirit of the public and the legislators who adopted them.\textsuperscript{158}

But the use of the concept of per se illegality has been unfortunate. To the extent that the term means what it says—that certain practices will invariably be illegal—it is difficult to defend. If a practice is to be classified as invariably illegal, it should be so designated only upon a showing that it will always (or at least almost always) cause harm outweighing any benefits which it may produce. Some courts have so held, stating that the per se label will be reserved for practices which will always, or almost always, fail the standard test of antitrust analysis, the rule of reason.\textsuperscript{159}

Absolutes, however, even when qualified with the word "almost," are hard to prove. In an area as complex as the effect of concerted business practices on competition, numerous counterexamples, both hypothetical and actual, may be advanced to rebut the contention that any such practice invariably injures competition. To defend per se illegality, then, is to defend something almost inevitably indefensible. The only possible way to defend the concept effectively is to resort to the course currently being taken by the Supreme Court: to narrow the categories so far as to make the question of categorization almost as complex as full rule of reason analysis. At that point, the defense of the per se concept becomes merely an exercise in semantics.

If the concept of per se illegality is indefensible, except when so refined as to make it largely irrelevant, why continue to defend it at all? Why not simply abandon the field to the rule of reason? It seems clear that the battle over the per se rules is less a clash over those specific rules than a battle over basic attitudes toward antitrust enforcement. For better or worse, per se rules have become linked in most minds with vigorous enforcement; to favor one is to favor the other. The rule of reason, on the other hand, is associated with a tolerant attitude toward antitrust defendants. Rule of reason analysis often—perhaps usually—leads to a

\textsuperscript{157} This was largely the motivation behind the adoption of the Clayton Act in 1914. See supra notes 11-14 and accompanying text.

\textsuperscript{158} See A. Walker, supra note 4.

\textsuperscript{159} When there is insufficient evidence to make such a finding of invariable anticompetitive effect, per se treatment is rejected. See White Motor Co. v. United States, 372 U.S. 253 (1963).
finding of no liability. Its complexity and uncertainty can deter plaintiffs from even attempting to challenge behavior which many would say should be challenged. Since, to so many, rule of reason analysis means a type of antitrust enforcement under which much anticompetitive activity will be permitted, per se analysis is defended, not so much for its own virtues, but rather because of fears of the permissive nature of its sole obvious rival.

An alternative system of antitrust analysis would ideally avoid the indefensible and ultimately self-defeating absolutes of per se analysis, yet also avoid such complexity and uncertainty that harmful or suspect business activities would go unchallenged. Once formulated, such an alternative should be embraced by advocates of vigorous antitrust enforcement. Although some may be reluctant to abandon a concept such as per se illegality which has been defended for so long, if its defense is clearly doomed to failure by inherent flaws in the concept, the battle lines should be drawn around a new perimeter not only capable of being defended, but also worth defending.

III. Strict Antitrust Scrutiny as an Alternative to Per Se Analysis

The need for an alternative approach to classic per se analysis which does not merely return to the permissiveness of the rule of reason has led to some interesting suggestions. The Fifth Circuit Court of Appeals has created a third test for use in Sherman Act cases. Less stringent than the per se rule, but less permissive than the rule of reason, the standard is called "facial unreasonableness."

The Fifth Circuit enunciated this test in United States v. Realty Multi-List, Inc. Membership criteria maintained by a multiple listing service of real estate brokers were challenged as an illegal boycott. Since the

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160. 629 F.2d 1351 (5th Cir. 1980).
161. From the formation of RML . . . its by-laws required an applicant for admission to hold a real estate broker's license in the state of Georgia, to agree to abide by all RML's internal rules, to receive the favorable recommendation of RML's membership committee after it investigated his or her application, to receive an 85% affirmative vote from RML's active members, and to purchase a share of RML stock. Id. at 1358 (emphasis in original) (footnote omitted).
162. Id. at 1364.
maintenance of multiple listing services served obvious procompetitive purposes, and since some membership restrictions could be reasonably ancillary to those purposes, the court found per se treatment inappropriate.\footnote{163}

The alternative the court adopted was not merely the unfocused and possibly too permissive rule of reason, but rather an intermediate type of analysis forged, said the court, out of the inherent flexibility of that rule. The court stated that application of its "facial unreasonableness" test would "void on its face any significantly restrictive rule of a combination or trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination's legitimate needs."\footnote{164}

Without requiring the delineation of specific types of practices previously demonstrated to be per se illegal, the facial unreasonableness test applies when a plaintiff shows two things: a rule of a combination or trade association which is significantly restrictive\footnote{165} and the existence of "significant" market power.\footnote{166} Defendants then must demonstrate a competitive justification for the rule and show that the rule is narrowly tailored to satisfy that purpose.\footnote{167} If a plaintiff carries his burden and the

\footnote{163. The court reasoned: By serving as a central processing and distributing point for listings of real estate, RML helps reduce "information and communication barriers" and ease "the built-in geographical barrier confronting buyer and seller." . . . It aids the seller by allowing him to give an exclusive listing to a broker, and thus to choose the agent with whom he prefers to deal, while nevertheless enabling him to place his listing in the hands of all RML's members to attempt to procure a buyer. . . . The buyer benefits by gaining access to a wider selection of properties in a shorter time period than would be the case if he engaged a lone broker. \textit{Id.} at 1368.}

\footnote{164. \textit{Id.} at 1370. The recently created Eleventh Circuit also applies this test. The new circuit adopted as precedent all cases decided before October 1, 1981 by the Fifth Circuit, from which the Eleventh Circuit had been split. \textit{See} Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).}

\footnote{165. "First, one can access [sic] the degree to which the association is involved in the actual business activities of its members. The more directly the association is involved in its member's business, the more likely it is that exclusion from membership will produce concrete anticompetitive effects." \textit{Realty Multi-List, 629 F.2d} at 1370.}

\footnote{166. In explaining what it meant by "significant" market power, the court stated: We do not set strict mathematical standards regarding the level of market power which must be shown; in any given case, the question whether the association has the requisite power may turn on a number of different factors. . . . At the least, when broker participation is high, the service itself is economically successful and competition from other listing services is lacking, rules which invite the unjustified exclusion of any broker should be found unreasonable. \textit{Id.} at 1373-74.}

\footnote{167. \textit{See id.} at 1374-85.
defendant fails to carry his, the practice is invalidated as "facially unreasonable."

Because the "facial unreasonableness" analysis requires that the purpose of the agreement be examined and the market power of the defendants assessed, one might question whether the test really differs from the rule of reason. The primary difference appears to be the way in which the test allocates burdens of proof, a factor of great importance when dealing with matters as unclear as those presented for adjudication in antitrust cases.

Professor John Flynn has argued that the proper way to view per se and rule of reason analysis is not as two types of rules applicable to different types of conduct, but rather as ways of "generating differing evidentiary presumptions for allocating burdens of proof." Professor Flynn points out what is now quite clear, that even in cases in which per se analysis is found appropriate, an "extended evidentiary inquiry" involving the purpose and overall effect of the challenged practice, as well as the market power of the defendants, is likely to take place. The real question is at what point the inquiry will begin, and how burdens of proof should be allocated during the inquiry.

Rather than beginning antitrust analysis by demanding a yes or no answer to the question of whether the practice at issue is one of those always forbidden, Professor Flynn would ask, "What facts will give rise to a presumption of illegality, how conclusive is the presumption, and what circumstances, if any, will justify permitting a rebuttal of the presumption?" When an analysis of the practice shows it to be the type which historically has proven to threaten competition, such as price fixing or horizontal market division, per se categorization should lead to a "nearly conclusive" presumption of illegality. In cases involving types of conduct less clearly anticompetitive, such as vertical nonprice

169. Id. at 1608-19.
170. Id. at 1613.
171. See supra notes 19-39 and accompanying text.
172. Flynn, supra note 168, at 1615. Professor Flynn explains:

The more central the goal being displaced . . . the more likely a presumption of illegality and the more conclusive the presumption. The more clear the goals of antitrust policy involved or the more confused anticompetitive effects become with procompetitive effects . . . the less conclusive the presumption allocating burdens of proof. Where no immediate impact on the goals of antitrust policy is perceived, no presumptions are created . . . .

Id. at 1613.
restrictions, per se analysis would mean "[l]ower levels of presumptive illegality." In every case, per se categorization and analysis would be a way of shifting the burden of proof to the defendant to justify his actions, rather than a way of putting an absolute end to the ability of the defendant to do so.

Both Professor Flynn's approach to per se analysis and the "facial unreasonableness" test of the Fifth Circuit take into account the enormous difficulty, if not futility, of attempting to label any particular practice as always anticompetitive. Each also retains, however, the label "per se." The Fifth Circuit's new test is meant not to displace, but to supplement per se analysis. Professor Flynn retains the term, but would change its meaning, if not from the way courts actually treat it, at least from the way in which most people think of it.

Why retain a term when it must be either redefined so drastically that it bears almost no resemblance to its commonly understood meaning, or defined so narrowly that it will hardly ever be used? The best answer may lie less in logic than in what might be called antitrust psychology. As discussed above, the term "per se" has become almost synonymous with serious antitrust enforcement; the rule of reason test has become associated with leniency. The argument over labels, then, is perhaps more understandable when seen as a battle over general attitudes toward antitrust enforcement. Those favoring rigorous enforcement cannot, and should not, be expected to give up the concept of per se illegality if the alternative is a standard which will be perceived as a step toward abandoning serious efforts to enforce the law.

If the concept of per se illegality is to be replaced, the alternative must clearly convey the notion that certain practices are highly suspect and will be subjected to close inspection. Any shift in terminology must be a clarification, not a loosening, of antitrust standards. At the same time, the substance of the new standard should incorporate the insights developed by those who have already suggested different ways of looking at per se analysis. Professor Flynn is correct when he argues that the

173. See supra notes 110-18 and accompanying text.

174. Flynn, supra note 168, at 1616 ("While Schwinn may have created too rigid a presumption of illegality, Sylvania appears to have gone to the opposite extreme and created too rigid a presumption of legality . . . ").

175. Thus, in the Fifth and Eleventh Circuits, in a case involving the activities of a joint venture or association of competitors, the court will consider the question of whether to label defendants' activity as per se illegal, and then, if deciding against such classification, will consider applying the facial unreasonableness test as an alternative. See, e.g., National Bancard Corp. v. Visa U.S.A., Inc., 596 F. Supp. 1231 (S.D. Fla. 1984), aff'd, 779 F.2d 592 (11th Cir. 1986).
difference between types of antitrust conduct should be seen as a matter of presumptions and burdens of proof. The Fifth Circuit is also correct when it recognizes the need for a test more stringent than rule of reason analysis, yet without the self-defeating absolutism inherent in the concept of per se illegality. As long as the term "per se" is retained, however, these insights are unlikely to prevail. Rather, the battle will continue between those defending an unrealistically stringent concept for fear of sending a too permissive message by abandoning it, and those who desire to send precisely such a message.

There is, however, a term and a framework for analysis which can very profitably be applied to antitrust. It quite accurately reflects what per se analysis has become, that is, a system of presumptions and burdens of proof rather than a checklist of easily identified absolute prohibitions. At the same time, it clearly conveys the message that the test being applied is a stringent one, a standard significantly more burdensome to defendants than the rule of reason. That term, found most frequently in the area of constitutional law, is strict scrutiny.\(^1\)

In the assessment of constitutional issues of due process and equal protection, the Supreme Court has designated certain governmental practices and classifications as subject to this test. Practices or classifications are subject to strict scrutiny not because they are "always" illegal, but rather because history and the goals of the Constitution indicate that they are particularly suspect.\(^2\) Generally, a government practice subject to strict scrutiny may be justified only by demonstrating that it is necessary to achieve a "compelling state interest" and is narrowly tailored to achieve that goal, going no further than necessary.\(^3\)

In constitutional litigation, strict scrutiny usually, but not always,\(^4\) results in the invalidation of the governmental practice in question. The alternative constitutional test, referred to as "ordinary scrutiny" or the "rational basis" test, requires only that the practice in question be rationally related to a legitimate governmental purpose. As might be expected, under this latter test the challenged practice usually, but not always,\(^5\)

\(^{176}\) See generally J. Nowak, R. Rotunda & J. Young, Constitutional Law 591-96 (2d ed. 1983).

\(^{177}\) The classic example, of course, is the use of race or national origin to classify a group for disadvantageous treatment. \textit{Id.} at 592.

\(^{178}\) \textit{Id.} at 591-93.

\(^{179}\) See Korematsu v. United States, 323 U.S. 214, 216 (1944) (upholding executive order requiring the exclusion of persons of Japanese ancestry from the city of San Leandro). Ironically, \textit{Korematsu} was the case which first clearly set forth the idea of strict scrutiny of statutes aimed at a "suspect" classification.

\(^{180}\) See City of Cleburne v. Cleburne Living Center, Inc., 105 S. Ct. 3249, 3254-60 (1985)
survives constitutional attack. While the shifts in presumptions and burdens heavily influence outcomes, neither test purports to be absolute. Practices subject to strict scrutiny need not be proven to be always unjustifiable.

Strict antitrust scrutiny would yield much the same result. When history shows that a practice is usually anticompetitive, the courts would declare the practice subject to strict scrutiny. The burden would then be on the defendant to demonstrate: (a) that the practice was adopted in pursuance of a procompetitive object and (b) that the practice is no more restrictive than necessary to achieve that procompetitive purpose. It can be anticipated that, as in the case of strict constitutional scrutiny, strict antitrust scrutiny will usually lead to invalidation of the challenged practice; however, antitrust theorists need not be enormously disturbed when a particular practice survives a challenge, since all cases will be scrutinized on their particular facts, and only justifiable practices will be upheld. Unlike the concept of per se illegality, strict antitrust scrutiny is compatible with the notion that absolute prohibitions may not be defensible.

Yet the test is sufficiently severe, and the terminology sufficiently indicative of that severity, that this recasting of the way in which particularly suspect practices are treated under the antitrust laws should not be seen as a wholesale retreat in antitrust enforcement. Indeed, the ultimate result of a change in both terminology and analysis should be to promote rigorous enforcement. Advocates of strict antitrust scrutiny should have an easier task persuading courts to apply the test than advocates of traditional per se analysis. Simple demonstration that certain practices, either actual or theoretical, would fall into the same category as those at issue and would yield procompetitive outcomes will be insufficient to avoid strict scrutiny.

Recent court decisions and scholarly criticism have made obvious the fact that the search for antitrust absolutes is not only futile, but also counterproductive when the alternative to per se absolutism is the permissiveness of the rule of reason. Antitrust law should therefore abandon the terminology of per se violations, yet retain the essential insight that certain practices are highly suspect. This can be done most effectively by

(striking down zoning ordinance, as applied, requiring special permit for home for mentally retarded persons).

181. The effect of a challenged practice on competition, rather than on more broadly defined aspects of public welfare, is the appropriate question in antitrust litigation, at least where Congress has not clearly enunciated some other goal to be weighed against competition. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978).
substituting for the per se concept the idea of strict antitrust scrutiny. Suspect practices subjected to this test will be judged, not under the standard rule of reason, which compels plaintiffs to demonstrate that the particular practice is, in the particular case, anticompetitive, but rather under a test which compels the defendant to bear the burden of justifying the practice.

IV. Applying Strict Antitrust Scrutiny

Not only is it possible to adhere to the principle that certain types of behavior deserve more careful antitrust treatment than is provided by normal rule of reason analysis without defending the position that such behavior must always be declared illegal, it is also preferable to the classic per se approach. The application of strict antitrust scrutiny will be harsh enough to discourage anticompetitive behavior, flexible enough to allow justifiable behavior which may superficially resemble anticompetitive behavior, and clear enough to promote better understanding and communication among those involved in antitrust enforcement.

Initially, a court must determine whether the behavior in question is of a type that deserves strict antitrust scrutiny. Such strict scrutiny should be applied when the practice in question has been shown to be dangerous to competition in a clear majority of cases. It need not be demonstrated, however, that the practice always, or even almost always, will fail the rule of reason. Thus, the production of one procompetitive counterexample, real or theoretical, will not be enough to invalidate the rule. Those types of behavior subject to strict antitrust scrutiny should, of course, largely be those categories now designated per se illegal. Strict antitrust scrutiny, while making the initial question of categorization less crucial than it is under per se analysis, will not eliminate the need for initial categorization.

Strict antitrust scrutiny should be applied to the following practices:

(1) Horizontal Price Fixing

This practice is, of course, traditionally considered the most suspect of all concerted anticompetitive behavior. Still, as demonstrated in Broadcast Music, it might occasionally be justified.182 If, rather than inevitably declaring a particular practice illegal after its classification as price fixing, a court allows the defendant to attempt the difficult task of justification, the court need not narrow the category itself, as the

Supreme Court did in *Broadcast Music*. To classify behavior as price fixing for purposes of determining whether to apply strict antitrust scrutiny, courts should simply inquire whether the defendants intended to, and did, raise, lower, fix, or stabilize a price.\(^\text{183}\) Whether that act was an end in itself or a means of achieving legitimate goals is a question to be raised in the application of the strict scrutiny test, rather than in deciding whether or not the test should be applied.

Once the court determines a practice is subject to strict scrutiny, the application of the test will resemble the analysis in the two most significant recent cases involving horizontal price fixing, *Broadcast Music* and *Maricopa*.\(^\text{184}\) Although difficult, if not impossible, to reconcile under current antitrust thinking, these cases are not inconsistent when viewed through the lens of strict antitrust scrutiny. In each case, defendants intended to and did in fact fix prices, in the literal sense of the words. At this initial stage of the analysis, rather than analyzing motives, the Court could simply have declared that the behavior in each case would be subject to strict antitrust scrutiny.

The defendants in *Broadcast Music* were able to clearly demonstrate that their price-fixing activity was narrowly tailored to serve the procompetitive purposes of maintaining the value of copyrights.\(^\text{185}\) Thus, the defendants successfully bore their strict scrutiny burden. The Court’s holding, that illegality should be found, if at all, only pursuant to a rule of reason, should not have been based upon the claim that the defendants’ behavior was not price fixing, but that it was, under the strict scrutiny test, justifiable price fixing. In *Maricopa*, on the other hand, the physicians were not able to bear the same burden. Central to the Court’s opinion were the Court’s doubts as to whether the physicians’ insurance plan was the least restrictive way of achieving whatever legitimate economies were claimed to be the goals of the program.\(^\text{186}\)

Under currently enunciated tests of per se illegality, it would appear that *Maricopa* and *Broadcast Music* are inconsistent. In each case, the defendants showed a distinct possibility of procompetitive effects. If per se categorization requires a showing of near certain anticompetitive effects, then neither practice qualifies. But the history of the practice, the need for the practice, and the benefits to be gained were much clearer in *Broadcast Music*. In *Maricopa*, despite some evidence of procompetitive

\(^{183}\) See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); *supra* notes 19-22 and accompanying text.

\(^{184}\) See *supra* notes 69-89 and accompanying text.

\(^{185}\) See *supra* notes 69-76 and accompanying text.

\(^{186}\) See *supra* note 85.
effects, the strict scrutiny burden was not sustained. This analysis of Broadcast Music and Maricopa indicates that strict antitrust scrutiny may not change the outcome in many cases. It would, however, better describe the reasons those outcomes occur and thus provide a sounder basis for future decisions.

(2) Vertical Price Fixing

The reasons currently cited for classifying vertical price fixing as per se illegal support its classification as conduct subject to strict antitrust scrutiny. By definition, vertical price fixing reduces intrabrand competition, and its overall effect will often be anticompetitive. However, even those sympathetic to the current per se illegal status of resale price maintenance should recognize that the absolutist position that such activity is always anticompetitive is untenable. Still, both precedent and legislative intent support stringent treatment of vertical price restraints. In addition, evidence shows that such practices may not be very efficient means of achieving the legitimate goals that supposedly lead manufacturers and suppliers to engage in such conduct. Strict antitrust scrutiny is the best way to resolve this dilemma.

Whether a particular practice constitutes resale price maintenance can be established under current tests. Again, any argument in justification of the practice should not arise until it has been decided that the strict scrutiny test is appropriate. Once vertical price restraints have been shown to exist, the defendants should be allowed to justify the practice by showing that it is narrowly tailored to attain demonstrated procompetitive ends. Defendants, however, would have the burden of proof, and it is quite likely that they will often fail to carry it. This prediction gains support from the fact that resale price maintenance is often a far less direct or efficient way of inducing procompetitive dealer conduct than other available courses. Some have suggested that a manufacturer's methods of increasing interbrand competition should not be second-guessed, and that once such motives are established, the practice should be condoned. But this "manufacturer knows best" philosophy is sim-

187. See generally Pitofsky, supra note 132, at 1490-91.
188. See id. at 1493 ("In any event, there are far more appropriate and less restrictive methods of insuring the availability of services. If a manufacturer really wants additional advertising, the common commercial practice is to contract separately for it.").
189. The most troublesome point is often whether there has been an agreement or merely unilateral action protected by the Colgate doctrine. See supra notes 99-102 and accompanying text.
190. See, e.g., Posner, supra note 98, at 23 ("[E]conomic theory . . . teaches that a manufacturer will (unilaterally) restrict distribution only in order to be more competitive.").
ply inconsistent with the basic skepticism toward collusive practices which is at the heart of the antitrust laws. Although the absolute prohibitions of the per se rule may be inappropriate for vertical price restraints, the alternative should not be rule of reason permissiveness, but rather the rebuttable skepticism of strict antitrust scrutiny.

(3) *Horizontal Market Division*

Clearly, division of markets among competitors is as anticompetitive, and quite possibly more so, than horizontal price fixing. In its more rigid forms, such as airtight territorial restraints or outright assignment of customers, this type of behavior eliminates all forms of competition between the parties, while price fixing by definition eliminates only price competition. Yet in certain situations procompetitive effects may result from some form of market division scheme, as was evident in *Topco*, the case in which such practices were first unambiguously labelled per se violations.

But *Topco* also demonstrates the wisdom of the approach of strict antitrust scrutiny. While using per se language, the courts disposed of the Topco agreement as if they were dealing with a strict scrutiny case. After the rigid territorial agreements of the initial Topco arrangement were invalidated, Topco adopted a less restrictive system of “areas of primary responsibility” enforced by “profit pass-over” provisions. These less restrictive means of attaining an efficient system of marketing house brand products to compete with national supermarket chains were upheld.

In other words, Topco initially failed the strict scrutiny test. The company admittedly engaged in horizontal market division and, although it was able to articulate a plausible procompetitive purpose, was

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191. Use of the rule of reason in cases involving vertical nonprice restraints has been extremely permissive. See id. at 22 (“In no case . . . when courts have required or at least permitted a deeper exploration of the facts than in the Schwinn era of per se illegality, has a purely vertical restriction on competition been shown to be anticompetitive.”) (emphasis in original).

192. See generally L. Sullivan, supra note 18, at 224-29.

193. See supra notes 37-39 and accompanying text.

194. Generally, these restrictions require a dealer to exert certain efforts and provide advertising or services within a designated territory, and while they allow other dealers to sell in that territory, the outside dealer who makes such a sale must compensate the dealer who has responsibility for the territory for part of his advertising or service costs. See Department of Justice, Antitrust Division, Vertical Restraint Guidelines § 2.5, 50 Fed. Reg. 6263, 6266 (1985).

unable to demonstrate that a restraint as severe as rigid territorial restrictions was necessary to enable the cooperative purchasing program to flourish. The revised Topco agreement, however, could be defended as narrowly tailored to achieve its procompetitive ends and therefore survive the test of strict antitrust scrutiny.

Courts and commentators have drawn distinctions among different types of market division practices. Rigid territorial divisions or the specific assignment of customers are the most dangerous to competition. It can be anticipated that under a regime of strict scrutiny, such horizontal practices would rarely be found to be sufficiently narrow to survive. On the other hand, such devices as the typical “area of primary responsibility” provisions are sufficiently narrow to be easily defended under such a test. In fact, it may be desirable to limit strict antitrust scrutiny in this context to territorial or customer divisions, and to adopt rule of reason treatment for less rigid systems. But unlike per se analysis, the boundaries of the category are less critical than the inquiry which follows the classification. As is the case with price fixing, strict scrutiny as applied to horizontal market division would enable courts to apply stringent standards of analysis when appropriate, without foreclosing legitimate justificatory arguments.

(4) Vertical Market Restraints

In the context of vertical market restraints, adoption of strict antitrust scrutiny cannot be taken to be an endorsement of permissiveness. The problems inherent in per se absolutism have already caused its demise with respect to these restraints, and the alternative of full rule of reason treatment has been adopted.196 This circumstance should not, however, exempt all such restraints from strict antitrust scrutiny. It is arguable that the Supreme Court’s choice of rule of reason treatment in *GTE Sylvania* was largely the consequence of the perceived existence of only two alternatives: per se analysis or application of the rule of reason.

As is true with horizontal restraints, an effective system of vertical market division will eliminate competition between the participants to a greater extent than a similar system of price fixing.197 On the other hand, it can be argued that this effect is balanced, if not outweighed, by the close relation of at least some types of market division to arguably procompetitive goals. The existence of exclusive territories, for example, may spur dealer advertising, since the dealer can be confident that he will

196. *See supra* notes 110-18 and accompanying text.
reap all of its benefits within his territory. But the fact that these restraints may be more closely related to arguably procompetitive goals than is resale price maintenance does not lead to the conclusion that they should automatically be given permissive rule of reason treatment. Rather, as is true with horizontal market division, strict antitrust scrutiny should be applied. This standard will allow manufacturers the opportunity to adopt demonstrably procompetitive vertical distribution systems while not going so far as to permit overly restrictive schemes. A manufacturer will have the burden of demonstrating that his system of vertical restraints is narrowly tailored to achieving an increase in intrabrand competition. As noted with respect to horizontal market divisions, it may be wise to designate only the most restrictive of these practices—strict territorial limitations and customer assignments—as subject to strict antitrust scrutiny. Arrangements less restrictive of intrabrand competition, such as the designation of areas of primary responsibility and the use of profit pass-over provisions, would be subject to the rule of reason.

Such a set of rules would permit the use of vertical marketing techniques helpful to manufacturers’ legitimate interests, yet strongly steer manufacturers away from using such interests to mask attempts to achieve anticompetitive goals through the use of overly restrictive means.

(5) Boycotts

Per se analysis has been used to invalidate a boycott only when the boycott has been directed against a competitor of at least one of the conspirators, and when the boycott seeks to cut its victim off from valuable trade relationships. Strict antitrust scrutiny would change little, except terminology, in the antitrust analysis of those practices. Courts have already suggested that even boycotts meeting the normal per se criteria may be justifiable if narrowly tailored to achieve legitimate ends. Adoption of the rule of strict antitrust scrutiny would make this sugges-

199. Justice White, concurring in Sylvania, argued that some, but not all, vertical restrictions should receive per se treatment. 433 U.S. at 59-63 (White, J., concurring).
200. See supra notes 43-46 & 119-25 and accompanying text.
201. In Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656 (1961), the Court found that an association’s refusal to give its “seal of approval” to a competitor’s gas burner would be an illegal boycott when the denial of the seal was not based upon genuine, objective concerns with the safety of the product. The implication is clear that if the denial was the result of subjective safety concerns, then it might be permitted, despite the fact that its effect would still be to deprive a competitor of a valuable trade relationship. See also Eliason Corp. v. National Sanitation Found., 614 F.2d 126, 128-31 (6th Cir.), cert. denied, 449 U.S. 826 (1980).
tion explicit. To escape condemnation, any attempt to deprive a competitor of a valuable trade relationship must be narrowly tailored to a legitimate end.202

(6) Tying Arrangements

As discussed above,203 the per se rule with respect to tying arrangements is unique. Since some degree of market power in the tying product is an element of the offense, per se analysis with respect to tying arrangements has always been somewhat difficult to distinguish from application of the rule of reason.204 Adoption of the test of strict antitrust scrutiny would put an end to the war over semantics and establish that any coercive tying of products must be narrowly tailored to a procompetitive end.

As has been noted in current law, coercion, which is at the heart of the offense, must be demonstrated at the outset. Market power is a convenient indicator of coercion, though not the only one.205 With the choice no longer between absolute illegality and permissive rule of reason analysis, but rather between the latter and strict scrutiny, courts need not strain to set standards for proof of market power so high. If the finding of coercion is based upon market share, rather than specific signs of unique advantage, it will be possible to set the standard for strict scrutiny at the level of significant, rather than monopolistic, market share. Again, while the rule will not absolutely bar tying arrangements, even by monopolists, it will require companies with significant market positions to take care in adopting such restraints.

Conclusion

Since the earliest days of antitrust enforcement, courts have attempted to deal with the fact that certain types of behavior, on their face, present more of a threat to competition than others. This has unfortunately led to the development of a concept of per se illegality which addresses a genuine problem in an unrealistic way. The basic notion of per se illegality—that some types of behavior can be defined as always, or almost always, unjustifiable—is far too vulnerable to attack. In a field as complex as legal regulation of the competitive process, the development


203. See supra notes 47-55 and accompanying text.


205. See supra notes 127-29 and accompanying text.
of counterexamples to refute any argument with such absolute pretensions is too easy.

In response to recent attacks on per se rules, courts have clung to the term and to its absolutism by steadily narrowing the definitions of the types of behavior subject to those rules. The result has been not only much confusion, with words being used to designate things far narrower than their commonly understood meanings, but also the application of permissive rule of reason treatment to some behavior which, while not meriting absolute prohibition, clearly deserves careful antitrust analysis.

The proper response to this confusion is to retain the valid insight of per se jurisprudence, that certain types of behavior should be treated as more suspect than others, while abandoning the indefensible absolutism of the term “per se.” However, since terms carry with them not only precise meanings, but also more general attitudes, “per se” must be replaced with a term which does not carry the permissive connotations which have become associated with the “rule of reason.”

The best available term for this new test is strict antitrust scrutiny. The use of such a term, and the type of analysis it suggests, is well known in constitutional law, where it by no means is associated with leniency. When faced with conduct which would traditionally be labelled per se illegal under the antitrust laws, courts should apply strict antitrust scrutiny. They should ask whether the defendant can carry the heavy burden of demonstrating that its conduct is narrowly tailored to achieve a procompetitive end. By replacing a system which places absolute prohibitions on types of conduct which can be defined so narrowly as to be irrelevant with a system which places, not absolute prohibitions, but heavy negative presumptions, on a larger set of behaviors, strict scrutiny should, on the whole, lead to more vigorous antitrust enforcement.

Strict antitrust scrutiny will not result in radical shifts in the outcome of antitrust cases. Recent per se analysis already contains the seeds of strict scrutiny. Indeed, strict scrutiny may be a better description of the reasoning actually underlying these cases than the term “per se.” Little would be lost, apart from semantics, by the change to strict scrutiny. What would be gained would be a much more defensible and enduring standard of analysis for those who favor rigorous antitrust enforcement.