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THE SHERMAN ACT § 1 PER SE—THERE OUGHT TO BE A BETTER WAY

by
William J. Flitie*

Originally it was planned to cover in a single Article both criticism of the Sherman Act § 1 per se concept, and an alternative to the per se concept which would be less destructive of the true goals of antitrust. The criticism segment, however, has proved more lengthy than anticipated. Inasmuch as the complete study breaks cleanly into these two subjects, this Article will present only the criticism of the per se concept. A second Article, which develops an alternative to the per se concept, is proposed for the coming year. This second Article will be concerned primarily with how expeditious record making procedures may be designed to deliver antitrust cases tried on the merits from the morass of the many essentially false adversary contests in which they are trapped. If the evidentiary conflict is reduced to what really is in issue, per se shortcuts, which flout individual case merits, may become unnecessary.

I. Has a Means Become an End?

This Article is concerned with the methods whereby the multi-party restraints of trade forbidden by Sherman Act § 1 are classed reasonable, and thus legal, or unreasonable, and thus forbidden. Two methods of inquiry are used: the per se rules and the rule of reason. Either might...

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1. The Sherman Act is the Act of July 2, 1890, 15 U.S.C. §§ 1-7 (1970). Sherman Act § 1, 15 U.S.C. § 1 (1970), states: “Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal . . . .” This section can be violated only by agreement of multiple parties; it takes at least two to conspire, combine, or contract. United States v. Empire Gas Corp., 393 F. Supp. 903, 908 (W.D. Mo. 1975). Direct price fixing, the normal, necessary and entirely legal function of every proprietor, becomes the most obvious of Sherman Act § 1 violations when arrived at through agreement of two or more parties.


Conduct which can conceivably violate the Sherman Act may be examined in terms of three basic variables: (1) its economic effects, positive (furthering efficient performance of economic functions) and negative (anti-competitive impact on the free play of market forces); (2) the power of the parties in the markets which they serve; and (3) the motives underlying the conduct. A full rule-of-reason standard requires scrutiny of all three variables before a judgment is reached that a given practice is “reasonable” (permissible under the Act) or “unreasonable” (proscribed). A rule-of-reason inquiry may also eliminate examination of one or more elements, so that, for instance, anti-competitive effect will be assessed but motive excluded as immaterial.

At the other end of the spectrum from the full rule-of-reason test is the strict per se rule, which characterizes the mere existence of a practice as a
produce the same result, but there is a vital distinction. Applied literally the per se concept must produce illegality, whereas rule of reason inquiry only may so result.\(^8\)

As will be seen in succeeding sections, the per se concepts, in some of their applications, have become so eroded, or from inception were always so compromised in definition, that they verge into what better might be called limited rule of reason inquiry. Nevertheless, there remains a tension to be grasped—the conflict between those who believe there should be more liberal inquiry through placing challenged practices in the context of their business environments,\(^4\) and those who favor enlarging the situations where such inquiry is denied.\(^5\)

To get an obvious example of the per se concept before us, consider direct price fixing among competitors. This is the purest of the per se concepts and also the one concerning which there is the least dispute as to propriety of condemnation upon mere identification.\(^6\) That is to say, once it is shown an agreement to fix prices exists, the violation is complete. All that remains to contest is appropriate relief. In civil cases the relief contest is in terms of the content of injunctive decrees or extent of monetary damages. In criminal cases once guilt has been found it is in terms of the criminal sentence to be exacted for the violation.\(^7\)

It may be concluded that the creep of the law has favored expansion of the per se concept since its initial 1927 appearance.\(^8\) But now, half a century later, a case has been decided which should give pause to proponents as well as opponents of the per se concept, at least to the extent of reexamination of this purely Supreme Court-made doctrine. In United

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5. D. Dewey, Monopoly in Economics and Law 165-66 (1959); C. Kaysen & D. Turner, Antitrust Policy 142-44 (1959); Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 NW. U.L. REV. 137, 148-49 (1962). In addition, Rahl argues all inquiry is rule-of-reason inquiry, but inquiry reasonably stops upon identification of the per se category of price fixing. Id. at 139-40. This only can be a play with words making for confusion of what is a useful labeling dichotomy that describes two quite different methods of trying antitrust cases. The weight of recent Supreme Court majorities falls with those favoring increased ascendancy of the per se concept. United States v. Topco Associates, Inc., 405 U.S. 596, 609-10 n.10 (1972).
6. However, even in the category of price fixing questions are being raised by distinguished authorities as to the desirability of per se rigidities. See Bork, supra note 4, 74 YALE L.J. 775, 776, 782 (1965), 75 YALE L.J. 373, 474 (1966); Elman, "Petrified Opinions" and Competitive Realities, 66 COLUM. L. REV. 625 (1966).
7. Query as to whether evidence of reasonableness should be heard in a criminal per se case. It is the role of the jury in criminal trials, which may refuse to find guilt despite what would be a directed verdict situation in a corresponding civil case, that raises the problem.
8. See notes 3-6 supra. For emergence of the per se concept see part II infra.
States v. Topco Associates, Inc.\(^9\) a cooperative corporation, Topco Associates, Inc., had been organized to serve some twenty-five small and medium-sized regional supermarket chains. The combined sales of the twenty-five were less than the individual sales of any one of the three supermarket chain giants: A&P, Safeway, and Kroger. The significant activity challenged in this litigation was the use by the twenty-five of their Topco Associates creature to procure for themselves numerous staple items of grocery stock (canned goods, paper goods, etc.) bearing various Topco private brand labels. The purpose of the twenty-five parents was to develop respected, private branded items of merchandise in order to compete more effectively with the private branded products of the giant chains. To protect their shared Topco brands from falling into hands that might use them in a fashion damaging to a reputation acquired through costly promotions and quality controls\(^{10}\) (and undoubtedly also to keep for themselves such business advantage as exclusive rights to Topco branded merchandise conferred) the Topco twenty-five, through the vehicle of their corporation, effectively restricted each to an exclusive territory in which a particular one of the twenty-five was the only seller having access to Topco branded products. There was no attempt or purpose to fix resale prices.\(^{11}\)

The trial court upheld the arrangement, finding the admittedly anticompetitive intra-brand restraint was far outweighed at the more important interbrand level "by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories."\(^{12}\) Almost any grocery shopper acquainted with this background would have pronounced the trial court's finding eminently sensible, and nowhere in its opinion does the Supreme Court majority contest the net competitive advantage found by the court below. Instead, the majority, speaking through Mr. Justice Marshall, reviewed the development of the per se concept and concluded, somewhat unconvincingly, that horizontal territorial restrictions already had been classified per se violations in a 1967 case.\(^{13}\)

\(^9\) 405 U.S. 596 (1972).

\(^{10}\) A particularly damaging competition would be that of a Topco associate that had outgrown the need for the shared brand and developed its own private brand. Apparently there was provision to oust and replace such associates. \textit{Id.} at 624 (Burger, C.J., dissenting).

\(^{11}\) There also were wholesaling restrictions that were stricken down as per se violations. \textit{Id.} at 612. These are little described and do not merit particular inquiry here. The harshest test for per se condemnation is presented in terms of the retailing restrictions. Further, it is quite evident the wholesaling restrictions were further to assure territorial exclusivity at the retail level.


\(^{13}\) 405 U.S. at 609, citing United States v. Sealy, Inc., 388 U.S. 350 (1967). But \textit{Sealy} is heavily tainted with the per se violation of price fixing. Indeed, the \textit{Topco} opinion concedes, by footnote, that \textit{Topco} well may be the first true per se disposition of horizontal territorial restrictions. 405 U.S. at 609 n.9. Given this doubt the Court, having the business context facts before it, surely should have made an evaluation on the merits, as it says it always does before pronouncing a per se category. \textit{White Motor Co. v. United States}, 372 U.S. 253, 263 (1963). Of course, had the Court done so, the result probably would have been opposite, and per se condemnation of horizontal territorial restrictions at least would have been deferred to a future case. Chief Justice Burger dissented sharply from the proposition that horizontal territorial restraints already had been classified per se violations, demonstrating that the case authorities that were relied upon by the majority were tainted with clear per se violations in already
This was held to preclude rule of reason inquiry into the challenged practice. The opinion states:

The District Court determined that by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains. But, the fallacy in this is that Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy.\textsuperscript{14}

Given the facts of this case, one can but wonder whether the Supreme Court intends ever to recede from a per se category once established. If not, we have here a most unusual display of stare decisis for this late date,\textsuperscript{15} particularly when it be remembered that the ever-fluid American economy is the backdrop against which antitrust enforcement is played.

One paragraph in the majority opinion contains awesome adverse implications to the maintenance of the competitive economy which is supposed to be the objective of the Sherman Act,\textsuperscript{16} especially since what was struck down may well have been the only means by which smaller grocers would be able to wage effective, private brand competition with the giants. If so, the giants gained a permanent and destructive competitive edge with the Court's blessing.

Whether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us. The fact is that the courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.\textsuperscript{17}

The contrary position of the Chief Justice was that antitrust cases never are easy, and the welfare of consumers, not difficulty or the convenience of courts, is the proper focus in formulating per se rules.\textsuperscript{18} Evidently the issue

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\textsuperscript{14} 405 U.S. at 610-11. This statement is correct only in the per se context. Rule of reason analysis invokes exactly such a weighing analysis.

\textsuperscript{15} Contrast Mr. Justice Powell, concurring, discussing stare decisis in Mitchell v. W.T. Grant Co., 416 U.S. 600, 623 (1974) (Powell, J., concurring). A constitutional point was in issue, but the Supreme Court long ago claimed for itself a role analogous to constitutional interpretation for Sherman Act cases. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933). For an extensive analysis indicating that stare decisis generally is a much weakened doctrine, see Flittie & Armour, The Natural Gas Act Experience—A Study in Regulatory Aggression and Congressional Failure to Control the Legislative Process, 19 Sw. L.J. 448, 473-75 (1965).

\textsuperscript{16} Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958); Apex Hosiery Co. v. Leader, 310 U.S. 469, 469-93 (1940).

\textsuperscript{17} 405 U.S. at 609-10.

\textsuperscript{18} Id. at 624 (Burger, C.J., dissenting). In contrast Mr. Justice Marshall for the majority stated, id. at 609-10 n.10, that per se predictability of legality or illegality should be the prime consideration absent congressional direction to abandon some or all per se categories. Then, if so directed, the courts could "ramble through the wilds of economic theory in order to maintain a flexible approach." It is elementary that dumping the matter on Congress will not square with the history of per se. It is a Court-made creation. See part II infra.
had been very sharply drawn in the Court's internal deliberations leading to
decision, and the statement quoted merits the dignity of a deliberate judicial
dictum.

II. THE ORIGINS OF THE SHERMAN ACT § 1 PER SE CONCEPT

The per se concept for Sherman Act § 1 violations developed in a
circuitous manner as a court-imposed gloss upon statutory language. A
concise description is found in Northern Pacific Railway v. United States. In
that case the Court said that there are "certain agreements or practices
which because of their pernicious effect on competition and lack of any
redeeming virtue are conclusively presumed to be unreasonable and there-
fore illegal without elaborate inquiry as to the precise harm they have caused
or the business excuse for their use." In terms of the rigid Supreme Court
posture in Topco, the modifying adjective "elaborate" may well be excised
from this description unless it is confined to meaning that any inquiry beyond
mere identification is elaborate. Although there are, and long have been,
serious breaches in the integrity of nearly all per se categories, the
Supreme Court in Topco rejected consideration of any defensive testimony
concerning business context despite the fact that such testimony actually was
available in a rather attractive case record.

It should be remarked in tracing the origins of per se that there are some
very early Sherman Act cases that superficially seem to speak in tones of per
se. For example, in the 1897 case of United States v. Trans-Missouri
Freight Ass'n a rate fixing agreement among competing railroads was
declared "illegal on its face." However, cases prior to 1911 are really
literal readings of Sherman Act statutory language, not initiations of the per
se concept as an exception to rule of reason analysis.

The route to our present per se categories is more circuitous. Per se is a
concept that could not emerge until after the landmark 1911 decision of
Standard Oil Co. of New Jersey v. United States. There the Supreme
Court rejected literal reading of Sherman Act § 1 by implying into it from
the underlying common law a "rule of reason" to the effect that only
unreasonable restraints are illegal. Only with that case's articulation of

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20. Id. at 5.
22. Note 13 supra and accompanying text.
23. 166 U.S. 290 (1897). See also Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).
24. 166 U.S. at 341.
26. 221 U.S. 1 (1911). There is an elaborate examination into the origins and de-
velopment of the rule of reason, including the contributions of particular past justices
of the Supreme Court in Bork, supra note 4, 74 YALE L.J. 775 (1965). The develop-
ment of the rule of reason actually has been a record of progressive diminishment in
its application caused by growth of the per se concept.
27. The pertinent sections of the Restatement of Contracts (1932) describing
legal and illegal restraints of trade at common law are as follows:
§ 4. Bargain Defined. A bargain is an agreement of two or more per-
sons to exchange promises or to exchange a promise for a performance.
the rule of reason concept could the format for developing per se classifications as exceptions to rule of reason inquiry come into existence.

One may postulate that, starting with 1911, all restraints of trade were entitled to be tested in litigation developing the relative merit, or lack thereof, in a challenged practice. The Court has said that it alone creates per se categories, and then only when it knows “enough of the economic and business stuff out of which these arrangements emerge to be certain.”

Thus, while some may try to identify then Circuit Judge Taft’s opinion in the 1898 case of United States v. Addyston Pipe & Steel Co. as the inception of the Sherman Act § 1 per se rule, it cannot be in any literal sense by reason of the historic sequence described. Moreover, upon close examination the Addyston opinion is found to be rested on the same distinction between legal (reasonable) and illegal (unreasonable) common law restraints as is the 1911 Standard Oil decision of the Supreme Court. It is just that in Addyston the blatant price fixing involved needed very little analysis for condemnation whereas the Supreme Court chose Standard Oil as its authoritative vehicle for declaring and explaining the rule of reason.

No doubt Addyston with its abrupt condemnation of direct price fixings made it easier for the Supreme Court in the 1927 case of United States v.

§ 513. Definition of a Bargain in Restraint of Trade. A bargain is in restraint of trade when its performance would limit competition in any business or restrict a promisor in the exercise of a gainful occupation.

§ 514. When a Bargain in Restraint of Trade is Illegal. A bargain in restraint of trade is illegal if the restraint is unreasonable.

§ 515. When a Restraint of Trade is Unreasonable. A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it

(a) is greater than is required for the protection of the person for whose benefit the restraint is imposed, or
(b) imposes undue hardship upon the person restricted, or
(c) tends to create, or has for its purpose to create, a monopoly, or to control prices or to limit production artificially, or
(d) unreasonably restricts the alienation or use of anything that is a subject of property, or
(e) is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of good-will or other subject of property or to an existing employment or contract of employment.

§ 516. Instances of Reasonable Restraints. The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly:

(a) A bargain by the transferor of property or of a business not to compete with the buyer in such a way as to injure the value of the property or business sold;
(b) A bargain by the buyer or lessee of property or of a business not to use it in competition with or to the injury of the seller or lessor;
(c) A bargain to enter into partnership with an actual or possible competitor;
(d) A bargain by a partner not to interfere by competition or otherwise with the business of the partnership while it continues, or subject to reasonable limitation after his retirement;
(e) A bargain to deal exclusively with another;
(f) A bargain by an assistant, servant, or agent not to compete with his employer, or principal during the term of the employment or agency, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.

29. 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).
Trenton Potteries Co.\textsuperscript{30} to uphold a jury instruction to the effect that should the jury find the price fixing agreements complained of to exist, it might return a verdict of guilty without regard to the reasonableness of the prices agreed.\textsuperscript{31} But from Standard Oil in 1911 until Trenton Potteries in 1927 the Supreme Court never spoke in terms that forbade inquiry into reasonableness of any business practices. Trenton Potteries, dealing with price fixing, necessarily is the first Sherman Act § 1 per se disposition.\textsuperscript{32} Since 1927 about five more per se categories have been recognized.

### III. The Sherman Act § 1 Per Se Categories

The Supreme Court reserves for itself all initial determinations of per se categories.\textsuperscript{33} However, there is no statement by the Court which, at any given time, has purported exhaustively to catalogue the then-recognized per se restraints, nor is there any perfect agreement among the writers who have addressed this matter. The nearest the Court has come was in White Motor Co. v. United States\textsuperscript{34} where tying, division of markets, group boycotts, both vertical and horizontal price fixings,\textsuperscript{35} and, at a considerably removed part of the opinion, horizontal territorial restrictions\textsuperscript{36} were identified as per se proscribed violations. The somewhat casual nature of these pronouncements militates against their elevation to the rank of judicial dicta cataloguing all then-recognized per se categories.

Oppenheim and Weston list five situations as Sherman Act § 1 per se restraints: price fixing agreements among competitors, agreements to limit production, agreements to divide markets, resale price maintenance agreements with distributors, and group boycotts.\textsuperscript{37} Von Kalinowski in his treatise classifies the per se restraints as vertical and horizontal price fixings, tying arrangements, vertical and horizontal boycotts, vertical and horizontal divisions of markets, and reciprocal dealings.\textsuperscript{38} A principal general search text for lawyers includes this somewhat variant group: tying agreements, agreements among competitors to divide markets or allocate customers, sales to independent dealers, vertical price fixing agreements, resale price maintenance agreements, division of markets and horizontal territorial restrictions.

\textsuperscript{30} 273 U.S. 392 (1927).
\textsuperscript{31} Id. at 401.
\textsuperscript{32} 16 BUSINESS ORGANIZATIONS, J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 6.02[3][b] (1976) recognizes Trenton Potteries as the first per se case. Supreme Court comment in Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 682 (1975), is supportive of this view. But see the opinion of Mr. Justice Douglas in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-13 (1940), where he suggests the per se concept originates with the turn of the century cases cited in note 23 supra.
\textsuperscript{34} 372 U.S. 253 (1963). In White there was refusal to pronounce per se condemnation upon vertically imposed territorial and customer restrictions inasmuch as not enough yet was known to consider taking the disposition from rule of reason analysis.
\textsuperscript{35} Id. at 259-60.
\textsuperscript{36} Id. at 263. There is no square supporting citation. Actually, per se status in horizontal territorial restriction was not attained until 1967 at the earliest, 1972 at the latest. Notes 12, 13 supra and accompanying text.
\textsuperscript{37} S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS, CASES AND COMMENTS 18 (3d ed. 1968).
\textsuperscript{38} J. VON KALINOWSKI, supra note 32, § 6.02[3][a]. In his subsequent text, however, this author undermines his categorization of reciprocal dealing as a per se by stating before it can be so classified it must have been "used to stifle competition." Id. § 6.03[3][f]. The only authority cited in support is United States v. Griffith, 334 U.S. 100 (1948), which is a Sherman Act § 2 conspiratorial monopolization case.
While a precise determination of per se categories is not essential to this Article since its conclusion would not vary with the addition or subtraction of a doubtful category, it is suggested that the following were the Sherman Act § 1 per se restraints as of the commencement of the Supreme Court's new term in 1975:

1. price fixing agreements;  
2. agreements to limit supply or production;  
3. horizontal territorial restrictions;  
4. vertical territorial and customer restrictions where title has passed from the supplier;  
5. group boycotts;  
6. tying.

Should a cornering case arise, it might be classified as a separate per se, although cornering a market is a genus so closely related to price fixing it could readily be treated as part of that category in its indirect price fixing subdivision.

IV. HOW CONSISTENT IN PER SE DISPOSITIONS ARE THE PER SE CATEGORIES?

Not very. Two leading proponents of broadened per se dispositions concede "there will always be borderline cases in which conduct may not be clearly forbidden or clearly lawful." Then, following a discussion de-

40. Price fixings not involving competitors or suppliers may not be reached by per se condemnation because they are neither horizontal nor vertical in nature. Evans v. S.S. Kresge Co., 394 F. Supp. 817 (W.D. Pa. 1975). The Supreme Court as yet has not pronounced per se condemnation even though the power to compel price agreement exists. It is probable that when the Supreme Court referred to both vertical and horizontal price fixing it intended to cover all price fixings that affect enough commerce for Sherman Act jurisdiction to attach, and there resulted a somewhat infelicitous statement that is vulnerable to narrow readings.
41. There is some doubt whether this is a separate category in that it definitely is an offshoot of price fixing in its indirect, as opposed to direct phase. The root case for the category would be United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), which is analyzed in terms of an indirect price fixing accomplished through supply restrictions. Refusals of the Antitrust Division to pursue per se dispositions in some production restriction situations, hereafter discussed, makes separate treatment desirable for the purpose of this Article.
42. This category evolved from a broader categorization of vertical territorial and customer restrictions that was considered in White Motor Co. v. United States, 372 U.S. 253 (1963). In United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the court receded from the implications of its holding in Simpson v. Union Oil Co., 377 U.S. 13 (1964), which arguably placed even consignments in hazard of becoming per se violations, and limited per se effects to situations where territorial or customer restrictions are imposed even though title has passed from the supplier. Any implications in the prior case reaching beyond title passage situations are expressly eschewed. 388 U.S. at 379-80. The net effect of these decisions is that consignment situations are measured in rule of reason testing but title passage situations involving vertical territorial or customer restrictions are assigned a per se categorization.
43. Cf. United States v. Patten, 226 U.S. 525, 542 (1913). This case was decided 14 years before the per se concept evolved.
44. See part IV, Indirect Price Fixing, infra.
45. C. KAYSEN & D. TURNER, supra note 5, at 142.
signed to justify per se despite its being a somewhat blunt instrument, these writers further concede that some practices, specifically identifying tying, "may not be subject to a per se rule in the strict sense" but still should be declared illegal as "nearly" per se violations.\textsuperscript{46} This weak characterization of tying was made in 1959, despite the Supreme Court's immediately preceding 1958 identification of tying as a per se\textsuperscript{47} which indicates that what actually is limited rule of reason inquiry cannot, by labels, be converted, even by the Supreme Court, into what it is not. We will return to tying, the most interesting and weakest of Sherman Act § 1 per se restraints, but, let us begin with the firmest.

(1) Price Fixing. \textit{Chicago Board of Trade v. United States}\textsuperscript{48} was decided in 1918, nine years before the per se rule evolved in \textit{Trenton Potteries}.\textsuperscript{49} Therefore, the case quite properly was decided by rule of reason analysis, despite the fact that it involved plain direct price fixing by competing traders over a small, but significant, fraction of total grain sales, and that the fixes were only for very short time intervals. The challenged practice survived rule of reason testing because the Court found its demonstrated benefits outweighed any evils.\textsuperscript{50} The case is yet the source of probably the most quoted explanation of how full scale rule of reason analysis works:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effects, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.\textsuperscript{51}

If this statement were only cut adrift from its own price fixing facts when the price fixing per se evolved, there would be nothing remarkable about \textit{Chicago Board of Trade}. But the case continues as live authority, capable of according rule of reason analysis in some price fixing situations.\textsuperscript{52}

In the 1940 case of \textit{United States v. Socony-Vacuum Oil Co.}\textsuperscript{53} the Supreme Court was at great pains to distinguish \textit{Chicago Board of Trade}. \textit{Socony-Vacuum}'s author, Mr. Justice Douglas, stated in this regard:

That case involved a prohibition on the members of the Chicago Board of Trade from purchasing or offering to purchase . . . grains [arriving while the Board of Trade was closed overnight and otherwise] at a price

\textsuperscript{46} Id. at 144.
\textsuperscript{47} Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).
\textsuperscript{48} 246 U.S. 231 (1918).
\textsuperscript{49} This case involved a simple direct price fix plus a restriction of sales to certain jobbers which could be characterized as an indirect price fix. 273 U.S. at 395.
\textsuperscript{50} 246 U.S. at 239-41. This reasoning is an antithesis of the refusal to consider competitive pluses in the \textit{Topco} case discussed in part I \textit{supra}.
\textsuperscript{51} Id. at 238.
\textsuperscript{52} Jacobi v. Bache & Co., 520 F.2d 1231, 1240 (2d Cir. 1975).
\textsuperscript{53} 310 U.S. 150 (1940).
other than the closing bid. . . . No attempt was made to show that the purpose or effect of the rule was to raise or depress prices. The rule affected only a small proportion of the commerce in question. . . . Since it was not aimed at price manipulation or the control of the market prices and since it had 'no appreciable effect on general market prices,' the rule survived as a reasonable restraint of trade. 54

Immediately following, Mr. Justice Douglas, now dealing with the Socony-Vacuum's facts which involved production and marketing restrictions, elimination of competitive "evils" such as price cutters operating in a very depressed market, and other price stabilizing tactics which the opinion classed as indirect price fixings, pronounced per se anathema as follows:

Any combination which tampers with price structure is engaged in an unlawful activity. . . . [T]he Sherman Act, so far as price fixing agreements are concerned, establishes one uniform rule applicable to all industries alike. . . . 55

Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the Act. 56

The variant dispositions are not intellectually satisfying, but this strained Chicago Board of Trade exception has been maintained. 57 Given its history, the exception must be accepted as a valid price fixing rule of reason precedent of limited application. As such the Chicago Board of Trade exception has performed signal service. For example, it necessarily filled the interval between 1927 and the securities acts of 1933 and 1934, when otherwise many exchange activities would have been per se illegal. 58

54. Id. at 217.
55. Id. at 221-22. Moreover, the violation is complete, without more, upon attaining agreement, for the Sherman Act conspiracy is on the common law basis requiring no overt act beyond the act of agreeing. Id. at 224-25 n.59.
56. Id. at 224.
57. The maintained exception emerges as early as Sugar Institute v. United States, 297 U.S. 553, 599 (1936). In Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958), Chicago Board of Trade is cited as an example of a case where no unreasonable restraint was found, and there are citations to the same general effect in Denver Union Stock Yard Co. v. Producers Livestock Mkt'g Ass'n, 356 U.S. 282, 287, 306 (1958), and United States v. Arnold, Schwinn & Co., 388 U.S. 365, 374 (1967). These citations can be explained as citations to a sound rule of law no longer applicable in the price fixing context in which it was enumerated, but Silver v. New York Stock Exch., 373 U.S. 341, 360-61 (1965), cites Chicago Board of Trade as a basis for excusing member-agreed limitations upon exchange membership though exempting SEC powers were absent. (It is true this citation occurred in a context where the Court also said such exemption of self-regulation was necessary to make the Securities Exchange Act work, but Chicago Board of Trade, prominently cited and relied upon, long predates the securities acts of 1933 and 1934.) In Silver it was group boycotting, another per se, that was in issue. The Court since has moved further toward a position of exceptions as something authorized by implication in the acts regulating the exchanges. Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 692 (1975); Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 304 (1973). See also United States v. National Ass'n of Secs. Dealers, Inc., 422 U.S. 694 (1975), which deals with mutual fund pricing under the Investment Company Act. But this does not eliminate the evident substantial reliance on Chicago Board of Trade at least as late as 1963 in Silver. Nor is it to be lightly taken that so able a federal judge as Judge Friendly of the Second Circuit seems to find Chicago Board of Trade a sound independent precedent as of 1975 in Jacobi v. Bache & Co., 520 F.2d 1231, 1240 (2d Cir. 1975).
Exactly such considerations ruled Judge Medina's 1953 decision in United States v. Morgan,\(^5\) popularly known as the Investment Bankers case. The syndicating practices of seventeen major investment banking houses were involved, particularly their agreements upon underwriting prices to be paid issuers and public offering prices to be charged by them for the securities issues thus acquired. These practices had antecedents in the last century which continued through the interval after the enactment of the Sherman Act\(^6\) until challenged here. Judge Medina was positive that SEC regulation, commencing in the mid-1930's, neither expressly nor impliedly conferred Sherman Act immunity on the investment banking practices before him.\(^6\) He rested his decision upon rule of reason analysis, citing Chicago Board of Trade.\(^6\) From the standpoint of the Government this case was at least the Antitrust Division's case of the year, and so convincing was the trial court's disposition there was no appeal. This history of the price fixing per se gives rise to a contradiction, for it is to say that agreed price fixing is a per se violation except when there is a price fix that experience or common sense sufficiently demonstrate should be governed by rule of reason analysis.\(^6\)

There are other possible deserving candidates for rule of reason treatment in the price fixing area. Consider, for example, Albrecht v. Herald Co.,\(^6\) where the vertical fixing of maximum prices by a supplier was per se condemned.\(^6\) Mr. Justice Harlan's dissent is a masterful demonstration that separating desirable from undesirable consequences in the case of such maximums would be better left to rule of reason if the advantage of ultimate consumers is the real concern of the antitrust laws.\(^6\)

**Indirect Price Fixing.** Not all price fixing situations can be disposed of on the abbreviated evidentiary record the Court claims is a primary advantage of per se enforcement.\(^6\) If a conspiring combination of separate entities has hidden its agreement in a sophisticated manner there is apt to ensue the equivalent of a rule of reason trial record in the course of settling the conspiracy issue. The trial record may be so enormous in bulk that all that will be gained from per se enforcement is the avoidance of the detailed court findings or jury instructions appropriate to rule of reason inquiries.\(^6\) Such

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60. Id. at 636.
61. Id. at 697.
62. Id. at 688-91.
63. Cf. Jacobi v. Bache & Co., 520 F.2d 1231, 1240 (1975). There is also an obscure suggestion in a recent Supreme Court case that the price fixing necessarily present when two competing newspapers use a joint corporation to set subscription and advertising rates might be legal if one of the newspapers were a failing company. Citizen Publishing Co. v. United States, 394 U.S. 131, 136-37 (1969). If so, this would be another breach in the per se price fixing front.
64. 390 U.S. 145 (1967).
65. Id. at 153.
66. Id. at 156-68.
68. The best examples of this problem are the conscious parallelism pricing cases such as United States v. Masonite Corp., 316 U.S. 265 (1942), and United States v. Paramount Pictures, 334 U.S. 131 (1948). Conscious parallelism once threatened to become a per se violation in its own right, but the trend was terminated by Theater Enterprises v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954), in which the Supreme Court stated that "[c]ircumstantial evidence of consciously parallel behavior may have made
gains are of small importance unless it be assumed our federal courts have such small competence their ignorance should be masked where possible by per se rules.\textsuperscript{69}

Not all price fixing is simple direct agreement among competitors, whether the agreement be open or hidden. Indirect price fixings, even though there is no substantial dispute as to the overt acts in issue, can generate immense records of contending evidence equal or greater than rule of reason case-in-chief and defense efforts in the course of determining what meaning attaches to such facts. This problem is well exemplified by two cases which both predate the emergence of the per se concept. \textit{American Column & Lumber Co. v. United States}\textsuperscript{70} today would be classified as an indirect price fixing accomplished through exchange of past pricing information, but \textit{Maple Flooring Manufacturers Ass'n v. United States},\textsuperscript{71} decided just four years later and practically identical in its basic facts, is an example of a successful rule of reason defense because no purpose to fix prices was found.\textsuperscript{72}

The trial route to rule of reason or per se disposition in such cases is about the same, long and complex. This phenomenon is no recent discovery. The stem case for indirect price fixing, \textit{United States v. Socony-Vacuum Oil Co.},\textsuperscript{73} exhibited fully this aspect in its treatment of a hidden conspiracy engaged in tampering with supplies in an indirect and sophisticated manner.\textsuperscript{74} In short, only the comparatively easy indirect price fixing cases will produce summary per se dispositions.\textsuperscript{75} The hard, complex cases will

\textsuperscript{69} This attitude is criticized in part V infra.
\textsuperscript{70} 257 U.S. 377 (1921).
\textsuperscript{71} 268 U.S. 563 (1925).
\textsuperscript{72} In the latest case of this exchange-of-past-prices genre, \textit{United States v. Container Corp.}, 393 U.S. 333 (1969), a bare majority of five Justices in a notably opaque opinion by Mr. Justice Douglas seem to per se condemn paperboard industry exchanges of past prices information. One concurring Justice and three dissenters objected to the per se treatment. Since the majority conceded that there can be exchange of past prices in less concentrated industries which could test out as legal, \textit{id.} at 337, the likelihood that this case really is a per se precedent is small. Given the majority's language and the division of Justices in this case, it is fairly predictable the 1976 Court membership will not find exchange of past price information a per se violation, which means the problem noted in the accompanying text continues.
\textsuperscript{73} 310 U.S. 150 (1940).
\textsuperscript{74} Further examples of complex per se cases are Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946); and the case which probably best epitomizes the hidden conspiracy engaged in a highly sophisticated price fix, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). This problem underlies the discussion in Flittie, \textit{Pretrial of Antitrust Conspiracy Cases—The Holland Safeguard and Judicial Notice}, 17 Sw. L.J. 1, 18-22 (1963), in which is discussed United States v. Standard Oil Co. of Cal., Civ. No. 11584-C (S.D. Cal., May 12, 1950). In that case the plaintiff put in issue production restricting practices in some 400 California oil pools, with rule of reason or per se disposition turning on whether the restrictions were valid reservoir engineering, or merely ostensibly such for the hidden purpose of limiting supply to demand. The enormous problem of proof is the same regardless of whether per se or rule of reason rules the outcome.
\textsuperscript{75} An example of an easy fact situation is Plymouth Dealers Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960), where there were agreements upon recommended price lists and trade-in discounts. Another example is Ethyl Gasoline Corp. v. United
continue to produce litigation not significantly different from rule of reason inquiry and disposition.

(2) Agreements To Limit Supply or Production. Agreements limiting supply and production tend to be tested as Sherman Act § 2 multi-party monopolizations rather than § 1 restraints of trade. Further, as already remarked, this category can be and has been treated as a species of price fixing per se by using means that are indirect rather than direct. The first case in which this type of restriction was brought under close scrutiny by the Supreme Court was Appalachian Coals, Inc. v. United States. That case involved among other things elimination by agreement of "pyramided" offerings of coal for sale. By these agreements the same ton of coal, offered for sale by producers through multiple selling agents, inflated the apparent supply in the market place. This aspect, in terms of its treatment seven years later in the 1940 Socony-Vacuum decision, suggests the propriety of treating supply and production restrictions as a separate per se category.

A fair reading of Appalachian Coals' subsequent history merits its evaluation today as a strictly limited precedent that might be followed in times of severe economic distress comparable to the early 1930's, particularly if there were involved an even more specially depressed specific industry condition resembling that of the coal industry in the Great Depression economy. At any rate, as with Chicago Board of Trade, the Supreme Court despite many opportunities to overrule Appalachian Coals has refrained from doing so. Despite the notable lack of success in citing Appalachian Coals, the current status of this precedent made it possible for a federal district judge to cite that case in the 1970's as authority for the following statement: "[I]t is true that compelling economic need may under certain rare conditions be a defense to price fixing ...".

The Socony-Vacuum case involved agreement among major integrated oil companies upon a buying program designed to take "distress" gasoline out of weak independent refiner hands, thus ameliorating the price depressing impact of excess gasoline supplies thrown in an unplanned manner upon an already weak market swept by intense retail price wars. It is a fair surmise that the gasoline acquired from the independent refiner, and thereafter worked into the market in a less disruptive fashion by the majors, resulted in some curtailment of their own gasoline production as well. Certainly, crude

States, 309 U.S. 436 (1940), which involved agreements and pricing formulas to maintain differentials between premium and standard grades of product. In both the practice to be tested was not deeply hidden or complex.

76. J. Von Kalinowski, supra note 32, § 6.02[2][f]. Sherman Act § 2 monopolizations, whether single- or multi-party, are per se illegal upon identification, but in a complex circumstantial evidence monopolization case, to attain the point where a per se pronouncement can be made also will involve extensive contested proofs.

77. See text accompanying notes 68-75 supra.

78. 288 U.S. 344 (1933). This case also was a direct price fixing case in that erstwhile competing coal producers had delegated sale of their combined production to their common exclusive sales agent, Appalachian Coals, Inc., which set the prices.

79. Id. at 363.

80. 310 U.S. at 221-24.

oil, both their own and that from independent producers, in enormous and
today almost unbelievably cheap supply in the mid-1930's, was no limiting
factor.82

The economic backdrop for Socony-Vacuum evidenced some improve-
ments over the early 1930's setting of Appalachian Coals. There was
modest gain in business activities. At least equally important, the panic
psychology initially attending the inception of the Great Depression had
subsided. This shift was even more pronounced by the time of the Court's
1940 decision when, under the impact of World War II already begun in
Europe, business was beginning to boom. Nevertheless, Mr. Justice Roberts
in his dissent accurately noted:

It is said that their combination [in Socony-Vacuum] had the purpose
and effect of putting a floor under the spot market for gasoline. But that
was precisely the purpose and effect of the Appalachian case. True the
means adopted to overcome the effects of the dumping of distress prod-
ucts on the market were not the same in the two cases, but means are
unimportant provided purpose and effect are lawful.83

Apart from time lapse, erosion of the public panic psychology attending the
beginning of the Depression, and a considerable change in the membership
of the Court, the only strong basis for distinguishing these two cases is that
Socony-Vacuum involved what probably was the economically strongest
industry in the country, while Appalachian Coals involved probably the
weakest.84

In language even less persuasive than that with which he had distin-
guished Chicago Board of Trade, Mr. Justice Douglas pronounced in Socony-
Vacuum concerning Appalachian Coals:

The methods . . . were quite divergent. [The distress gasoline] buying
programs . . . had as their direct purpose . . . the raising and mainten-
ance of . . . market prices . . . by the elimination of distress gasoline.
. . . [T]he plan in the Appalachian Coals case was not designed to
operate vis-à-vis the general consuming market. . . . [T]he effect, if
any, of that plan on prices was not only wholly incidental but also
highly conjectural. . . . And as we have seen it would per se constitute
such a restraint if price fixing were involved [in Appalachian Coals.]85

This explanation will not rise to greater dignity than the otherwise unsup-
portable fiat of a court of last resort. By tests recognized as early as 1927,
and since, Appalachian Coals is a case involving practices which, in the con-
text of the present coal business, would be condemned per se. That it is
not overruled means an indistinct zone of supply and production restrictions
has been left for analysis in a more sympathetic manner than per se treatment
which, strictly applied, never listens to reason.

On balance, it is well the Court acted as it did even though its reasoning is
not intellectually persuasive. As is well known to petroleum reservoir
engineers, most oil pools of good quality are rate sensitive. Producing them

82. 310 U.S. at 171-74.
83. Id. at 261-62.
    (Jackson, J., dissenting).
85. 310 U.S. at 216.
with due regard for this sensitivity exhibits a pattern where a lower producing rate usually significantly increases ultimate recovery, whereas high producing rates leave the pool expulsion mechanisms, i.e., native energy, exhausted with a great deal of otherwise recoverable oil unproducible, locked in the reservoir. From this developed the petroleum industry's concept of maximum efficient rates (MERs) at which pools should be produced.86

To put MERs into effect requires agreement among the several producers usually present in any petroleum reservoir. If all cannot agree, none can agree, and avoidance of drainage through selfishly excessive production rates by some will compel all to more rapid and dramatically less efficient methods.87 The need for cooperation through agreement among producers in a pool grows even more pressing in instances of pressure maintenance projects and secondary recovery operations designed at great expense to maintain pressures or re-energize exhausted reservoirs.88

Honoring these immutable natural physical phenomena concerning oil reservoirs, counsel for the United States in United States v. Standard Oil Co. of California88 carefully spelled out in pre-trial hearings that no attack was intended upon agreed reduced producing rates having legitimate reservoir engineering justifications.90 This position was consistent with that adopted by the Government in the earlier oil field unitization case of United States v. Cotton Valley Operators Committee91 where the Attorney General's statement attending initial filing of the complaint expressly eschewed any attack on the agreed unitized production limiting activities of the defendants, and declared the Government's case was restricted to attacking joint processing, refining, and sales agreements among the several operators in the Cotton Valley pool.92 When United States v. Standard Oil Co. of California effectively was concluded by consent decree in 1959, after nearly a decade of one of the most active and massive pre-trials ever conducted, the decree expressly exempted agreements for the control or limitation of production for economic or other reasons from a pool or connected pools in which all the parties to the agreement are producers or have a proprietary or other financial interest, including, but not limited to, unit plans, ratable taking plans, operating agreements, pool MER agreements, well spacing agreements, secondary recovery programs and pressure maintenance programs.89

The United States by consent decree also has accepted agreed limitations upon lumber production when the purpose is adjustment of cutting to the sustained yield capacity of forest lands and in accord with sound principles of

86. PETROLEUM CONSERVATION 141-74 (S. Buckley ed. 1951).
87. Id. The worst excesses in this regard today are considerably ameliorated by state conservation laws and regulations.
88. Id. at 182-247, 278-96.
89. Civil No. 11584-C (S.D. Cal., May 12, 1950).
90. Id., Transcript of March 13, 1950, at 415.
93. 1959 Trade Cas. ¶ 69,399, at 75,529 (S.D. Cal. 1959).
In short, there are and probably will be yet other supply and production restrictions which should be permitted to avoid condemnation by per se testing. These situations need the Appalachian Coals precedent to demonstrate that rule of reason analysis is not excluded in all situations.

(3) Horizontal Territorial Restrictions. The origin of this recently pronounced per se category has been described and criticized\(^{95}\) in the preceding Topco case discussion.\(^{96}\) Despite its debatable origin, as yet no decisions inconsistent with Topco have developed. Inherently there has to be a fundamental flaw in allowing exceptional treatments for exceptional situations in the older, and presumably sounder, per se categories, but not here. However, until the Supreme Court softens its stand or fails to hold the line against the lower courts when and if exceptions develop, this per se category, resting on the uncompromising language of Topco, is the most extravagantly rigid of all.\(^{97}\) Measured by the facts of Topco, one can project stare decisis rigidity yet at the same time suggest that so uncompromising a stance will be difficult to maintain.

(4) Vertical Territorial and Customer Allocations Where Title Has Passed from the Supplier. The 1967 case of United States v. Arnold, Schwinn & Co.\(^{98}\) is the source of this recent per se category. Already decisions have appeared in the lower courts which deviate from the line set by Schwinn. In Tripoli Co. v. Wella Corp.\(^{99}\) the Third Circuit permitted a manufacturer to restrict users of a certain cosmetic product to barbers and beauticians after sale by the manufacturer. The reason was physical hazard to members of the public if the product was applied by persons other than experienced professionals. In Carter-Wallace, Inc. v. United States\(^{100}\) the Court of Claims carved out an exception in upholding a limitation that permitted a drug supplier to forbid resales in unchanged physical condition of that portion of the sales of a certain drug sold by the supplier at a lesser price than usual. The reasoning was that the cheaper supply was only to be used by buyers for blending with other drugs into a distinct composite product. This assertion of resale control was held justified when the same drug was available to customers for resales at the higher regular price.

Reluctantly obeying the Schwinn command, the Tenth Circuit in Adolph Coors Co. v. FTC\(^{101}\) held per se condemned attempted supplier controls

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\(^{94}\) United States v. National Lumber Mfrs. Ass'n, Civil No. 11,262 (D.D.C., May 6, 1941), consent decree reported at 1940-43 Trade Cas. ¶ 56,123, at 492-95.

\(^{95}\) Part I supra.

\(^{96}\) Clear emergence of this per se category was in 1972, but arguably it has existed since 1967. Note 13 supra.

\(^{97}\) See notes 14, 17 supra and accompanying texts.

\(^{98}\) 388 U.S. 365 (1967); see note 42 supra for details of this emergence.


\(^{100}\) 497 F.2d 1178 (10th Cir. 1974). But see Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 947 (5th Cir. 1975), which refused to join with the Tenth Circuit recommendation because there was no evidence such a concession was necessary to Coors' business survival. The decision remarks that before a per se exception should be allowed it should be demonstrated that less restrictive means of quality control are not possible. To develop a trial record of that extent, then consider it in terms of such
after title to beer supplies had passed. These controls were designed to maintain quality control from brewery to consumer. Involved were territorial and customer restrictions that assured speedy, refrigerated delivery of a premium unpasteurized beer. The court found these restrictions so reasonable that it recommended the Supreme Court consider making exceptions "when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason." Further Tenth Circuit reluctance is demonstrated in Redd v. Shell Oil Co. where, without much justification, such restrictions were said not to be per se violations unless enforced by "firm and resolute action by the seller.

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The rigid, formalistic nature of this per se category was severely criticized by Mr. Justice Stewart in his Schwin partial dissent:

[T]he Court has, sua sponte, created a bluntly indiscriminate and destructive weapon which can be used to dismantle a vast variety of distributitional systems—competitive and anticompetitive, reasonable and unreasonable. . . . It is particularly disappointing to see the Court balk at the label 'sale,' and turn from reasoned response to a wooden and irrelevant formula.

The sua sponte aspect in that criticism comes about because government counsel at all stages of Schwin had conceded it was a case for rule of reason disposition so that, necessarily, the per se disposition derives wholly from an initiative by the Court majority. Quite understandably this Justice queries how the Court possibly could have assembled an adequately litigated record upon which to make its per se pronouncement in such circumstances, and then suggests that the competitive realities of markets, not ancient common law rules concerning restraints on alienation of property titles, properly should be the area of inquiry in a Sherman Act case. "[T]he Court inexplicably turns its back on the values of competition by independent merchants and the flexible wisdom of the rule of reason when dealing with distribution. . . . Without considering its function, purpose or effect, the Court declares this [the resale restriction] aspect of Schwin's program to be per se invalid."

On remand of Schwin the trial court authorized the supplier to designate territories of prime responsibility for its distributors and terminate any whose representation in such territories was inadequate. Taken in conjunction with monetary "passover" clauses where the resale is outside a purchaser's supplier-designated territory of primary responsibility, it well may turn findings of fact and conclusions of law, trenches so closely on a fairly wide rule of reason contest as to be virtually indistinguishable.
out that these per se condemned practices can be effectively resurrected on a
legal basis. If so, the premonition of Mr. Justice Stewart that the Court has
“created considerable business for legal draftsmen” to write ways around this
particular per se will have come to pass. Such a response is, of course,
bound to give rise to very complicated evidentiary records, whether the
ultimate disposition is by per se or rule of reason.

With the then current example of Sandura Co. v. FTC before it, the
Supreme Court might have proceeded with more care in measuring the
desirability of creating this category of per se violation. In Sandura Co. the
Sixth Circuit had before it the situation of a small, struggling manufacturer of
floor coverings which rather clearly could not have afforded to operate
through consignments and almost certainly would have failed had it not been
for its adoption of closed distributor territories. These closed territories
enabled the company to obtain strong dealers and survive. The opinion
upholding the practice is a classic demonstration of the continuing need for
rule of reason treatment in this area. One may predict with some certainty
that this category will and should be riddled with deserving exceptions in
years to come.

(5) Group Boycotts. This per se category, also called concerted refusal to
deal, originates in the 1941 case of Fashion Originators' Guild of America v.
FTC. Strictly speaking, this is not a Sherman Act decision. The Federal
Trade Commission has no Sherman Act jurisdiction. Federal Trade Com-
misson Act § 5a, however, confers parallel powers, and a great deal
more, in statutory language empowering 'the Commission to identify and
suppress “unfair methods of competition.”' Mr. Justice Black's opinion in
this case, reviewing such a Commission inquiry, often is cited as authority for

Division in the mid-1960's, has taken the position that profit passovers and repayment-
of-cost passovers related to areas of primary responsibility are not per se condemned.
M. Handler, H. Blake, R. Pitofsky & H. Goldschmidt, Trade Regulation Cases and
Materials 638 (1975).

110. 388 U.S. at 394. Demonstrating this point is the drafting attempt in Reed
Bros. v. Monsanto Co., 525 F.2d 486 (8th Cir. 1975). The opinion is by Mr.
Justice Clark (retired).

111. 339 F.2d 847 (6th Cir. 1964).

112. Eastex Aviation, Inc. v. Sperry & Hutchinson Co., 522 F.2d 1299 (5th Cir.
1975), discusses the pattern of developing exceptions to Schwinn, then purports to make
a per se disposition because it was not shown a less restricting alternative could not have
been used. Judge Gee, specially concurring, states a view of the case in terms that nec-
essarily amount to a rule of reason disposition. Id. at 1309. The logic of Judge Gee's
position is unassailable.

113. 312 U.S. 457 (1941). An argument could be made that Paramount Famous
Lasky Corp. v. United States, 282 U.S. 30 (1930), is the first per se of this category
but for the fact that it contains an abundance of rule of reason analysis. In addition,
the case is not cited in Fashion Originators' Guild.


115. Any doubt that the Federal Trade Commission has authority to go considerably
beyond the bounds of Sherman and Clayton Act violations in defining "unfair competi-
tion" was eliminated by FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972). One
has an uncomfortable feeling that some Sherman Act § 1 per se content has been "boot-
strapped" into "unfair competition" through these FTC administrative law proceedings
in which the presumed expertise of the Commission is a barrier to full review. The
FTC precedent is later cited as authority for per se treatment in Sherman Act cases.
per se treatment of group boycotts under Sherman Act § 1, a recent example being the 1966 Supreme Court opinion in United States v. General Motors Corp. 116

Fashion Originators' Guild posed such attractive facts for a successful defense one may speculate it possibly could have been accorded rule of reason testing had it come up as a Sherman Act case, free of the element of presumed expertise which the Commission wields. 117 The case involved a combination of manufacturers of women's garments and textiles who had agreed they would refuse to deal with manufacturers and retailers who dealt with competitors that pirated the dress or textile designs of members of the combination. The aim of the members in both its horizontal and vertical aspects was to protect against what probably was tortious conduct under state law. The court concluded, however, that "even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together . . . ." 118

This particular per se has been maintained quite firmly—with one glaring exception. As a result of this exception one cannot take literally the Court's declaration, exemplified in the 1966 General Motors case, that upon finding concerted action to deprive others of access to merchandise they wish to sell the public, "we need not inquire into the economic motivation underlying their conduct." 119 Suppose an automobile manufacturer has franchised four dealers occupying small, contiguous territories. One of these for purely selfish and aggressive business reasons persuades the manufacturer to agree to get rid of the other three and give the enlarged territory to him. Or suppose the manufacturer takes the initiative for its selfish business purpose of confining retail outlets to fewer and stronger dealers, who then can pay somewhat higher prices to their supplier by reason of increased volumes. Such acts are legal 120 even though it is inescapable that there is present group action which deprives the ousted dealers of merchandise they wish to continue selling to the public. However, add to these facts a motive to get rid of the three because they were price cutters, or to mask the cutting off of

118. 312 U.S. at 468.
119. 384 U.S. at 146.
120. This well-established deviant line of cases is developed and discussed in Mogul v. General Motors Corp., 391 F. Supp. 1305, 1310-12 (E.D. Pa. 1975). In Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), a leading per se boycott case where the victim was a price cutter, the Supreme Court emphasized that the group activity alleged was "not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship." Id. at 212. As said in De Filippo v. Ford Motor Co., 516 F.2d 1313, 1318 (3d Cir. 1975), "a concerted activity constitutes a 'group boycott' and is considered per se in restraint of trade when 'there [is] a purpose either to exclude a person or group from the market, or to accomplish some other anticompetitive object, or both.'" This case collects impressive authority to support the existence of the exception. Id. at 1317-18. Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 682-83 (9th Cir. 1976), Chastain v. American Tel. & Tel. Co., 401 F. Supp. 151, 160-62 (D.D.C. 1975), and Sum of Squares, Inc. v. Market Research Corp. of America, 401 F. Supp. 53, 56-57 (S.D.N.Y. 1975), openly state that this "purpose" test divides per se dispositions from rule of reason dispositions.
one who was a price cutter by termination of the other two. There would beyond peradventure be a boycott violation of Sherman Act § 1.\textsuperscript{121}

The trouble is that the forbidden situations cannot be identified in per se terms. Legality and illegality will depend upon extensive inquiry involving what usually will be essentially a circumstantial evidence case.\textsuperscript{122} It is splitting hairs at this point to say that a species of rule of reason inquiry is not in progress. Much evidence of such nature would have to be admitted, or effectively the right to defend would be denied.

In addition to the gaping hole made by this category in the per se line, there are other cases. One upholds the exclusion from tournaments of a professional golfer who did not meet association membership requirements.\textsuperscript{123} In another, an industry association set product standards some could not meet, and legality was tested by rule of reason.\textsuperscript{124} One cannot but wonder how an agreement having the effect of boycotting either a supplier or retailer whose merchandise posed a real risk of physical harm to the public would fare. Where a single manufacturer effectively restricted the use of his cosmetic product to professionals despite the fact that title had passed, an exception to the title passage per se was recognized by the Third Circuit in a 1970 case, and certiorari was denied.\textsuperscript{125}

(6) Tying. Tying is the practice of requiring another to take a possibly unwanted thing, the tied item, in order to acquire the tying item.\textsuperscript{126} Initially, tying was tested under Clayton Act § 3,\textsuperscript{127} which limits tying items to leases, sales and contracts for sale of goods, wares, merchandise, machinery, supplies, or other commodities, and tied items to goods, wares, merchandise, machinery, supplies, or other commodities. In brief, the practice is restricted in coverage to ties involving tangible personality.

Although a 1922 case indicated that Clayton Act § 3 posed a different, and at that time apparently more rigid, test for defendants to surmount than did Sherman Act § 1,\textsuperscript{128} development of the Sherman Act § 1 tying per se

\textsuperscript{121} This motive distinction is squarely recognized in Dreibus v. Wilson, 529 F.2d 170 (9th Cir. 1975).
\textsuperscript{122} Id. But cf. Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975); a decision which, rejecting the per se test, nevertheless indicates rule of reason illegality may be present if there are predatory, unfair tactics in preferring one class of automobile dealer over another.
\textsuperscript{123} Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165 (9th Cir.), cert. denied, 385 U.S. 846 (1966).
\textsuperscript{124} Structural Laminate Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154 (D. Ore. 1966). This case may seem in conflict with the Supreme Court's holding in Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), but that case was a test at the pleading stage directed primarily to the injury to competition effects which the Court in Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959), already had held would be conclusively presumed in private treble damage cases.
\textsuperscript{126} Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958). It is not tying if both are offered as a single priced package, with the alternative of taking either alone also available. Id. at 6 n.4. Presumably this means good faith and not a pricing structure where the alternative single offerings are so priced as to make the seeming alternative a mere sham or subterfuge.
\textsuperscript{128} United Shoe Mach. Corp. v. United States, 258 U.S. 451, 459-60 (1922).
has brought about a change. Today the Clayton Act § 3 test, if different at all, permits more extensive inquiry in a defense against Clayton Act § 3 charges by reason of the statutory requirement there that there be shown an actual tendency to lessen competition or create a monopoly. In any event, with Northern Pacific Railway v. United States tying was pronounced a Sherman Act § 1 per se, and the impact upon commerce said needed for jurisdiction to attach was the minimal "not insubstantial" test.

Importantly, the Sherman Act § 1 per se is not limited, as is Clayton Act § 3, to tangible personal property. The tying devices in Northern Pacific were railroad deeds and leases of lands; the tied items were contractual requirements that the grantees and lessees use the railroad's transportation services to move commodities produced from or manufactured in the lands deeded or leased. In Fortner Enterprises v. United States Steel Corp. the tying condemned was even more exotic. It involved money loans to a developer with which to acquire building sites, in return for which the developer-borrower agreed to purchase prefabricated houses for installation in his development from the manufacturer-lender. Presently there is also an unresolved conflict among the circuits whether trademarks can be per se tying devices. The Ninth Circuit so held in Siegel v. Chicken Delight, Inc. A contrary view is taken in the earlier Second Circuit case of Susser v. Carvel Corp., though the fact of trademark tying is not denied.

129. Cf. Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 297-98 (1949); International Salt Co. v. United States, 332 U.S. 392 (1947). It is unclear whether Clayton Act § 3 or Sherman Act § 1 rules the disposition of the latter case. After these cases comes the exasperating analysis in Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), suggesting that Clayton Act § 3 is more readily violated than Sherman Act § 1. Id. at 608-09. Times-Picayune probably should be treated as a judicial sport. It cannot be reconciled in its application of law to facts unless one is prepared to accept reasoning to the effect that morning and afternoon newspaper advertisements make up but one product if both papers are owned and operated by the same publisher in the same market.

130. Standard Oil Co. of Cal. v. United States, 337 U.S. 293 (1949), interpreted Clayton Act § 3 to require only a perfunctory quantitative substantiality test. Id. at 304, 310, 314. The subsequent case of Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961), however, enunciated a qualitative test, not satisfied by mere substantial dollar measures. Id. at 329. Such a test necessarily requires a considerably more developed evidentiary record than is supposed to be needed for identification and condemnation of true per se violations.


132. Id. at 8. This does not mean the label necessarily is correct. While the Supreme Court can make final disposition of controversies before it, even its unappealable fiat cannot elevate a test which permits and requires some rule of reason record in deciding tying controversies to the level of a true per se disposition.

133. Id. at 8.


135. Strictly, it was a wholly owned subsidiary of the manufacturer which made the loan. Id. at 496-97.


138. The distinction lies in making conclusive the requisite degree of tying power if a trademark is the tying item (the per se view) as opposed to factual inquiry to determine if a requisite degree of power resides in the mark (the rule of reason view).
Fortner states that the economic jurisdictional test for Sherman Act \( \S \) 1 per se tying is "whether 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."\(^{139}\) If the economic inquiry were so limited, the tying per se would be essentially within a true per se structure. But *Northern Pacific*, the root case, contains this language:

[Tyings] are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected.\(^{140}\)

To the extent the economic requisites of the quoted language exceed the minimal “affecting commerce” economic impact needed for Sherman Act jurisdiction, the problem necessarily moves from per se into some degree of rule of reason inquiry.

The lower federal courts have distilled from this *Northern Pacific* language a four-part test. There must be: (1) two separate products, the tying product and the tied product; (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in the tied market.\(^{141}\) The first requirement is as unexceptional for per se treatment as the need to find an agreed price in the price fixing per se.\(^{142}\) But the second, third, and fourth requirements, far from being satisfied when a more than de minimis economic impact is shown, have spawned lower court decisions requiring that actual and successful coercion of substantial dimensions affirmatively be shown.\(^{143}\) These decisions create a proof problem very different from the conclusive presumptions usually found to flow from the mere identifications of such per se restraints as price fixes,\(^{144}\) group boycotts,\(^{145}\) and horizontal territorial restrictions.\(^{146}\)

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139. 394 U.S. at 501. But on remand the Sixth Circuit overturned a directed verdict for Fortner by the trial court and held there was an issue for the jury as to whether U.S. Steel had sufficient economic power in terms of loan funds, the tying item. Fortner Enterprises, Inc. v. U.S. Steel Corp., 523 F.2d 961 (6th Cir. 1975).

140. 356 U.S. at 6.


142. This is not to say that finding two items in order to find a tying is never a problem. Kugler v. Aamco Automatic Transmission, Inc., 460 F.2d 1214 (8th Cir. 1972). And see note 129 *supra* for a failure to find two items in the *Times-Picayune* case.


146. United States v. Topco Associates, Inc., 405 U.S. 596 (1972). The per se formulation in these terms is particularly strongly stated in this very recent case. Part I *supra*. 

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Baffling, too, is reasoning in another group of lower federal court cases. Consider the business of professional football where access to tickets to the regular season games is used to force ticket sales to pre-season exhibition games. The cases hold there cannot be anticompetitive effects because a monopoly exists with respect to both items; hence, no competitor is injured.\textsuperscript{147} At the very least this is a remarkably narrow view of who are the competitors of a professional athletic team. Economic reality and common sense suggest that such competitors are at least all those who compete for the somewhat inelastic supply of spectator dollars. A forced sale of unwanted exhibition football tickets cannot but pinch sales of tickets to baseball, basketball, and hockey events, to name a few of the more obvious.

If a per se concept is to be maintained vis-à-vis tying, the proof of an actual tying in the context of economic facts sufficient for Sherman Act jurisdiction should be enough to establish the per se restraint.\textsuperscript{148} However, only one clear instance has been identified where a lower federal court has given unmistakable per se treatment in a tying situation. In \textit{Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.}\textsuperscript{149} the Fifth Circuit, after adopting the Ninth Circuit view that a trademark could be a per se tying device, said in peremptory fashion:

\begin{quote}
[T]he plaintiffs were entitled to have the jury instructed that Copeland's policies of barring its franchised wholesalers from dealing in compressors rebuilt by non-authorized rebuilders and of barring its franchised rebuilders from obtaining parts from non-Copeland sources, if proved by a preponderance of evidence, constituted \textit{per se} violations of the Sherman Act without necessity of proof of 'unreasonableness' and 'anti-competitive effect.'\textsuperscript{150}
\end{quote}

More recent decisions make it doubtful the Fifth Circuit adheres to that statement.\textsuperscript{151}

While per se dispositions should not permit inquiry into the reasonableness of a tying, examinations of several recent trademark tying cases show reasonableness inquiries in fact have been made. Thus, in \textit{Chicken Delight} the trial court submitted to the jury the issue of whether it was justifiable to compel franchisees to purchase special frying dip mixes and cooking hardware for use at trademark-franchised locations.\textsuperscript{152} Upon review, the Ninth Circuit only pointed out that this issue of reasonableness had been resolved against the franchisor by the jury.\textsuperscript{153} Similarly, \textit{Kolene Corp. v. Motor City Metal Treating, Inc.}\textsuperscript{154} upheld the compelled purchase of metal treating

\begin{thebibliography}{99}
\bibitem{147} Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321, 323 (5th Cir. 1974); Coniglio v. Highwood Servs., Inc., 495 F.2d 1286, 1291-92 (2d Cir. 1974).
\bibitem{149} 463 F.2d 1002 (5th Cir. 1972).
\bibitem{150} Id. at 1016.
\bibitem{151} Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321, 323 (5th Cir. 1974); Refrigeration Eng'r Corp. v. Frick Co., 370 F. Supp. 702, 711-12 (W.D. Tex. 1974). The latter case suggests inquiry should be had into uniqueness and substitutes for the tying device in a manner which would have to be substantial rule of reason inquiry.
\bibitem{152} 311 F. Supp. at 851.
\bibitem{153} 448 F.2d at 51.
\end{thebibliography}
salts by the franchisee for use in treating metals which would bear the franchisor's mark.

The Federal Trade Commission has gone so far as to uphold as reasonable compelled purchases of the franchisor's special blend of coffee, and even its baked goods.\textsuperscript{155} Evidently this practice, and not a per se approach, represents the Commission's attitude, for in a 1969 speech at a meeting of franchisors Commissioner MacIntyre stated that the least restrictive practice consistent with franchisor quality control is the proper practice.\textsuperscript{156} An evaluation of this type only could be made by permitting defendants to introduce what necessarily is rule-of-reason-oriented defensive evidence. Franchise tying is admittedly a somewhat special situation. Nevertheless, to acknowledge existence of so huge a gap does considerable damage to the Supreme Court's \textit{Northern Pacific} declaration that "tying arrangements serve hardly any purpose beyond the suppression of competition."\textsuperscript{157}

In a separate opinion concurring in part and dissenting in part to \textit{Schwinn} Mr. Justice Stewart collects the background of prior Court statements supporting the desirability of maintaining a franchise business structure which enables small businessmen to compete, and sometimes thrive, by presenting a uniform product to a wide public.\textsuperscript{158} His treatment of the area raises doubts that the Supreme Court will mechanically uphold a per se disposition when a franchise tying test case finally comes before it.

The writer of a 1970 article, exploring the tension inherent between the need for maintenance of quality control over franchisee-dispensed products and the tying per se, proposed that manufacturer-franchisors should be entitled to have a purchase requirement compelled upon a franchisee evaluated in terms of exclusive dealing, thus avoiding harsh per se dispositions.\textsuperscript{159} A federal district court case puts the reason succinctly thus:

The Court is impressed by the argument of Defendant that, to hold that a distributorship relationship is a tying product . . . would render all exclusive dealing arrangements per se illegal . . . without regard to the unreasonableness or anticompetitive effect on the exclusive dealing in contravention of the clear dictates of the Sherman and Clayton Acts . . . .\textsuperscript{160}

In \textit{Northern Pacific}, the first certain Sherman Act § 1 per se tying case, the Supreme Court said tying arrangements are per se condemned when

\begin{itemize}
\item[155.] Chock Full O'Nuts Corp., Inc., 3 TRADE REG. REP. ¶ 20,441 (FTC 1973).
\item[156.] 5 TRADE REG. REP. ¶ 50,105 (1969).
\item[157.] \textit{Northern Pac. Ry. v. United States}, 356 U.S. 1, 6 (1958). The background is a dictum in \textit{Standard Oil Co. of Cal. v. United States}, 337 U.S. 293, 305-06 (1949), an exclusive dealing case in which that practice was said to have considerable merit, but tying practically none.
\item[158.] 388 U.S. at 386-88.
\item[160.] Refrigeration Eng'r Corp. v. Frick Co., 370 F. Supp. 702, 711 (W.D. Tex. 1974). To go a step beyond this, any exclusive dealing involving two or more items would be at no little hazard of being classed a per se tying. \textit{Colorado Pump & Supply Co. v. Febco, Inc.}, 472 F.2d 637, 640-41 (10th Cir. 1973). Also, exclusive dealings run the risk of group boycott treatment, for these dealings, by agreement, exclude competing suppliers, or competitors of the customer, or both. Consider the mutual exclusivity described in \textit{Eastex Aviation, Inc. v. Sperry & Hutchinson, Inc.}, 522 F.2d 1299, 1301 (5th Cir. 1975), involving the supplying of trade stamps to retailers.
\end{itemize}
there is a conjunction of tying power and more than a de minimis restraint in
the tied item.\textsuperscript{161} Standard Oil Co. of California,\textsuperscript{162} an earlier exclusive dealing case in which tying is contrasted unfavorably with exclusive dealing, is the source of most of the Northern Pacific attitude toward tying. Though there is no convenient block of quotable language in Standard Oil with which the point can be made in facile fashion, a fair reading of that case leads to the conclusion that its limited rule of reason test\textsuperscript{163} is almost identical to what Northern Pacific calls the per se test for tying. The additional inquiry in both cases is concerned with economic power. Which should yield, the per se or the rule of reason label? The latter seems to be a more accurate representation of what actually happens in both tying and exclusive dealing cases, particularly as the federal courts have interpreted the requisite contents of tying.

In short, tying has so much merit that the lower federal courts have been loath to accept that the Supreme Court has pronounced true per se condemnation. The lower courts' position, in fact, is supported by the equivocal stance of the High Court itself.\textsuperscript{164}

To the cases already noted should be added three that further demonstrate the undesirability of a hard per se line in tying situations. The events in United States v. Jerrold Electronics Corp.,\textsuperscript{165} a 1960 case, occurred at a time when the technology for installation and maintenance of community television antennas was new and unfamiliar. The defendant Jerrold Electronics Corp. had sold complete installations with the requirement that maintenance service be performed by the defendant. As dictum the federal district court said tying in that time period had been legal even though by the time of trial the technology had become so established that it could no longer survive rule of reason testing. The next year Dehydrating Process Co. v. A.O. Smith Corp.\textsuperscript{166} found reasonable the tying of a silo unloader mechanism to the sale of a patented silo by reason of the history of failure of other manufacturers' unloaders to give satisfactory service. Then, in a 1962 case, the First Circuit in Baker v. Simmons Co.\textsuperscript{167} upheld a tie-in whereby the Simmons Company required that motels displaying Simmons "Beautyrest" signs actually be equipped with Simmons Beautyrest mattresses. The tying was upheld because it was actuated by legitimate business concern with the Simmons reputation and good will, not the improper motive of increased market control through the leverage of tying. Motive, however, can hardly be put in issue without departing from the precincts of per se analysis.

\textsuperscript{161} 356 U.S. at 6.
\textsuperscript{162} Standard Oil Co. of Cal. v. United States, 337 U.S. 293 (1949).
\textsuperscript{163} Id. at 314. The economic power to which this statement relates is developed in prior pages. Id. at 295-97. To put it mildly, this opinion is not distinguished by clarity or consistency.
\textsuperscript{164} See notes 140, 141 supra and accompanying text. The problem is that the Court's definition of tying permits, and has been taken by the lower courts to require, very considerable evidence of economic power and effect.
\textsuperscript{166} 292 F.2d 653 (1st Cir.), cert. denied, 368 U.S. 931 (1961).
\textsuperscript{167} 307 F.2d 438 (1st Cir. 1962).
The Federal Trade Commission's position is consistent with these cases. The Supreme Court in *FTC v. Texaco, Inc.*\(^{168}\) upheld a Commission finding of illegal tying within the meaning of Federal Trade Commission Act § 5(a) by reason of Texaco's successful program of persuading its franchised service station dealers to stock Goodrich tires, batteries, and accessories, all without overt coercion whatever on the part of Texaco. Texaco had been receiving a ten percent commission on Goodrich sales to Texaco franchised dealers. The arrangement was found inherently coercive, but only in terms of a record where Texaco's size and dominance, as well as the multi-million dollar volumes of business involved, were developed. Despite Mr. Justice Stewart's dissent denouncing it so,\(^{169}\) this is not a per se disposition unless per se has ceased to be a term of legal art. Here the tie-in was placed and then examined in its industry setting, including the power of the defendant wielding the tie-in. This is rule of reason inquiry sufficiently pursued in the case of this dominant and very powerful defendant. There is nothing in the decision that would compel a like result for a much smaller and weaker branded gasoline supplier. The key to the decision, as in the Sherman Act exclusive dealing and tying cases, is a sufficient showing of real power to support the finding of a coercive arrangement.

V. SOME CRITICISMS ADDRESSED TO THE CONVENTIONAL JUSTIFICATIONS FOR PER SE DISPOSITIONS

A 1975 Second Circuit case\(^{170}\) identifies three possible justifications for per se dispositions of Sherman Act § 1 allegations:

> [T]hey are more certain than the rule of reason; they obviate the need for elaborate and often fruitless evidentiary inquiries; and they reflect an awareness that a court is not the best forum for making complex economic judgments.\(^{171}\)

But, the court added:

> [N]one of these are policies that has a great force in relation to the rules of securities exchanges which are 'germane' to performance of the duty of self-regulation . . . . Rather the rule of reason provides the 'breathing space' necessary for the process of supervised self-regulation to work.\(^{172}\)

So, despite the fact that exchange regulation is notoriously one of the more intricate economic areas, the easy per se route was not followed when to do so would damage the primary objective of a viable system of conducting the business under scrutiny. In his *Topco* dissent Chief Justice Burger, in the context of the more mundane grocery business, made essentially the same point when he indicated in criticism of the majority's extension of per se to

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169. *Id.* at 232.
171. *Id.* at 1238.
172. *Id.* at 1239.
horizontal territorial allocations that it seemed unjustified to take the per se step in the teeth of an evidentiary record pointing the other way.\textsuperscript{173}

Certainty of result, if for mere convenience of disposition in the courts, is not a respectable reason for per se rules. Presumably this is why the Court says it does not pronounce a new per se category until enough is known of the challenged practice through prior rule of reason testings to condemn it.\textsuperscript{174} A more logical explanation, however, is that the Court is both too busy and inappropriate a forum to give contested business methods any more economic scrutiny than is requisite for disposition of a particular case. In fact, the Court has pronounced per se categories after only a limited history of rule of reason testing in prior litigations. Witness the price fixing per se in its direct aspect. That per se was pronounced only nine years after what inescapably was an agreed price fix not only had been tested by rule of reason in \textit{Chicago Board of Trade},\textsuperscript{175} but also had so emphatically passed the test that the opinion is the premier exposition of what rule of reason testing is all about. Nothing in the initial 1927 per se price fix opinion suggests that price fixing had been the subject of instructive Court inquiries in those intervening nine years. To the contrary, \textit{Trenton Potteries}\textsuperscript{176} and the precedents on which it relies, all of which are prior to \textit{Chicago Board of Trade}, all wear the indicia of predilection and common sense intuition, not the indicia of broad gauge economic study. The other per se categories are no different. The conclusion is inescapable that the certainty of result reason is, at best, mere convenience \textit{qua} convenience, without more.

To predetermine when evidentiary inquiry will be fruitless, the second justification for per se dispositions, is rarely possible. The several per se categories are riddled with exceptions because the federal district courts do develop evidentiary records and do find sufficient merit to hold for defendants. Coupled with the Supreme Court's inconsistent behavior in defining and maintaining the per se categories it pronounces, these exceptions make the evidentiary inquiry argument self-destruct.

Essentially the whole burden of justification must be carried, therefore, by a claimed lack of economic expertise in the courts. There are several short, telling responses to that. If there is a lack of expertise, how does the Court ever gain the even greater expertise required to pronounce a per se rule and thus preclude reasoned inquiry for all the future? And how is it that some of the most difficult areas continue under rule of reason? Indeed, can one seriously doubt that current rule of reason situations are more difficult to analyze than current per se fact situations would be if left to rule of reason testing?\textsuperscript{177} Per se may speed the rapidity of some case dispositions, but that

\textsuperscript{173} 405 U.S. at 614-15, 619-20, 622.
\textsuperscript{175} Chicago Bd. of Trade \textit{v.} United States, 246 U.S. 231 (1918).
\textsuperscript{176} United States \textit{v.} Trenton Potteries Co., 273 U.S. 392 (1927).
\textsuperscript{177} Consider, for example, the wedge driven between vertically imposed territorial and customer restrictions according to whether title has passed or not. Are not analyses of consignments, now assigned rule of reason testing, necessarily going to represent considerably more onerous judicial tasks than would the same restrictions where title does pass if that situation is also left to rule of reason? Inescapably, analyses of consign-
is a high price to pay for damage to the maintenance of a sound competitive system, an injury exemplified by the woodenly commanded result in the Topco case. Moreover, efforts by skilled counsel to draft around the per se categories must inevitably give rise to more complicated litigation just to reach the point at which per se or rule of reason disposition will be determined.

Inescapably, the Supreme Court is a collection of amateurs in the field of economics, as are the lower courts. Nevertheless, the Supreme Court has devised and compelled upon the lower courts some economic tests which are far more intricate and difficult of application than those tests eliminated by any per se category. Consider, for example, Clayton Act § 7,178 the anti-merger statute which requires a prediction that the effect of a merger "may be substantially to lessen competition, or tend to create a monopoly." In some degree this is a test laid on the courts by Congress, whether or not the courts are qualified to apply it. But the intricate relevant market tests exemplified in such decisions as United States v. E.I. du Pont de Nemours & Co.,179 Brown Shoe Co. v. United States,180 and United States v. Philadelphia National Bank181 are Court initiatives which betray an active willingness, perhaps eagerness, to thrust the federal judiciary into extremely complex economic analyses that certainly go far beyond anything Congress could have intended.

A decision which demonstrates that the Court can be very immodest of judicial branch economic attainments is United States v. Penn-Olin Chemical Co.182 Despite the fact that competition necessarily was increased by a new joint-ventured production facility in a geographic area where neither of the two venturers theretofore had been a real competitive factor, the Court refused in Penn-Olin to limit itself to making a decision on that basis. Instead, the Court compelled a test designed in terms of probabilities as to whether either venturer would have gone solo with its own plant while the other remained a potential competitor.183 This extremely abstruse and sophisticated potential probability test has been further developed in FTC v. Consolidated Foods Corp.,184 a case in the related potential for reciprocal dealing area. In that case the Court required the test be focused in terms of the potential for reciprocal dealing as of the moment of merger, a require-

ment which virtually disregarded what actually had transpired in the several years before the merger was challenged. The conjecture tests in terms of market structure are at least as difficult as any area of economic judgment. In addition, no statutory base beyond statutory authority that tests be devised exists. The record is one of willingness, even eagerness, to examine matters of great economic complexity—but only when the Court is so inclined.

Finally, is the field of economics so complex that an instructed amateur, who has heard the testimony of "expert" economists, should hold himself unqualified to hand down findings of fact and law relating to economic issues? A column in the leading financial daily, pointing to the inability of economic experts to agree upon even short range forecasts of future economic conditions, recently reviewed expert forecasting performance by comparing the forecasts to what actually had transpired, concluding:

"The performance of most forecasters has been far from perfect, particularly in recent years... A case in point is a survey of about three dozen prominent forecasters, taken in late 1973... The great majority predicted that the economy would continue to expand in 1974. In fact, as we painfully know, economic activity contracted sharply last year."

Short range forecasting is an area where economic expertise should be at its best. A babel of voices, however, attends the predictions of economic experts in judgment areas relating to antitrust. Unfortunately, the term "expert" too often indicates a person with an inflexible commitment in a particular subject area. For that reason, the expert often is less capable of fair evaluation than is an intelligent amateur trier of fact who has undergone

185. Id. at 597-98. See also the concurring opinion, id. at 605-06. That the merging company would hold down the performance of the acquired company becomes particularly ridiculous when it is recognized that the merger is forever after subject to attack. United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 596-607 (1957).


188. Id.

evidentiary instruction. Let us be careful here. Amateur judgment, in contrast to the judgment of an expert, has as much potential for correctness and remains essentially a judgment without emotional or professional commitment. The expert will persist in calling for one additional dose of his medicine when the patient does not respond. The amateur, however, is able, intellectually and without loss of face, to back away from an unsound disposition which seemed sound but proved not, and to essay alternative solutions.

VI. JURISDICTIONAL LIMITATIONS

Two further problems in the application of Sherman Act § 1 involve extensive litigation which results in trial records considerably at war with the intended simplicity and certainty of per se dispositions. The first is a type of limitation which sometimes operates to shield as evident a per se situation as direct price fixings from the reach of the Act. This limitation is based upon the theory that there is a jurisdictional distinction according to whether restraints of trade are "in commerce" or "affect commerce." The "in commerce" situations are conclusively presumed jurisdictional. But those affecting commerce, to be proscribed, must involve restraints which test out as qualitatively or quantitatively more than insubstantial. The quantitative test looks to the amount of economic value counters involved, typically dollar totals; the qualitative test looks to whether the impact of the restraint extends beyond essentially its local origin. A finding that there are present the elements of either condition results in Sherman Act jurisdiction.

The per se concept should be shorn of the unwarranted jurisdictional limitations of this test. The Sherman Act long has been held to be a full extension of congressional power under the Commerce Clause. The definitive holding for the ultimate reach of that power is the 1942 case of Wickard v. Filburn. That decision found the constitutional basis for federal jurisdiction in growing a few bushels of grain on a small farm, for use as animal feed where grown. The Court there held that even so minor and local an activity, because it made it unnecessary for the producer to enter the cash grain markets for his feed requirements, was enough to sustain federal jurisdiction under the then-current federal agricultural adjustment act limiting acreages of grain plantings.

190. United States v. Starlite Drive-In, Inc., 204 F.2d 419 (7th Cir. 1953), involving an agreement among all operators of drive-in theaters in Cook County, Illinois, fixing admission prices, and Evans v. S.S. Kresge Co., 394 F. Supp. 817 (W.D. Pa. 1975), involving agreed prices for grocery store sale items are examples of this type of decision. The latter case develops the distinction between "in commerce" situations, where jurisdiction is conclusively presumed, and "affecting commerce" situations, where it becomes a question of fact whether wholly intrastate activities affect interstate commerce sufficiently that Sherman Act jurisdiction should attach.

191. J. VON KALINOWSKI, supra note 32, § 5.01[4][a].
192. "The case law clearly indicates that so long as the effect on interstate commerce of an alleged restraint is not both indirect and insubstantial, federal jurisdiction will exist." Id. at 5-111.
Fortner Enterprises v. United States Steel Corp.\textsuperscript{195} recently stated that the economic test for Sherman Act jurisdiction only requires there be more than de minimis values.\textsuperscript{196} In two cases of the October 1974 term, Gulf Oil Corp. v. Copp Paving Co.\textsuperscript{197} and United States v. American Building Maintenance Industries,\textsuperscript{198} the Supreme Court was at pains to distinguish the reach of the Sherman Act from that of the Clayton Act, pointing out the Sherman Act is an "affecting commerce" statute which represents the full extension of the constitutional powers of Congress under the Commerce Clause, whereas the Clayton Act is an "in commerce" statute, more restricted in its coverage. Can anyone seriously doubt that Congress has the power to legislate Sherman Act coverage of a private economic activity having, say, a ten thousand dollar impact upon a local economy in business contact with a regional economy wider than the bounds of a single state? Although the negative response seems clear, the Fourth Circuit en banc majority in Hospital Building Co. v. Trustees of Rex Hospital\textsuperscript{199} held that restraints upon the provision of hospital services in a particular city were too local in impact to draw Sherman Act jurisdiction, despite the fact there were interstate business contacts and connections. The dissent viewed the matter differently: "Under Gulf Oil, the test is one of congressional power, and the question is whether Congress could reach the alleged conduct under the commerce power . . . . [T]he majority opinion . . . [erroneously] applies a test ['in commerce' rather than 'affecting commerce'] designed for determining the jurisdictional ambit of the Clayton and Robinson-Patman Acts."\textsuperscript{200} That this dissent is essentially correct is demonstrated by the Supreme Court's 1976 reversal of the Fourth Circuit,\textsuperscript{201} when a unanimous Court held that though economic effects might be indirect because not "purposely directed" toward interstate commerce, this did not limit Sherman Act jurisdiction.\textsuperscript{202} The definition of "substantial effect" also is stated in terms that suggest any effort more than de minimis is substantial.\textsuperscript{203} Unfortunately, the Court did not squarely so state. Thus, though the eventual outcome becomes increasingly predictable, there remains the probability for yet more cases in the federal trial courts that struggle with the false issue of whether the activity classifies as interstate or intrastate in a sense supposedly obsolete in the case of an "affecting commerce" statute since Wickard v. Filburn.

\textsuperscript{195} 394 U.S. 495 (1969). The ultimate confusion in this area is exemplified by Sapp v. Jacobs, 408 F. Supp. 119 (S.D. Ill. 1976), where the opinion measures jurisdiction by economic impact on a particular treble damage claimant. \textit{Id.} at 131-32. Jurisdiction is, of course, the same for the United States and private persons.

\textsuperscript{196} 394 U.S. at 504.

\textsuperscript{197} 419 U.S. 186 (1974).

\textsuperscript{198} 422 U.S. 271 (1975).

\textsuperscript{199} 511 F.2d 678 (4th Cir. 1975), rev'd, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976).

\textsuperscript{200} 511 F.2d at 687. \textit{See also St. Bernard Gen. Hosp., Inc. v. Hospital Serv. Ass'n, 510 F.2d 1121, 1123-24 (5th Cir. 1975). Query whether even this dissent improperly shields from the Sherman Act intrastate activities having sufficient economic impact to be more than de minimis. 511 F.2d at 689.}

\textsuperscript{201} Hospital Supply Co. v. Trustees of Rex Hospital, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976).

\textsuperscript{202} \textit{Id.} at 1852, 48 L. Ed. 2d at 344.

\textsuperscript{203} \textit{Id.} at 1853, 48 L. Ed. 2d at 344-45.
The second area of jurisdictional limitations is concerned with the legislative grants of immunity to private persons and other entities, in addition to which the Sherman Act structurally does not apply to acts of governments. Express and implied exemptions from general antitrust laws have been carved out by a comprehensive federal regulatory scheme. Specific exemptions such as the Capper-Volstead Act and the Webb-Pomerene Act allow associations of farmers and export associations to fix prices where competition in the United States is not substantially affected. The McCarran-Ferguson Act defers to state regulation of insurance where otherwise violations, including per se violations, might be found. There is also the labor union exemption. An exemption is implied by reason of the legal monopoly given owners of patents, and there is the political exemption which stems from the right of persons to combine and petition their governments for advantage, including selfish economic advantage, which otherwise might be a violation. Until 1976 the states were permitted to authorize sellers in their jurisdictions to compel sales at agreed fair trade prices. And the antitrust laws are not applicable against governments, in consequence of which state action and state-compelled action are exempt.

As demonstrated in the cases cited in the footnotes to the preceding paragraph, exemption from general antitrust coverage is grudgingly found. When not found the dispositions of the general antitrust laws, including

204. These exemptions are discussed at much length in the majority and dissenting opinions in United States v. National Ass'n of Secs. Dealers, 422 U.S. 694 (1975), the case itself being concerned with whether immunity from the general antitrust laws will be implied for secondary offering of securities price fixings by reason of SEC regulation. In it are noted situations of FPC, CAB, Maritime Commission, and national bank regulation, with varying results. See also Gordon v. New York Stock Exch., 422 U.S. 659 (1975), decided the same day and concerned with the exemption of agreements fixing brokerage commissions by reason of SEC powers to review and regulate. Somewhat different, but also to be noted, is an instance where the Supreme Court adheres to an exemption which depends on a pre-1940 commerce clause interpretation which defined the constitutional limits of federal jurisdiction before about 1940. Such an exemption continues to be allowed the business of major league baseball, despite that no other business-organized spectator sport is permitted a like exemption. Flood v. Kuhn, 407 U.S. 258 (1972).


Sherman Act § 1 per se dispositions, are in order. Yet these cases make it evident that the inquiry needed to test the validity of a claimed exemption often will involve making a trial record of rule of reason proportions.

VII. Conclusions

The only Sherman Act § 1 per se which presently maintains an unbreached line of authority is the new and difficult to justify horizontal territorial allocation restriction articulated by the Supreme Court in its 


Topping decision. The other per se categories range from fairly firm per se treatments to limited rule of reason inquiries masquerading under per se labels. Even the price fixing per se, in its indirect phase, blurs into limited rule of reason inquiry because it is necessary to identify whether it is in fact a price fix, or something else. Also, the lower federal courts often permit extensive economic inquiry in determining whether requisite “commerce” is present for Sherman Act jurisdiction. Finally, tying seems to have developed an economic impact test even more demanding than this questionable jurisdictional hurdle. Yet the elements of tying inquiry are supported in very considerable degree by the Supreme Court’s own formulation of it.

Despite the deviations mentioned in the previous paragraph, per se concepts also frequently tend to be applied with such blind rigidity as to raise concern that a per se, once established, forever after will be treated as set in concrete. But if this wholly Court-developed method of disposition is to be re-examined in any meaningful way, mechanisms must be found whereby the Supreme Court obtains rather complete records of business setting and economic impact from which it can determine whether it is justified to continue to maintain a per se category, or even the concept itself. In short, the per se concept presently is at war with any but rigidly applied, never-changing stare decisis doctrine. This rule of prior decision is followed so mindlessly nowhere else in our law, and so to apply it here is to choose what is one of the least appropriate areas for the application. It is the constantly changing kaleidoscope of local, regional, national, and international business economies in which the Sherman Act operates. Can nine Justices ever be wise enough to lock the economic future into straitjackets?

The tying per se, in particular, has demonstrated too much deviation in terms of Supreme Court and lower federal court definitions to continue pretending it is what it is not. But this most flawed per se, by reason of its affinity to exclusive dealing, can become the vehicle for evolving away from per se disposition while maintaining efficient means for disposing of situations now in the per se categories. The procedures whereby this might be accomplished will be developed in a subsequent Article.