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LEGAL PROCESS AND THE PAST OF ANTITRUST

*William L. Reynolds**
*Spencer Weber Waller***

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I. INTRODUCTION

THE first century of antitrust law in America has been turbulent and controversial. The history is well-known. An initial period of neglect followed the passage of the Sherman Act in 1890.¹ Enforcement efforts picked up during the Taft Presidency, and, aided by the Clayton Act in 1914,² reached a peak with the early per se holding in *Trenton Potteries*.³ The Depression abruptly halted this trend, an effect especially noticeable in the extraordinary *Appalachian Coals*⁴ decision in 1933. The halt proved only temporary, however, and by 1940 the per se rule had been reinstated⁵—as it turned out—with a vengeance.

After World War II, the Supreme Court expanded the horizons of antitrust in all directions. For a third of a century—from the *Alcoa*⁶ decision in 1945 to that in *GTE Sylvania*⁷ in 1977—the growth of antitrust enforcement, both public and private, never seemed to slow. Then, once again abruptly, Antitrust fell out of favor, a place where it has largely remained to this day.

Many explanations can be offered for this checkered history. Political, economic, and judicial fashion all change as time passes and new *dramatis personae* enter the drama. Outside events clearly play a role—*Appalachian Coals* only makes sense when placed in the context of the country's disillusionment with capitalism during the depths of the Depression.⁸ Similarly, the marked reluctance to enforce many antitrust doctrines in the 1980s can be traced in part to concern over America's declining position in the world marketplace. Strong Justices who feel passionately about Antitrust—Black, Douglas, Scalia—certainly matter. The attitude of the Executive Branch can be critical, as seen vividly in recent years by the refusal of the Reagan Justice Department to prosecute resale price maintenance violators. Antitrust also has certainly had its critics in the economics professorate, ranging from John Kenneth Galbraith and Lester Thurow on the left to the Chicago School and libertarians on the right.⁹

These influences are all extensively discussed in the literature. A factor that is rarely discussed, however, is the quality of the opinions issued by

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1. 15 U.S.C. §§ 1-7 (1988 & Supp. V 1993).
 2. 15 U.S.C. §§ 12-27, 44 (1988 & Supp. V 1993).
 3. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).
 4. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). The decision approved an industry-wide coal cartel with wide authority to set prices, production quotas, and the like.
 5. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).
 6. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).
 7. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).
 8. As well as with the fascination with Italian-style corporatism found in the early years of the New Deal. *See generally* ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* (1966).
 9. *See* Spencer W. Waller, *The Modern Antitrust Relevance of Oliver Wendell Holmes*, 59 *BROOK. L. REV.* 1443 (1994).

the Supreme Court. This is somewhat surprising. Those opinions sometimes have been notably good;¹⁰ all too often, however, they have been awful.¹¹ Worse, many have been intellectually dishonest.¹² It is easy to believe that the quality of the explanation for a particular decision has had a significant, generally adverse, impact on the success of the doctrine the Court sought to establish.¹³ This paper examines the quality of some of these opinions, a measurement made by reference to the standards of jurisprudence developed by the Legal Process School.¹⁴

Antitrust is best thought of as a massive delegation of authority to the federal courts to create a body of common law to interpret and develop over time the broad and quasi-constitutional language that Congress used in the Sherman Act and many later antitrust statutes. The Legal Process School provides a particularly powerful lens to use in viewing that body of common law adjudication. Looking at Antitrust through that lens, we suggest that specific rules of antitrust doctrine have "succeeded" when they have been the subject of reasoned elaboration by the Supreme Court, openly and fairly confronting the legal and policy questions before it, and creating a reasonably stable body of precedent that is accepted by both governmental institutions and private parties as a basis for planning and conducting economic behavior. Measured against this standard, we believe that the Supreme Court has enjoyed a few shining successes and a greater number of dismal failures. Those failures either led to continued warfare among the lower courts, the agencies, and the commentators or forced the government and private parties to find non-adjudicative ways to reach stable and predictable rules to guide market behavior.

II. THE LEGAL PROCESS LENS

This essay tests the hypothesis that the success of antitrust jurisprudence reflects its ability to realize Legal Process goals. "Success" is measured by several factors: coherence and stability of doctrine through reasoned elaboration by the Supreme Court; acceptance of that doctrine by lower courts, practitioners, and academics; and acceptance by other policymakers such as Congress and the Department of Justice. Because this is a speculative essay, we attempted to keep both it and the footnotes short and to the point.

The essay begins with a short reminder of antitrust realities and a brief description of Legal Process decision-making.

10. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

11. See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

12. See, e.g., *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

13. Those opinions also have had a significant, adverse impact on many who read them. The senior author of this Article first became cynical about all Supreme Court opinions while teaching Antitrust two decades ago. The cynicism has never left.

14. See *infra* Part II.B for an explanation of Legal Process jurisprudence.

A. ANTITRUST REALITY

The stakes involved in antitrust litigation are high.¹⁵ The federal government may bring either a civil or criminal action.¹⁶ A criminal charge may result in a felony conviction, a jail term, and/or a huge fine.¹⁷ A losing defendant also may face structural relief—dissolution, divestiture, general judicial interference in the company's business, or anything else a creative equity court may imagine.¹⁸ Worse, this interference may last for decades if the court decides to retain jurisdiction over compliance.¹⁹

Private actions also may be brought under the antitrust law. Again, the stakes are high. A losing defendant must pay treble damages, as well as costs and attorneys' fees.²⁰ Those damages may be proven with the relaxed causation and rigor associated with the proof of tort damages.²¹ Liability is joint and several, with no right to contribution.²² Some cases can be brought as class actions, multiplying exposure many times. Limitation periods are loosely enforced. A plaintiff may use a successful governmental enforcement action as "prima facie" evidence of defendant's misconduct.²³ Not only are the financial stakes high, but these incredibly complex cases are tried to a jury, a body which hardly can be expected to understand the complexities or be sympathetic to antitrust defendants.

These harsh antitrust realities suggest that antitrust law works best when it is predictable and subject to decisions rendered as a matter of law rather than of fact. Predictability is important because antitrust concerns are often raised at the planning stage of business decisions. A decisional rule which requires an analysis of many factors of unknown weight does not reassure planners.²⁴ The effect of lack of predictability, of course, is either to deter completely ventures which do not in fact raise serious antitrust concerns, or to raise the cost (by increasing the risks) for those which do go forward.²⁵

15. There is a large degree of overlapping jurisdiction in government enforcement. Both the Department of Justice and the Federal Trade Commission have general jurisdiction over Antitrust enforcement. Other federal regulatory agencies, such as the FCC, are expected to consider antitrust concerns in exercising their powers. Finally, the individual states may seek enforcement under either state or federal antitrust law.

16. 15 U.S.C. §§ 1-2, 16 (1988 & Supp. V 1993).

17. 15 U.S.C. §§ 1-2 (Supp. V 1993).

18. 15 U.S.C. § 26 (1988); see also §§ 4, 25.

19. The defendant might have to spend decades seeking approval from a hostile judge. See, e.g., *In re IBM*, 45 F.3d 641 (2d Cir. 1995). The court granted a mandamus requiring the recusal of the judge who had supervised the initial consent decree and in whose court the case had been since 1952. *Id.* at 645.

20. 15 U.S.C. § 15 (1988).

21. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

22. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

23. 15 U.S.C. § 5 (1988).

24. See, e.g., *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 176-77 (1964) (listing 12 factors for the trial court to consider and balance on remand).

25. Treating antitrust issues as law rather than fact questions discourages "strike" suits—suits brought for their settlement value, but which have no intrinsic claim to merit. Questions of law, of course, are much more susceptible to resolution before trial, or, perhaps, even before discovery.

This law must be judge-made. The language of the basic antitrust statutes—the Sherman,²⁶ Clayton,²⁷ and Celler-Kefauver²⁸ Acts—is general and unhelpful. Their legislative history, despite wishful efforts by Judge Bork to the contrary,²⁹ provides even less help. For more than a century, antitrust legislation has been what the Supreme Court has said it is.

B. LEGAL PROCESS

Legal Process jurisprudence,³⁰ briefly put, requires that a judge *explain* her decision. That explanation must refer to the societal goals that the judge seeks to achieve.³¹ The opinion should be honest and provide a basis for determining whether the rule laid down controls arguably similar fact situations. Precedent must be distinguished on the basis of expressed decisional standards. That which cannot be distinguished must be overruled. A Legal Process judge, in short, engages in what Hart and Sacks call “reasoned elaboration”—honest, that is to say forthright, explanations of why the facts will lead to identified goals.³²

An opinion satisfying Legal Process standards does not have to establish a *per se* or otherwise easy to apply rule of decision. A proper opinion, however, *does* have to fit the rule laid down within a policy analysis. When that is done, the opinion helps lawyers and judges decide on which side of the line the conduct falls. It also helps them determine whether the rule applies in analogous cases. As an example, consider the following excerpt:

The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to “restrain trade” unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to fos-

26. 15 U.S.C. §§ 1-7 (1988 & Supp. V 1993).

27. 15 U.S.C. §§ 12-27, 44 (1988 & Supp. V 1993).

28. 15 U.S.C. § 18 (1988).

29. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

30. Legal Process jurisprudence takes its name from HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994). The publication date of the text is quite misleading. The manuscript began extensive circulation in the mid-1950s and reached its final “tentative” form, albeit still unpublished, in 1958. For four decades it circulated widely in manuscript form. Only last year was a printed version finally available. Despite the obvious difficulties caused by this history of non-publication, *THE LEGAL PROCESS* has been the most influential American legal treatise of the past half-century. For more on the history of Legal Process, see William M. Eskridge, Jr. & Philip P. Frickey, *Introduction*, to *id.*

31. See generally WILLIAM L. REYNOLDS, *JUDICIAL PROCESS IN A NUTSHELL* 55-65 (2d ed. 1991) (explaining Legal Process analysis). A recent, sympathetic account of Legal Process can be found in Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. (forthcoming 1995).

32. HART & SACKS, *supra* note 30, at 143.

ter. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.³³

By rooting that explanation in policy goals, the Court has made it possible for lower courts and litigants to know whether to apply the *Copperweld* test to arguably comparable situations.³⁴

"Good" antitrust law, from a Legal Process point of view, is law that is clear and easy to apply. It also should be acceptable to lower courts and enforcement agencies, so that they will not conduct guerrilla warfare to undermine an overly broad rule.³⁵ Finally, it should reflect societal understanding of what constitutes desirable business behavior. The rest of this paper evaluates the success of the Supreme Court in achieving the Legal Process goals in its antitrust jurisprudence.

III. ANTITRUST SUCCESSES AND FAILURES

A. COMPLETE SUCCESS: HORIZONTAL PRICE FIXING

The Court's most successful antitrust jurisprudence has been the per se rule against agreements among competitors which affect prices. The Court's decisions on horizontal price fixing for half a century have satisfied the criteria for successful decision-making. They have been doctrinally coherent, provided guidance, and have been widely accepted.

This success does not stem from the Court's success in articulating the per se rule. Indeed, the opinion which established the per se rule did so in as obscure a fashion as possible.³⁶ It comes in the middle of a long footnote dealing with venue, cites only to a treatise, and provides no policy justification.³⁷ Although the Court eventually did identify policies served by the per se rule against horizontal price fixing, its early explanations were neither sophisticated nor compelling. The great success of the per se rule must have some other source.

Part of this success must come from the uncompromising nature of the rule, and the vigor, indeed relish, with which the Court has applied it for more than half of a century. The Court has left no room for doubt. The rule means what it says.

33. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984) (citations omitted).

34. See generally Stephen Calkins, *Copperweld in the Courts: The Road to Caribe*, 63 ANTITRUST L.J. 345 (1995). This language apparently was cribbed from the Solicitor General's Brief. See *id.* at 369. It will surprise no Antitrust devotee to learn that one of the few satisfactory Supreme Court passages in this area did not originate with the Court.

35. HART & SACKS, *supra* note 30, at 545-630.

36. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

37. *Id.* at 224-26 n.59.

1. Doctrinal Coherence

Antitrust claims generally are evaluated by a balancing test—in anti-trust parlance, by a “rule of reason.”³⁸ Some practices, however, are so unlikely to be reasonable that the Court, for reasons of predictability and judicial economy, has condemned them out of hand. Such per se practices are “conclusively presumed to be unreasonable and therefore illegal. . . .”³⁹

The per se rule applied to horizontal price-fixing cases has been extremely successful, and has been re-affirmed by the Court many times over the years. It is easy to see why this is so. The per se rule is easy to understand and easy to apply. Even its exceptions make sense and fit easily within the harmony of the rule.⁴⁰ As is always true in the law, there are boundary problems and some horizontal restraints have been held not to be subject to the per se rule.

The Supreme Court has held in a series of cases that some horizontal arrangements affecting price are not so inevitably anticompetitive that they should be condemned as per se unreasonable.⁴¹ Commentators who read these cases as the heralding of the demise of per se rules⁴² generally make two mistakes. First, as a matter of statutory construction of the Sherman Act, restraints of trade are unlawful only if they “unreasonably” restrain trade.⁴³ Under the rule of reason, agreements only are per se unreasonable where they are manifestly anticompetitive and lack any plausible procompetitive benefits for society. Otherwise, they must be tested under the traditional rule of reason and upheld unless on balance the agreement unreasonably restrains competition. The practices that the Court considered in the 1970s and 1980s could not be condemned outright as per se unreasonable either because the Court was not sufficiently familiar with the competitive effects of the practice in question or because the agreement appeared to have a significant procompetitive potential.

Rather than forcing every potential agreement into a price-fixing or not price-fixing label with outcome determinative consequences, the Court has in fact injected some analytical content into the rule of reason. The Court has no intention of abandoning the use of per se rules for practices with no apparent pro-competitive potential.⁴⁴ More important,

38. This test was first announced in *Standard Oil Co. v. United States*, 221 U.S. 1, 66 (1911).

39. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

40. There is some minor academic quibbling, of course. See, e.g., STEPHEN F. ROSS, *PRINCIPLES OF ANTITRUST LAW* 134-43 (1993) (discussing standard of legality to be applied in non-per se cases).

41. *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 103 (1984); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979); *National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679, 696 (1978).

42. See, e.g., Ross, *supra* note 40, at 134-43.

43. *Standard Oil*, 221 U.S. at 58-60.

44. See *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam) (horizontal division of territories still per se unreasonable); *FTC v. Superior Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 436 (1990) (price-fixing scheme implemented through group boycott per se unreasonable); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 650 (1980).

regardless of what label the Court uses, it has been firm and clear in striking down agreements between competitors without much ado whenever it appears that the procompetitive upside of the arrangement is nil.⁴⁵ As Justice Stevens has observed: "The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye."⁴⁶

But the Court has always been careful to make it quite clear that whatever the scope of the exceptions to the per se rule, no room exists for the belief that a defendant can question the basic application of the per se rule to run-of-the-mill price-fixing conspiracies.⁴⁷ The Court also will not permit defendants to question the fundamental congressional belief that competition rather than collusion is society's strongly preferred method of interaction among competitors.⁴⁸

Agreement in the Court regarding the wisdom of the per se rule, extending over a long period of time, makes it much less likely that a litigant will seek to attack or undermine the rule.⁴⁹ Even when a particular application of the doctrine has been problematic and powerfully attacked by prominent critics, the Court steadfastly has resisted watering down the basic rule of prohibition. The obvious example is horizontal, maximum-price-fixing where the Court has stuck to its per se guns.⁵⁰

2. *Substantial Merit*

More of the success can be traced to the basic soundness of the per se rule. No one ever has anything good to say about the practice of horizontal price fixing. Some commentators may believe that good things can be said about various peripheral price-fixing practices;⁵¹ but practically no one ever has anything nice to say about the practice in general.

In sum, the per se rule prohibiting horizontal price fixing has achieved doctrinal coherence, has not been undermined by lower courts, and appears to be singularly successful. Yet, its success can be traced only partially to its attainment of Legal Process grounds. The Court has identified a sound policy present, and does not waffle about applying it. And yet the Court's failure to articulate clearly why it chose the per se path is troubling to the theorist; for it suggests that quality in decision-making is

45. *Id.*

46. *NCAA*, 468 U.S. at 109-10 n.39 (citing PHILLIP AREEDA, *THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES* 37-38 (1981)).

47. *See, e.g., Catalano*, 446 U.S. at 643 (re-affirming broad application of per se rule).

48. *Trial Lawyers*, 493 U.S. at 424; *NCAA*, 468 U.S. at 116-17; *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 349-52 (1982); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 693-94 (1978).

49. This is illustrated by the unanimity which prevailed on the Court concerning desegregation for the seventeen years between *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). That unanimity is often thought to have been important in defusing Southern efforts to reverse or limit *Brown*.

50. *See Maricopa County*, 457 U.S. at 348-54 (rejecting the rule of reason analysis found in Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981)).

51. *See, e.g., BORK, supra* note 29, at 263-79.

not all that important. What is important, instead, is the absence of backsliding and the consensus that the Court is right.

B. OBFUSCATION AND DEFIANCE: EIGHTY YEARS OF LESS THAN
REASONED ELABORATION IN RESALE PRICE
MAINTENANCE CASES

The Supreme Court's treatment of resale price maintenance or vertical price fixing stands in marked contrast to its success in horizontal price fixing. While there are compelling reasons to maintain the per se rule against resale price maintenance,⁵² the Court has never been able to articulate those reasons in more than eight decades of litigation over the treatment of vertical price fixing. This failure is not due to a lack of ability, but, rather, to a lack of honesty. The Court's disingenuousness began with its first major case dealing with resale price maintenance and has continued to the present day. This lack of candor has continued regardless of whether the Court was expanding or contrasting the permissible behavior of manufacturers regarding the sales price of their products.

1. *Doctrinal Incoherence*

The first problem the Court confronted was the shaky foundation for the per se treatment of resale price maintenance. Despite its similarities to garden variety horizontal price fixing, a wealth of literature suggests that all forms of resale price maintenance are not so inevitably anticompetitive as to merit being treated as per se unreasonable under section 1 of the Sherman Act.⁵³

The seminal case is *Dr. Miles Medical Co. v. John D. Park & Sons Co.*⁵⁴ In *Dr. Miles* the Court refused to enjoin the sale of medicines by a discounter who had obtained them from a distributor in violation of that distributor's written price maintenance contract with the plaintiff. The Court found the price maintenance contracts between the manufacturer and the distributor to be injurious to consumers, and the functional equivalent to a price-fixing cartel among the distributors. The Sherman Act only played a minor role in the decision, however, and resale price maintenance agreements ultimately were condemned as a violation of the medieval property rule against restraints against alienation. Under this line of thinking, a manufacturer can impose no restrictions on the distribution of a product after title has passed. It was on this shaky foundation that a per se rule was built, explained,⁵⁵ expanded to maximum resale

52. See Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487 (1983).

53. The various arguments regarding the potential pro- and anticompetitive effects of resale price maintenance are discussed in HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* §§ 11.2-3 (1994).

54. 220 U.S. 373 (1911).

55. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 47 (1960).

price maintenance as well,⁵⁶ and nominally maintained to the present day.⁵⁷

The other main problem for the Court has always been that resale price maintenance by itself is not illegal. The Sherman Act only prohibits contracts, combinations, and conspiracies in restraint of trade.⁵⁸ This is the basis of the *Colgate* doctrine that a manufacturer unilaterally can terminate distributors who do not comply with the manufacturer's condition (including pricing) and most of the subsequent confusion in the Court's jurisprudence.⁵⁹ *Colgate* may make sense when applied to cases where resale price maintenance jurisprudence is being used to police collusion by either manufacturers or retailers. The distinction between *agreements* to maintain prices and *unilateral directions* as to price may make sense in such cases.⁶⁰ On the other hand, when resale price maintenance jurisprudence is applied for other reasons (such as the protection of small retailers), distinctions between agreements to maintain prices and unilateral directions as to price are unimportant.⁶¹

Neither the per se rule nor its major limitation rests on elaborated grounds. The Court only made things worse by permitting the per se rule against resale price maintenance agreements to survive the demolition of the rule against restraints on alienation as a basis for antitrust liability in *Continental T.V., Inc. v. GTE Sylvania Inc.*⁶²

Instead of directly confronting these policy weaknesses and taking an honest intellectual stand, the Court responded by paying lip service to both the per se rule and the *Colgate* rule but raising or lowering the requirement for proof of agreement to suit its changing views about the harm caused by the setting of retail prices by manufacturers. Thus, cases like *Parke Davis*⁶³ and *Albrecht*⁶⁴ tortured the concept of an agreement beyond common sense in order to capture behavior that the Court felt was harmful to competition. To most observers, these cases appeared to be beyond the wording of the Sherman Act.⁶⁵

2. Modern Dishonesty

In more recent times, the Supreme Court simply has left resale price maintenance in the per se illegal category, but made it impossible to

56. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

57. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

58. 15 U.S.C. § 1 (Supp. V 1993).

59. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

60. See HOVENKAMP, *supra* note 53, § 11.4d.

61. *Id.*

62. 433 U.S. 36 (1977).

63. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

64. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

65. The greatest intellectual honesty was shown by the Federal Trade Commission which unsuccessfully attempted to overturn *Colgate* or, at a minimum, establish that the dictation of resale prices by manufacturer, without more, could be an unfair method of competition in violation of § 5 of the Federal Trade Commission Act. See *In re Russell Stover Candies, Inc.*, 100 F.T.C. 1 (1982), *rev'd*, 718 F.2d 256 (8th Cir. 1983).

prove in the real world by raising the standards for proof of an actionable agreement,⁶⁶ restricting the definition of what constitutes resale price maintenance agreement,⁶⁷ and curtailing the standing of private parties to sue.⁶⁸ The most defensible of these decisions was *Monsanto*, in which the Court raised the nature of proof required to show that a price-cutting distributor was terminated pursuant to an agreement rather than the unilateral business decision of the manufacturer. The *Monsanto* Court's holding that complaints to the manufacturer by other distributors were admissible, but not sufficient, to show termination by agreement rather than unilateral decision was defensible.⁶⁹ Unfortunately, it soon became part of an insurmountable hurdle for a private plaintiff bringing a per se resale price maintenance case under what otherwise seemed settled law.

In *Business Electronics Corp. v. Sharp Electronics Corp.*⁷⁰ Justice Scalia accomplished the seemingly impossible task of reaffirming the per se rule against resale price maintenance while making it impossible to prove in the real world. Under *Business Electronics*, a terminated distributor who can overcome the *Monsanto* hurdle and establish that she was terminated pursuant to an agreement, must then answer the further question of whether she was terminated pursuant to a resale price maintenance agreement rather than some kind of vertical non-price agreement.⁷¹

The distinction is critical—but devious. If the plaintiff can establish that she was terminated because of a resale price maintenance agreement, the case will be judged under the per se rule, greatly simplifying the plaintiff's task. If the plaintiff was terminated pursuant to a vertical non-price agreement, then she normally must establish the defendant's power within the relevant market and that the agreement unreasonably restricted competition. This distinction becomes outcome determinative in most dealer termination cases.⁷²

The Court, led by Justice Scalia, held in *Business Electronics* that a plaintiff can establish per se unreasonable resale price maintenance *only* where the defendant has agreed with another person to terminate the plaintiff for reasons related to price *and* there is some *further* agreement between the conspirators on prices or price levels.⁷³ Proof that the plaintiff was terminated pursuant to some agreement between the defendants because she was a price cutter is not enough. The Court held that such agreements must be judged under the rule of reason else plaintiffs actually might win jury trials on these issues.⁷⁴

66. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

67. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988).

68. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335 (1990) (hereinafter *ARCO*).

69. *Monsanto*, 465 U.S. at 762-63 & n.8.

70. 485 U.S. 717 (1988).

71. *Id.* at 735.

72. *See, e.g., Center Video Indus. Co. v. United Media, Inc.*, 995 F.2d 735 (7th Cir. 1993).

73. *Business Elecs.*, 485 U.S. at 726-27.

74. *Id.* at 727-28.

Finally, in *ARCO*,⁷⁵ the Court struck its cruelest blow by maintaining the per se illegality of all forms of resale price maintenance, but virtually eliminating all private causes of action on standing and antitrust injury grounds. The fiction of per se illegality was maintained with private rights of action eliminated, and enforcement was left to a largely indifferent Justice Department and Federal Trade Commission.⁷⁶

The effect of these decisions is to amend the law while claiming to uphold it. Assuming (heroically) that the plaintiff has standing under *ARCO*, the combined effect of *Monsanto* and *Business Electronics* destroys most cases by forcing plaintiffs to prove the very type of evidence that is most difficult to obtain. The plaintiff always knows its own pricing policies, pricing policies of competing dealers are usually well known in the market place, and patterns of complaints about price cutting are equally easy to ascertain. However, *Monsanto's* requirement that the plaintiff get inside the manufacturer's head to ascertain *why* the decision to terminate occurred is hard enough. When combined with *Business Electronics's* further requirement of proof of a continuing post-termination agreement as to price, the plaintiff's task becomes almost impossible, given defendants' ability to manipulate pricing and invoices while under scrutiny from a prospective plaintiff. The lower courts have followed the Supreme Court's signal and have been quite aggressive in granting motions to dismiss, motions for summary judgment, and sanctions for unsuccessful resale price maintenance plaintiffs not deterred by these formidable hurdles.⁷⁷ Although the Court has achieved stability in the application of the law, it has done so by avoiding doctrinal coherence. Legal Process does not tolerate such a raw power grab.

3. *The Irrelevance of Congress*

The effrontery to Legal Process in the Court's sneak attack on the per se rule against resale price maintenance is bad enough by itself. It is especially troublesome given the history of congressional approval of the per se rule and general disapproval of resale price maintenance. In 1975, Congress repealed the authority for states to enact the so-called "fair trade" laws, which permitted sellers to engage in resale price maintenance.

75. 495 U.S. at 328.

76. The history of government enforcement against resale price maintenance has waxed and waned with changes in administrations. Despite the continuing per se status of resale price maintenance, there has been no criminal grand jury investigation in this area since the Cuisinarts investigation, which was resolved through a civil consent decree in the early 1980s. *United States v. Cuisinarts, Inc.*, 46 Fed. Reg. 3665 (1981) (Proposed Final Judgment and Competitive Impact Statement). Civil enforcement actions against resale price maintenance halted during the Reagan administration and have been used only sporadically since then. There probably is no one currently at either the Antitrust Division or the Federal Trade Commission who has ever worked on a government maximum resale price maintenance case, which is the only viable option after the *ARCO* opinion.

77. See, e.g., *Center Video Indus. Co. v. United Media, Inc.*, 995 F.2d 735 (7th Cir. 1993).

nance.⁷⁸ That repeal, done against the background of the long existing per se rule dating back to *Dr. Miles*, represents congressional condemnation of resale price maintenance as a practice.⁷⁹ Similarly, a later Congress expressed the same sentiments when it adopted resolutions cutting-off all funding for Reagan Antitrust Division attempts to eliminate the per se rule in this area.⁸⁰ The Congress, our primary maker of policy, has thus made quite clear its preference for a strong stand against resale price maintenance.

The Court, however, has ignored that preference. The Court's history of clever writing to obscure, rather than illuminate its own policy preferences, is precisely the opposite of the reasoned elaboration called for by Hart and Sacks.⁸¹ The deliberate choice to dissemble leaves a body of antitrust doctrine flawed from the beginning and in need of both consistency and fidelity to congressional policy preferences.

C. SUCCESS BY DEFAULT AND DESPAIR: MONOPOLIZATION

The Supreme Court's jurisprudence concerning monopolization also has been less than successful.⁸² Part of the problem has been the promulgation of high-sounding but vague standards. Another part of the problem has been a disgraceful refusal by the Court to touch this vital area for decades at a stretch.⁸³ A final part of the problem stems from the tension between a populist hatred of "monopoly" and marketplace realities.

1. Doctrinal Incoherence

Modern monopoly law begins with Learned Hand's opinion in the *Alcoa* case,⁸⁴ an opinion unfortunately "riddled with internal inconsistencies."⁸⁵ Moreover, the opinion suffers from bizarre product market definitions and it condemned conduct—expanding capacity to meet demands—which was not only sound business but good for consumers and the economy. *Alcoa*, in short, produced bad writing, bad economics, and

78. Consumer Goods Pricing Act of 1975, 89 Stat. 801 (1975), amending 15 U.S.C. §§ 1, 45(a).

79. HOVENKAMP, *supra* note 53, § 11.1. See also *Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 94th Cong., 1 Sess. (1975). Even the *Sylvania* Court, in eliminating per se rules for vertical nonprice restraints, acknowledged congressional approval for continued per se analysis of vertical price restraints. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977).

80. See *White House Opposes Authorization of Justice Department with RPM Rider*, 52 ANTITRUST & TRADE REG. REP. (BNA) 1127, 1127 (1987).

81. HART & SACKS, *supra* note 30.

82. "Attempt to monopolize" is also a Sherman Act offense. For many years, the law in this area was a hopeless mess, but it has been clarified recently by making it a part of the general law of monopolization. Thus, liability for attempted monopolization requires both a specific intent to monopolize as well as a "dangerous probability of success." *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 892 (1993).

83. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 444 U.S. 1093 (1980) (Rehnquist, J., dissenting from denial of certiorari) (expressing exasperation at his Brethren's willingness to "let this cup pass from us. . ." *Id.* at 1094).

84. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

85. Ross, *supra* note 40, at 26.

bad law.⁸⁶ The opinion seemed tailor-made to condemn Alcoa.⁸⁷ As such, it did little to give credibility to the law of monopolization.⁸⁸

The Supreme Court, after flirting with a per se rule to condemn monopolies,⁸⁹ finally adopted a version of the *Alcoa* test in the *Grinnell* case:⁹⁰

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.⁹¹

This hardly improved things. Generations of law students have wrestled with questions like the following: Why wasn't the building of new plants by Alcoa to meet increasing demands an example of business foresight? If one of two competitors' plants is destroyed in an earthquake and the survivor had refused to build on that spot, has the survivor had its monopoly position thrust upon it? And so forth.

The incoherence of the *Grinnell* test was exacerbated by the importance of defining the relevant product and geographic product markets. This task seemed beset in this area (as well as in that of mergers) by jury-rigged market definitions designed to help absolve or condemn particular activity.⁹² At least with market definitions, the Court has provided guidance in a large number of opinions dealing with merger law. Monopolization, however, was left untouched for nearly three decades following the *Grinnell* decision.

2. *Guerrilla Warfare*

That lacuna has proven most unfortunate, for the *Grinnell* standard contributed little to efficient resolution of monopolization complaints. In hostile hands, the standard formulation proved an apt tool for judges prone to exercise populist predilections.⁹³ That exercise unfortunately also cramped efforts by dominant firms to behave competitively. Even an expansion of capacity to meet demands, as *Alcoa* illustrated, could have disastrous consequences.

86. It is no wonder that Gerald Gunther does not even mention *Alcoa* in his recent biography of Learned Hand. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

87. Judge Wyzanski later wrote that Hand probably was "cabined by the findings" of the trial court, apparently suggesting that Hand contrived his opinion to get around inconvenient facts found below. See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 341 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam). If so, Hand was not only acting unprofessionally, he was not doing the law any favors.

88. Although a circuit court decision, *Alcoa* has always been treated as a primary precedent and its test later was approved by the Supreme Court in *American Tobacco Co. v. United States*, 328 U.S. 781, 811-14 (1946).

89. *E.g.*, *United States v. Griffith*, 334 U.S. 100, 107 (1948).

90. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

91. *Id.* at 570-71.

92. *Alcoa* and *Grinnell* were particularly egregious examples of this practice.

93. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

The void was filled by commentators⁹⁴ and, somewhat reluctantly, by lower courts.⁹⁵ Like guerrillas waging an ultimately victorious war, the lower courts began by testing the edges of the *Grinnell* doctrine. As the Supreme Court avoided contact with the guerrillas (by refusing to grant certiorari), the lower courts became more ambitious and replaced *Grinnell* with far more sophisticated tests.⁹⁶

The Supreme Court finally returned to the merits of section 2 in 1985 in the *Aspen* case.⁹⁷ In *Aspen* the Court chose a particularly peculiar factual setting to make modern sense of *Grinnell*. There are four ski mountains in the Aspen ski area. Originally, all four mountains were independently owned, but their operators cooperated in offering a very popular series of joint lift tickets.⁹⁸ Eventually, the three most desirable mountains fell under common control. The dominant ski operator then imposed progressively more onerous terms on its joint venture partner and finally terminated the arrangement. Skilled plaintiff's counsel obtained a \$7.5 million verdict that the defendant had "monopolized the market for downhill skiing services in Aspen, Colorado."⁹⁹ The Supreme Court agreed and upheld the jury verdict. Discussion of *Grinnell* is relegated to a footnote.¹⁰⁰ Instead, Justice Stevens's opinion focuses on: "whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive'—to use the words in the trial court's instructions—or 'predatory,' to use a word that scholars seem to favor."¹⁰¹

The Court then suggested that a defendant would not be liable under section 2 if there were "valid" or "normal" business reasons for its behavior.¹⁰² The key to distinguishing predation from hard competition in *Aspen* itself was the defendant's willingness to forego short term profits "because it was more interested in reducing competition . . . over the long run by harming its smaller competition."¹⁰³

94. See, e.g., 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626 *et seq.* (1978).

95. See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978).

96. See, e.g., *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

97. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

98. In comments befitting a hotel concierge, the Court noted: "Most experienced skiers quite logically prefer to purchase their tickets at once for the whole period that they will spend at the resort; they can then spend more time on the slopes and enjoying the après-ski amenities . . ." *Id.* at 605.

99. *Id.* at 587. The question of whether there is a relevant market for skiing limited to Aspen, Colorado should have been a significant issue in the litigation. For unexplained reasons, the defendant never challenged the jury's findings that it had monopoly power in this "market." *Id.* at 596 & n.20.

100. *Id.* at 596 n.19.

101. *Aspen*, 472 U.S. at 602.

102. *Id.* at 604-05, 608. In *Aspen* the jury found that the defendant did not have a valid business justification for its behavior. There was sufficient evidence to support this conclusion, and hence the verdict was affirmed.

103. *Id.* at 608; see also *id.* at 610-11.

Aspen raises two Legal Process type questions. Did it change the law? And, what difference does it make?

The authors of this paper and the lower courts are split over whether *Aspen* represents a fundamental change in the law of monopolization or is merely an application of *Grinnell* to a bizarre fact pattern not likely to recur outside the world of ski resorts of the rich and famous.¹⁰⁴

Our best guess is that Justice Stevens sought to rationalize and modernize the law of monopolization. If *Aspen* was intended as a narrow application of existing law to a peculiar set of facts, then the Court had three easy options. First, it could simply have denied certiorari since it ultimately affirmed the decision of the jury, the district court, and the Tenth Circuit. Second, the Court could have affirmed on the more narrow "essential facilities" grounds used by the Tenth Circuit. Finally, if *Aspen* is just the latest entry in a long line of *Grinnell* cases, the Court could have said so, and saved itself a lot of heavy analytical lifting.

It seems, therefore, that *Aspen* represents a new test for monopolization. However, this test also fails to satisfy the demands of reasoned elaboration. The search for a "valid business justification" is no more content-filled than *Grinnell's* "willful acquisition or maintenance" formula.¹⁰⁵ The problem, of course, is that the kind of intent and conduct that amounts to healthy hard competition is virtually indistinguishable from unlawful predatory monopolization.

The result of fifty-plus years of *Alcoa*, *Grinnell*, and *Aspen* has been the virtual abandonment of monopolization litigation by the government. No private section 2 case raises the serious prospect of divestiture or structural relief. Monopolization and attempted monopolization is alive and well in private treble damage litigation, but only as part of a general panoply of business tort remedies. What is forever gone as a result of the Court's ongoing failures is section 2 as the serious public policy tool that Congress intended.

Has the Supreme Court's lack of leadership harmed anyone? Quite clearly it has. First, by using easily manipulated tests, the Court has deterred significant amounts of legitimate conduct. Second, the lower courts may have straightened things out but it took a long time to do so, a process that only exacerbated the problem of doctrinal incoherence. Third, in the absence of guidance from above, a variety of doctrines are

104. Some circuit courts attempt to analyze valid business purpose while others merely string-cite *Grinnell* and *Aspen* together. Compare *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990) with *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 377 (7th Cir. 1986).

105. A useful analytic approach would examine the defendant's willingness to sacrifice short-term profits to achieve long-term benefits at the expense of a rival. That test is not yet being rigorously applied by the lower courts. The focus is more typically on whether the jury's determination as to "intent" to monopolize is defensible. See, e.g., *Illinois v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1481-82 (7th Cir. 1991).

beginning to percolate among the lower courts,¹⁰⁶ a bad situation in a national economy.

D. FAILURE BY OVER-BROAD DOCTRINES LACKING POLICY BASES

The areas of group boycotts and tie-ins have proven serious failures despite the intuitive appeal of the basic law. This failure can be traced to the Supreme Court's declaration of a broad rule supported only by the most cursory of policy justification. When lower courts refused to adhere to the extreme implications of the stated law, the Court refused to adjust to doctrine. The result is doctrinal shambles.

1. Group Boycotts

Joint efforts to deny a competitor access to goods or services (group boycott) are said to be per se illegal. Children should not be permitted to see this area of the law. Doctrinal wallowing, massive resistance by the lower courts, and scholarly confusion dominate the field.

The Court announced the per se rule in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*¹⁰⁷ Because the Court enunciated a per se rule for any concerted refusal to deal with no apparent limit either in the facts of *Klor's* or its analysis, an allegation of group boycott soon became a favorite weapon in every plaintiff's arsenal.

Since *Klor's*, the Court has spoken with many tongues on the subject of group boycotts. In *General Motors* the Court condemned per se a classic group boycott by car dealers to punish a price-cutting competitor by eliminating its source of supply.¹⁰⁸ The Court refused to apply the per se label in *Indiana Federation of Dentists*,¹⁰⁹ but nonetheless quickly condemned an arrangement to jointly refuse to supply dental x-rays and other information to insurance providers.¹¹⁰

In *Northwest Stationers*¹¹¹ the Court appeared to speak more clearly in refusing to condemn per se a cooperative arrangement whereby smaller sellers of stationary supplies pooled their resources to purchase merchandise jointly at better prices and create their own cooperative warehouse. A much larger competitor, expelled for failure to adhere to cooperative

106. The post-*Aspen* decisions on § 2 are collected in SECTION OF ANTITRUST LAW, AMERICAN BAR ASS'N, ANTITRUST LAW DEVELOPMENTS (THIRD) 219-26 (Willard K. Tom et al. eds., 1992) and the ANTITRUST LAW DEVELOPMENTS ANNUAL REVIEW SERIES.

107. 359 U.S. 207 (1959). The opinion was written by Justice Black. *Klor's* alleged that Broadway-Hale had enlisted appliance manufacturers in a boycott of *Klor's*. Because *Klor's* was said to have "hundreds" of competitors in the area, later courts and commentators have struggled to find some rationale for the boycott. It is best to remember that the boycott was only alleged, and that the procedural posture of the case was that the defendant had been granted a summary judgment. The alleged boycott, in short, is difficult to credit unless *Klor's* was a notorious price-cutter undermining an illegal resale price maintenance scheme. No evidence, however, supports that supposition.

108. *United States v. General Motors Corp.*, 384 U.S. 127, 146 (1966).

109. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

110. *Id.* at 459-65.

111. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

rules, sued and alleged that it was the victim of a per se unreasonable group boycott and refusal to deal. The Court, for the first time, sought to distinguish among the many types of boycotts and concerted refusals to do business. The Court also attempted to bring group boycotts back into the general framework of the rule of reason governing all of section 1 and the limited application of per se rules to those agreements between competitors which were inevitably and unreasonably anticompetitive.

The Court did not question the use of per se rules in those situations where the boycott was designed to deny a competitor a source of supply,¹¹² especially if the boycotting firms possess the power to enforce their boycotts effectively.¹¹³ However, the Court also stated:

Although a concerted refusal to deal need not necessarily possess all of these traits to merit per se treatment, not every cooperative activity involving a restraint or exclusion will share with the per se forbidden boycotts the likelihood of predominately anticompetitive consequences.¹¹⁴

The message of *Northwest Stationers* then appears to be that there are group boycotts and there are *group boycotts*. How to distinguish the two is left largely unresolved. At least, *Northwest Stationers* represented a clear signal to the lower courts that some effort must be made to determine whether a concerted refusal to deal was facially anticompetitive in nature prior to per se condemnation. That signal was muddied and undercut by *FTC v. Superior Court Trial Lawyers Ass'n*.¹¹⁵ In *Trial Lawyers* a group boycott of the District of Columbia criminal justice system by court appointed lawyers seeking higher hourly wages was condemned per se without the more discriminating language of *Northwest Stationers*.

Against this background, the lower courts simply have rebelled. Most lower courts continue to characterize group boycotts as per se unlawful but have developed a series of different strategies to avoid actually applying the per se rule to the cases before them. Some of these courts limit the per se rule to so-called "classic" group boycotts initiated to harm a competitor.¹¹⁶ Some limit the rule to those boycotts aimed at enforcing price-fixing agreements or other independently illegal objectives.¹¹⁷ Others seized upon the language in *Northwest Stationers* to create a hybrid test where the per se rule is only applied to group boycotts following proof of the defendants' power in a relevant market.¹¹⁸ Still other courts manipulate the standards for distinguishing between a concerted refusal

112. *General Motors*, 384 U.S. at 127.

113. *Northwest Stationers*, 472 U.S. at 293-94. *Northwest Stationers* thus can be read as either affirming or reversing the per se rule as it was applied in *Klor's*.

114. *Id.* at 295.

115. 493 U.S. 411 (1990).

116. See, e.g., *Flegel v. Christian Hosp.*, 4 F.3d 682, 687 (8th Cir. 1993); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 593 (1st Cir. 1993); *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388 (10th Cir. 1992); *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555 (11th Cir. 1991).

117. See, e.g., *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 479 (7th Cir. 1988).

118. See, e.g., *Lie v. St. Joseph*, 964 F.2d 567, 570 (6th Cir. 1992).

to deal and a series of lawful unilateral decisions by firms acting in their own rational self interest.¹¹⁹ Finally, a growing number of courts simply abandon the per se rule, despite its continued favor in the Supreme Court, and require an analysis of the purpose and effect of the boycott in keeping with the teachings of the traditional rule of reason analysis.¹²⁰ These more adventurous lower courts either think they can read the tea leaves regarding the next Supreme Court pronouncement or place their faith in the Court's recent unwillingness to grant certiorari in antitrust cases.¹²¹

2. *The Vanishing Per Se Rule: Tying Arrangements*

A manufacturer of widgets who requires that every widget buyer also buy its gadgets from the widget manufacturer is said to have tied the sale of gadgets to the sale of widgets. Tying agreements have been held subject to a per se rule,¹²² subject to a series of conditions: that two products be involved, that the defendant have substantial market power over the tying product, and that the agreement affect "a not insubstantial amount of commerce."¹²³

The Court's jurisprudence in this area parallels its group boycott analysis. An overly broad rule, poorly thought out and defended, was subjected to scathing academic criticism, undermined by guerrilla warfare in the lower courts, and finally modified in two doctrinally incoherent opinions.

Classical tying doctrine suffered from two basic flaws: it covered too much territory and it made no sense. The first defect was easy to see: How do you know when you have two products, for example? When a car company sells a car with its own radio inside, is it selling a product or is it tying the sale of the radio to the sale of the car? The answers to these questions could not be found in the stated policy underlying the rule.¹²⁴

119. See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Precision Piping & Instruments, Inc. v. E.I. du Pont de Nemours & Co.*, 951 F.2d 613 (4th Cir. 1991).

120. See, e.g., *Wigod v. Chicago Mercantile Exch.*, 981 F.2d 1510, 1517 (7th Cir. 1992); *Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1570 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 2996 (1992); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992).

121. A legal realist would be more inclined to see the torture of the per se rule for group boycotts in the lower courts as the result of the tremendous pressures put on the legal system by the ongoing changes to the nation's health care system and the generation of many hundreds of hospital staff privilege cases that the federal courts are reluctant to characterize as per se unlawful group boycotts with the attendant treble damages and attorneys fees.

122. Tying arrangements may be tested under either § 1 of the Sherman Act, or § 3 of the Clayton Act. The test is the same.

123. The per se rule in this area is usually associated with *International Salt Co. v. United States*, 332 U.S. 392 (1947).

124. *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) (*Fortner I*) represented the high water mark of this absurdity. The Court there held that when U.S. Steel extended credit to a buyer of its mobile homes it was tying the sale of the homes to the sale of its credit. *Id.* at 509. Only misguided (and unstated) populism could explain such a stupid holding.

Indeed, it was not until the past decade that the Court began to grapple with these definitional problems.

A more fundamental flaw lay in the lack of doctrinal support of the per se rule. Not all ties are bad. Some can even be pro-competitive, as the lower courts recognized early on. A tie becomes anticompetitive when it threatens to create or entrench a firm's dominant market position or is used to evade price regulation. The per se rule, however, condemned *all* ties—good, bad, or indifferent.¹²⁵ Naturally, this led lower courts, eager to avoid injustice, to create exceptions to the per se rule.¹²⁶

Unfortunately, Supreme Court doctrine took no notice either of hostile commentary or rebellion in the lower courts. Even though Justice Stevens tried to instill some economic rigor into his Brethren in *Fortner II*,¹²⁷ the task seemed hopeless, given the Court's sorry earlier history in this area.¹²⁸

A decade later, in *Jefferson Parish Hospital District No. 2 v. Hyde*,¹²⁹ the Court once again dropped the ball. At issue in *Hyde* was the defendant hospital's contract with a group of anesthesiologists to provide exclusive services. The Court treated what was obviously an exclusive dealing case as a tying arrangement, and the majority barely rejected an effort to remove ties from the area of per se illegality.¹³⁰ The majority, however, did not take the opportunity to elaborate the law in a reasoned way. Rather, the court announced a new test: Did defendants use this market power to "force" consumers to buy an unwanted product.¹³¹

This inquiry, unfortunately, is about as easy to use as a set of gossamer wings.¹³² Exactly when does a defendant have enough power, for example, to "force" a defendant to accept the tie? Imprecise as the *Hyde* decision might have been, however, at least it had the virtue of relating stated

125. The per se rule against tying was the subject of the first rigorous economic attack against the Court's antitrust decisions. It later became commonplace to assert that the only evil associated with ties was the extension of power from one market to another. More recently, sophisticated defenses of tie-in illegality have been warranted. See HOVENKAMP, *supra* note 53, at 370-81 (discussing literature).

126. See, e.g., *United States v. Jerrold Elects. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961) (per curiam) (holding that "bundling" of products justified to get new industry started); *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981) (holding that if a tie is successful, it is not illegal).

127. *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977).

128. See Victor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust As History*, 69 MINN. L. REV. 1013, 1047-49 (1985) (observing that much of the trouble with *Fortner II* could be traced to the fact that the Court did not affirm the summary judgment for the defendants in *Fortner I*). The *Fortner* litigation took fifteen years to resolve. The trial court was reversed three times during that period, suggesting how ridiculous the law of tie-ins had become. See *id.* at 1064-65.

129. 466 U.S. 2 (1984).

130. Two Justices voted for the majority on the grounds that Congress had ratified the Court's prior construction of the Act by not amending that area of the Act. *Id.* at 32. Justice O'Connor, concurring, treated the question as one of exclusive dealing. *Id.* at 32-47.

131. *Id.* at 18.

132. See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS* 192 (2d ed. 1994).

doctrine to the only known evil of tying arrangements—the “leveraging” of power from one market to another.

The same cannot be said for the Court’s most recent entry into the field, *Eastman Kodak Co. v. Image Technical Services, Inc.*¹³³ This rather complex case involved a requirement by Kodak that it would sell replacement parts for its copiers only to those who either repaired their own machines or had Kodak service them. The opinion is decidedly, and perhaps deliberately, obscure. It can be read as a rebuke to a trial judge for granting summary judgment too quickly, or it can be read as holding that market imperfections (such as information costs) require a case-by-case analysis of when “forcing” takes place.¹³⁴ In any event, *Kodak* does nothing to restore coherence to the field of ties.

As was the case with boycotts, the Court’s recent efforts to deal with tying arrangements have tried, unsuccessfully, to restore some order. Its failure can be attributed largely to a lack of intellectual honesty, this time by those seeking to maintain a per se rule against tying.

Nominally, the fight centers on the determination as to when tying is per se unreasonable. However, because proof of substantial market power is an element of a per se tying violation, this invokes most of the costs, and none of the benefits, of the full rule of reason.¹³⁵ Conversely, a plaintiff can always seek to prove unlawful tying under the rule of reason. However, if the plaintiff cannot prove sufficient power to invoke the per se rule, how can she win under the rule of reason? The best argument that advocates of the current rule have mustered is that it is too late to change the law in this area.¹³⁶ The time has come for the Court to make a better reasoned stand or else change the status quo.

E. INSTITUTIONAL FAILURE: HORIZONTAL MERGERS

Mergers between competing companies, horizontal mergers, are governed by the 1950 amendment to section 7 of the Clayton Act.¹³⁷ The Court’s jurisprudence under section 7 has fluctuated wildly. This oscillation is somewhat surprising given a rough consensus as to the goal to be achieved by section 7.

1. Doctrinal Incoherence

A major part of the problem lays with the Court. Its decisions have been, in a word, lousy.¹³⁸ Beginning with *Brown Shoe*¹³⁹ and continuing

133. 112 S. Ct. 2072 (1992).

134. See Stephen Calkins, *Supreme Court Antitrust 1991-92: The Revenge of the Amici*, 61 ANTITRUST L.J. 269 (1993).

135. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 34 (1984) (O’Connor, J., concurring).

136. *Id.* at 32 (Brennan, J., concurring).

137. 15 U.S.C. § 18 (1988). Section 7 is often referred to as the Celler-Kefauver Act.

138. See *United States v. Von’s Grocery, Co.*, 384 U.S. 270 (1966).

139. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

through such disasters as *Philadelphia National Bank*¹⁴⁰ and *Von's Grocery*,¹⁴¹ the decisions provided little guidance and less doctrinal coherence. As Justice Stewart's dissent in *Von's Grocery* suggested, "[t]he sole consistency I can find is that in litigation under § 7, the Government always wins."¹⁴² And while many commentators have praised the *Philadelphia National Bank* test requiring a change of "qualitative substantiality" to void a merger under section 7, even that test is fundamentally flawed.

The truth of the matter is that the judicial system lacks institutional competence to resolve either the political or theoretical problems presented by most horizontal mergers. Phrases like "qualitative substantiality" may sound good but they provide little guidance—other than to eliminate the *de minimis* merger on the one hand and to include the merger that creates a near-monopoly on the other.

"Qualitative substantiality" really is a jury instruction. In other words, if the merger is neither tiny nor great the court has great discretion in making its decision. When a case will fall within that range, however, is difficult to predict. Thus, it fails to provide both industry and government with adequate guidance as to whether a particular merger is vulnerable under section 7. Although it is certain that the Court could have been more forthright in its explanations, it is hard to imagine a standard that would have given the requisite guidance and, at the same time, captured the nuances of the many factors that might be considered in approving a merger.

To express all of this somewhat less elegantly, merger law ain't easy. Consider some of the factors that might be considered: market concentration and trends; ease of entry; potential efficiencies; national security; foreign competition; failing firms and industries. Many, perhaps all, of these factors are subject to intense debate concerning their analytic value and application. Resolution of these indefinite and inchoate matters require what Lon Fuller styled "polycentric" decisions, decisions that courts are ill-equipped to make.¹⁴³ Courts function best, Fuller suggested, when they make "yes-no" decisions—such as whether the defendant was driving negligently. They are far less capable to answer questions such as whether a school system needs more money at the expense of, say, health care. Questions of this type are inherently political and should be decided by the political branches of government.

The Supreme Court has remained silent about the substantive interpretation of section 7 of the Clayton Act since the *General Dynamics*¹⁴⁴ case

140. The reception of these opinions was not aided by the even more disastrous opinions issued by the Court in the 1960s and 1970s on vertical and conglomerate mergers.

141. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

142. *Von's Grocery*, 384 U.S. at 301 (Stewart, J., dissenting).

143. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

144. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

in 1974. The Court has been content for two decades to nibble at smaller issues relating to standing and the like.¹⁴⁵

2. *Administrative Coherence*

As a result of the Court's past inability to bring coherence to the field of merger law and policy and its current silence, other actors have stepped in to dominate the field. The center of gravity has shifted from the courts to the enforcement agencies.¹⁴⁶ Merger and acquisition work from the antitrust side has become more about lobbying the Antitrust Division and the Federal Trade Commission (and state attorneys general) not to challenge a proposed deal and almost nothing about the litigation of contested mergers in the courts.

This change was inevitable for a variety of reasons—in addition to the inability of the courts to coherently define legal standards and consistently apply them in litigation. First, Congress increased the focus on the enforcement agencies in passing the 1976 Hart-Scott-Rodino Act requiring premerger notification for most substantial acquisitions.¹⁴⁷ Second, restrictions on standing and antitrust injury¹⁴⁸ made governmental challenge the only real effective deterrent to anticompetitive mergers. Third, the Antitrust Division, later joined by the Federal Trade Commission, began issuing and refining a series of Merger Guidelines which replaced the case law as the applicable standards for counselors. Finally, both agencies adopted a policy of negotiation and a willingness to refrain from challenging an acquisition based on the binding commitment of the parties to restructure the deal or make limited spinoffs within a defined time frame.

All of these changes have resulted in a system where the death knell for a proposed merger is neither the decision of a court nor even the decision of the agencies, i.e., to challenge the merger in court. Instead, the key decision is whether the agencies will make a second request for additional information; that request prevents the parties from consummating any reportable transaction until there is a complete response to the agency's often voluminous request.¹⁴⁹ While part of this trend is inevitable given the need for certainty and speed in business transactions, a large part of the growth of the administrative merger state appears to be the direct product of the failure and then abdication of the Supreme Court to create a coherent body of merger law enforceable in the courts.

145. See, e.g., *California v. American Stores Co.*, 495 U.S. 271 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

146. See Richard M. Steuer, *Counseling Without Case Law*, 63 ANTITRUST L.J. 823 (1995).

147. 15 U.S.C. § 18a (1988 & Supp. V 1993).

148. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

149. 15 U.S.C. § 18a(e) (1988).

IV. CONCLUSION

The Supreme Court used to speak quite regularly on matters of great importance to Antitrust. The Court has preferred in recent years, however, to address the marginalia of Antitrust, and in the past few years has remained completely silent. Antitrust as a common law discipline needs an active Supreme Court to guide and shape a field and body of doctrine that sits at the intersection of law, politics, and economics. The effect of the Court's recent silence only highlights its past successes and failures. Rules against horizontal price fixing are clear and easy to follow with swift and certain consequences for their willful violation. It is ironic that the Court remains the most active in the area where it is least necessary and where there is the greatest danger of blurring the rules that have governed antitrust for most of its modern era.

The Court remains silent in the areas where it could do the most good. Areas like mergers, resale price maintenance, refusals to deal, and tying cry out for reasoned elaboration, honest disclosure of policy preferences, and deference to clearly expressed congressional policy. The failure to do so leaves lower courts as the battlegrounds for litigants and invites government bureaucrats to occupy the field through their enforcement decisions. Clear and honest opinions are needed for antitrust laws to succeed in these areas to distinguish between desirable and anticompetitive market behavior. However, if the Legal Process approach to jurisprudence teaches us anything, it is that the Supreme Court has a unique duty to speak clearly and forthrightly. If it cannot or will not do that, perhaps silence is golden.