INTRODUCTION

TRACING THE EVOLVING SCOPE OF THE RULE OF REASON AND THE PER SE RULE

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Analysis of alleged antitrust violations in the United States is conducted by generally using one of two rules of decision. Under the rule of reason, the presumptive mode of analysis, courts identify and balance the procompetitive and anticompetitive effects of a challenged restraint. Under the per se rule, courts have identified a narrow class of restraints (now limited to horizontal restraints) that always, or almost always, tend to be anticompetitive. If the restraint exists in the form contemplated by the per se rule, the court must find that it was illegal. This Introduction traces the development of both the rule or reason and the per se rule since the adoption of the Sherman Act.

As detailed below, the ebb and flow of the rule of reason and the per se rule have been inversely related. The current era, in which the rule of reason is flourishing, has been marked by an increased role of economics in the assessment of restraints and a decreased willingness by courts to accept asserted characterizations of "price fixing" or "market allocation" as sufficient for the restraint to warrant per se treatment.

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In the modern era, courts have opted for a tailored approach to the application of the rule of reason that is "meet for the case" and that permits scrutiny beyond asserted labels for legitimate benefits of the alleged restraint. The predominant analytical question in all applications of the rule of reason, however, remains the same as that developed by Judge William Howard Taft developed in his landmark Sixth Circuit opinion, United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898)—does the alleged restraint serve a legitimate purpose of the practice in question?*

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I. INTRODUCTION

A threshold issue in any case is the legal standard that the court or jury should use to assess liability. In cases under § 1 of the Sherman Act,[1] the emergence of two legal standards—the rule of reason and the rule of per se liability—has complicated that issue.

This Introduction traces the development of both rules. The rule of reason, defined at the outset of Sherman Act jurisprudence, has become the presumptive rule of liability and applies where the context of a restraint of trade presents the prospect that the restraint may produce a legitimate business or consumer benefit. The per se rule arose where no such prospect was present and in response to claims that the

[1] 15 U.S.C. § 1 (2018) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal.").

level at which a price that had been fixed by competitors was itself "reasonable."

The "modern" era of antitrust law, marked primarily by the issuance of *Continental T. V., Inc. v. GTE Sylvania Inc.*[2] in 1977, has been characterized by greater judicial consideration of the economic and business contexts of restraints and the prospect that they may support legitimate business or consumer benefits. That trend has expanded the application of the rule of reason, in a form that is "meet for the case,"[3] and restricted the application of the per se rule.

II. ROOTS OF THE RULE OF REASON

The modern rule of reason owes its origins, in large part, to the reasoning of then-Judge (later President and Chief Justice) William Howard Taft. In *United States v. Addyston Pipe & Steel Co.*, the Sixth Circuit Court of Appeals considered the case of "manufacturers and vendors of cast-iron pipe" that "entered into a combination to raise the prices for pipe for all the states west and south of New York, Pennsylvania, and Virginia."[4] The defendants argued that the Sherman Act "was not intended to reach any agreements that were not void and unenforceable at common law" and their agreement would not violate the common law, so the agreement was beyond antitrust scrutiny.[5]

Writing the opinion of the court, Taft purported to situate the Sherman Act, then less than ten years old, within the existing common-law tradition.[6] His opinion, however, established a new rule of antitrust analysis:

> [N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment

[2] 433 U.S. 36 (1977).

[3] *See* Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 781 (1999).

[4] United States v. Addyston Pipe & Steel Co., 85 F. 271, 291 (6th Cir. 1898).

[5] *Id.* at 278.

[6] *See id.* at 280–82.

> of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.[7]

Taft's opinion thus distinguished between what D.C. Circuit judge and antitrust scholar Robert Bork later characterized as "naked and ancillary restraints."[8]

While *Addyston Pipe* is best remembered as the foundation of the rule of reason, Taft's opinion also clarified that, if the agreement were "naked" (to use Judge Bork's term), the reasonableness of the price fixed would not be a defense. The alleged conspirators argued "that the prices at which the cast-iron pipe was sold in pay territory were reasonable," utilizing purported affidavits from purchasers.[9] Based on a distillation of the common-law rule described above, Taft found that there was no "question of reasonableness open to the courts with reference to such a contract."[10]

The rule of reason received the Supreme Court's imprimatur in the landmark 1911 cases of *Standard Oil*[11] and *American Tobacco*.[12] In *Standard Oil*, the lower court "adjudged that the combining of the stocks of various companies in the hands of the Standard Oil Company of New Jersey in 1899 constituted a combination in restraint of trade" under § 1 of the Sherman Act as well "as an attempt to monopolize and a monopolization under § 2 of the Anti-trust Act."[13] The Supreme Court, however, added a gloss to the text of § 1 by holding that the statute incorporated "the standard of reason which had been applied at the common law and in this country."[14]

The Court held the same in its analysis of § 2 of the Sherman Act, which prohibits attempts to monopolize,

[7] *Id.* at 282.

[8] ROBERT BORK, THE ANTITRUST PARADOX 30 (Free Press 1993).

[9] *Addyston Pipe*, 85 F. at 293.

[10] *Id.* The Court did note that, even if it could conduct a reasonableness inquiry, it would strike the restraint down as unreasonable. *Id.*

[11] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[12] United States v. Am. Tobacco Co., 221 U.S. 106 (1911).

[13] *Standard Oil*, 221 U.S. at 45.

[14] *Id.* at 60.

monopolization, and conspiracies to monopolize,[15] this time using the exact phrase "rule of reason."[16] Concluding that § 2 was a "complement" to § 1, the Court held "that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the *rule of reason* guided by the established law and by the plain duty to enforce the prohibitions of the act."[17]

The *Standard Oil* Court noted that the Act lacked "any direct prohibition against monopoly" as such and thus "indicate[d] a consciousness that the freedom of the individual right to contract[,] when not unduly or improperly exercised[,] was the most efficient means for the prevention of monopoly."[18] In doing so, the Court implied that a company growing to a large size—even becoming a monopoly—would not *in itself* violate the act unless it did so by "unduly or improperly" exercising the right to contract. The *Standard Oil* Court ultimately concluded that, except for "minor matters," the decree entered by the lower court "was right and should be affirmed."[19]

The *American Tobacco* decision, issued two weeks after the *Standard Oil* decision, further clarified the rule of reason as applied to restraints of trade. *Standard Oil*, the *American Tobacco* Court explained, held that the term "restraints of trade" in § 1 had the same meaning as at the common law, where it

> only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade.[20]

[15] 15 U.S.C. § 2 (2018).
[16] *Standard Oil*, 221 U.S. at 61–62.
[17] *Id.* (emphasis added).
[18] *Id.* at 62
[19] *Id.* at 81–82.
[20] United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911).

Turning to the Government's allegations, the Court, as in *Standard Oil*, held that size alone, or the acquiring of control of the tobacco trade "by the mere exertion of the ordinary right to contract and to trade," would not in itself violate the Sherman Act.[21] Rather, the case turned on the business practices undertaken by the combined company.[22]

The Court further defined the rule of reason seven years later in *Board of Trade of Chicago v. United States*.[23] The Board of Trade consisted of "brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products and proprietors of elevators."[24] The restraint was a rule that board members' bids needed to be fixed by a certain time each day.[25]

The Court reversed the district court's judgment of liability, finding that the court erroneously struck "from the answer allegations concerning the history and purpose of the [challenged] rule and . . . later exclude[ed] evidence on that subject."[26] The Supreme Court acknowledged the importance of the context of the restraint, not just the restraint's existence, and held that

> [e]very agreement concerning 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 effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention

[21] *Id.* at 181–82.
[22] *See id.* at 181–83.
[23] Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).
[24] *Id.* at 235–36.
[25] *Id.* at 237.
[26] *Id.* at 238–39.

> will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[27]

Despite the district court's erroneous evidentiary rulings and alteration of the defendants' answer, the Supreme Court discerned from the record "that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law."[28] Indeed, "the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago."[29] In fact, it "improve[d] market conditions."[30]

The above cases provided an important part of the foundation of the rule of reason in Sherman Act jurisprudence. At the same time, the courts recognized that the reasonableness standard applied to the price fixed or the amount of trade restrained could not justify agreements that offer no prospect of producing a legitimate business or consumer benefit—that are naked restraints of trade without more. We review those "per se" decisions below and the momentum that the per se rule obtained over the middle decades of the last century.[31]

III. THE GROWTH OF THE PER SE RULE

A. Price Restraints

Courts have found that certain categories of restraints always, or almost always, lessen competition such that the only relevant analysis is determining whether the restraint exists. In one such opinion—the famous *Dr. Miles Medical Co. v. John D. Park & Sons Co.*—issued the year before *Standard Oil* and *American Tobacco*, the Supreme Court established the per se rule of liability for vertical price fixing (resale price maintenance) that would stand for almost 100 years: "a

[27] *Id.* at 238.
[28] *Id.* at 239.
[29] *Id.* at 240.
[30] *Id.*
[31] *See infra* Part III.

general restraint upon alienation is ordinarily invalid," and "[t]he complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."[32]

Naked agreements among competitors directly to fix prices were frequent targets of early cases applying the per se rule. For example, in *United States v. Trenton Potteries Co.*, the Supreme Court considered a § 1 case in which the defendants, "members of a trade organization known as the Sanitary Potters' Association," controlled eighty-two "per cent[] of the vitreous pottery fixtures produced in the United States for use in bathrooms and lavatories."[33] The government alleged that defendants agreed to fix prices of pottery and to restrict sales to certain purchasers known as "legitimate jobbers."[34]

Before the Supreme Court, the defendants did not argue that their agreement had a purpose beyond setting price. Indeed, the Court remarked that there was "no contention here that the verdict was not supported by sufficient evidence that respondents . . . combined to fix prices and to limit sales in interstate commerce to jobbers."[35] Rather, the question before the court was whether the naked agreement could be justified as a reasonable restraint of trade.[36]

The Supreme Court held that such "agreements to fix or maintain prices are [not] reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable."[37] It continued: "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition."[38] Courts can hold such

[32] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404, 409 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[33] United States v. Trenton Potteries Co., 273 U.S. 392, 394 (1927).

[34] *Id.* (internal quotation marks omitted).

[35] *Id.*

[36] *Id.* at 394–95.

[37] *Id.* at 396.

[38] *Id.* at 397.

agreements unlawful "without the necessity of minute inquiry whether a particular price is reasonable or unreasonable."[39]

Thirteen years after *Trenton Potteries*, the Court reiterated in *Socony-Vacuum* that

> for over forty years [it had] consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.[40]

In *Socony-Vacuum*, the defendants agreed upon "buying programs" that limited the amount of gasoline available on the spot market and thereby raised the price of such gasoline.[41] The Government "alleged that the [defendants' agreed-upon] purchases of gasoline were in excess of the amounts which defendants would have purchased but for those programs; [and] that at the instance of certain defendants these independent refiners curtailed their production of gasoline."[42] The ultimate goal of the buying programs was "to raise the price of gasoline in their sales to jobbers and consumers in the Mid-Western area."[43]

The defendants identified no affirmative benefit from the combination but argued that "[*f*]*airer competitive prices* . . . resulted when distress gasoline was removed from the market."[44] The Court held that, "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."[45]

Almost thirty years later, near the end of long period during which the Court expanded the application of the per se

[39] *Id.*
[40] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).
[41] *Id.* at 207–08.
[42] *Id.* at 167–68.
[43] *Id.* at 190.
[44] *Id.* at 220 (emphasis added).
[45] *Id.* at 223.

rule in the non-price context,[46] the Court extended the *Dr. Miles* rule against minimum resale maintenance to maximum resale price maintenance. In *Albrecht v. Herald Co.*, the Court held that "schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market."[47] The Court concluded, "the combination formed by the respondent in this case to force petitioner to maintain a specified price for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under section 1 of the Sherman Act."[48]

Another thirty years would pass before the Court overruled *Albrecht*[49] and almost forty years before *Dr. Miles* met the same fate.[50] Although the Court often invokes the strong language of *Trenton Potteries* and *Socony-Vacuum* in contemporary per se cases, the Court has limited its application to restraints whose context exposes *nothing but* a "naked" agreement on price or output.[51]

B. Non-Price Restraints

Gradually, in the middle decades of the twentieth century, the Supreme Court expanded the application of the per se rule beyond agreements directly fixing prices, whether vertical or horizontal. For example, in *Associated Press v. United States*, the Court considered a group boycott case in which "[t]he heart of the government's charge was that appellants had by concerted action set up a system of By-Laws which prohibited all [Associated Press (AP)] members from selling news to non-members, and which granted each member powers to block its

[46] *See infra* Part III.B.

[47] Albrecht v. Herald Co., 390 U.S. 145, 152 (1968), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997).

[48] *Id.* at 153.

[49] *State Oil*, 522 U.S. 3, *overruling Albrecht*, 390 U.S. 145.

[50] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007), *overruling* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[51] *See infra* Part IV.B.

non-member competitors from membership."[52] The Court agreed with the finding below "that the By-Laws *on their face, and without regard to their past effect, constitute restraints of trade*."[53]

The AP's "By-Laws had tied the hands of all of its numerous publishers, to the extent that they could not and did not sell any part of their news so that it could reach any of their non-member competitors."[54] Therefore, the Court found, it could not "possibly be challenged, that AP's By-Laws had hindered and restrained the sale of interstate news to non-members who competed with members."[55] The Court held that the bylaws were a "contractual restraint of interstate trade 'designed in the interest of preventing competition'" and thus within the Sherman Act's prohibition.[56] Although the Court did not use the words "per se," *Associated Press* is commonly understood as invoking the per se rule in a non-price context.[57]

In the next decade, the Court placed tying arrangements under the per se ban in *Northern Pacific Railway Co. v. United States*.[58] In that case, the railroad defendant had sold or leased much of the land granted to it by Congress.[59] The railroad inserted "[i]n a large number of its sales contracts and most of its lease agreements . . . 'preferential routing' clauses which compelled the grantee or lessee to ship over its lines all commodities produced or manufactured on the land."[60] Although those provisions applied only if the defendant railroad's "rates (and in some instances its service) were equal

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[52] Associated Press v. United States, 326 U.S. 1, 4 (1945).

[53] *Id.* at 12 (emphasis added).

[54] *Id.* at 13.

[55] *Id.*

[56] *Id.* at 19 (quoting United States v. Associated Press, 52 F. Supp. 362, 371 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1).

[57] *See* WILLIAM C. HOLMES & MELISSA H. MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:16, Westlaw (database updated Dec. 2020); 1 ANTITRUST LAW DEVELOPMENTS § 1.C.3 n.690 (8th ed. 2017), LexisNexis.

[58] 356 U.S. 1, 5 (1958).

[59] *Id.* at 3.

[60] *Id.*

to those of competing carriers,"[61] the Court nonetheless held that the clauses were per se unlawful.

The Court described per se violations as "agreements or practices which because of their pernicious effect on competition and *lack of any redeeming virtue* are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[62] The Court's insistence that per se liability attaches only to agreements that "lack any redeeming virtue" endures to this day, though, as the role of economics in antitrust analysis increased in ensuing decades, courts have expanded the scope of their understanding of "redeeming virtue."[63] In *Northern Pacific Railway*, the Court found that "the district judge was clearly correct in entering summary judgment declaring the defendant's 'preferential routing' clauses unlawful restraints of trade."[64]

The next year, in 1959, the Court further expanded the per se rule to include refusals to deal, including vertically-implemented ones. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, Klor's, a retail store, claimed that, at the behest of its competitor, Broadway-Hale, a chain of manufacturers and distributors of certain brands, refused to sell to Klor's.[65] The manufacturers and distributors "conspired among themselves and with Broadway-Hale either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms."[66] Klor's further alleged that Broadway-Hale utilized its "'monopolistic' buying power to bring about this situation."[67]

The Court explained that "[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been

[61] *Id.*
[62] *Id.* at 5 (emphasis added).
[63] *See infra* Part IV.
[64] *N. Pac. Ry. Co.*, 356 U.S. at 7.
[65] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 209 (1959).
[66] *Id.*
[67] *Id.*

held to be" per se unlawful.[68] These agreements cannot be "saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.'"[69]

Similarly, in 1961, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, the Court found that the plaintiff, an excluded competitor, had alleged per se violations against an association of its competitors depriving the plaintiff of an important benefit.[70] Radiant Burners claimed that the American Gas Association, a membership corporation run by its competitors, unlawfully refused to provide a certification for Radiant's gas burners, and that the conspirators used the lack of certification to refuse to sell Radiant's products.[71]

In 1967, the trend of enlarging the scope of the per se rule approached its zenith when the Court placed non-price vertical restrictions within its purview. In *United States v. Arnold, Schwinn & Co.*, the Court held that vertically imposed "territorial restrictions upon resale" of goods, as well as "restrictions of outlets with which . . . distributors may deal and . . . restraints upon retailers to whom . . . goods are sold" were per se Sherman Act violations.[72] "Under the Sherman Act," the Court found, "it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."[73] Such a restraint is "so

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[68] *Id.* at 212 (first citing E. State Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); then citing Binderup v. Pathé Exch., Inc., 263 U.S. 291 (1923); then citing Fashion Originators' Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 457 (1941); then citing Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 214 (1951), *abrogated by* State Oil Co. v. Khan, 522 U.S. 3 (1997); then citing Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 625 (1953); and then citing *N. Pac. Ry. Co.*, 356 U.S. 1).

[69] *Id.* (quoting *Fashion Originators' Guild*, 312 U.S. at 466).

[70] 364 U.S. 656, 659–60 (1961) (per curiam).

[71] *Id.* at 658.

[72] United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967), *overruled by* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[73] *Id.* (first citing White Motor Co. v. United States, 372 U.S. 253 (1963), *abrogated by Arnold, Schwinn*, 388 U.S. 365, *overruled by GTE*

obviously destructive of competition that [its] mere existence is enough."[74]

The same day the Supreme Court decided *Schwinn*, it also expanded the use of the per se rule in a trademark-licensing case. In *United States v. Sealy, Inc.*, the defendant granted exclusive licenses to bedding manufacturers to make and sell products under the Sealy brand name.[75] Importantly, the manufacturer-licensees were also Sealy, Inc.'s sole stockholders, allowing the Court to characterize the arrangement as a horizontal market allocation.[76] The Court thus determined that "Sealy, Inc., is an instrumentality of the licensees for purposes of the horizontal territorial allocation."[77] The court further determined that the "restraints were . . . part of [appellee's] unlawful price-fixing and policing."[78] Whether or not, as appellee argued, "territorial exclusivity served many other purposes. . . . its connection with the unlawful price-fixing is enough to require that it be condemned as an unlawful restraint and that appellee be effectively prevented from its continued or further use."[79]

Five years after the Court announced the per se rule in *Sealy*, the Court applied the rule to a cooperative association of supermarket chains that used the brand name "Topco" and had agreed that its members would sell Topco-branded products in different and exclusive territories.[80] In *United States v. Topco Associates*, the Court found that territorial restrictions imposed by "a purchasing association wholly owned and operated by member chains" constituted per se violations of the Sherman Act.[81] For a member of the

Sylvania, 433 U.S. 36; and then citing Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007)).

[74] *Id.*

[75] United States v. Sealy, Inc., 388 U.S. 350, 351–52 (1967).

[76] *Id.* at 352.

[77] *Id.* at 354.

[78] *Id.* at 356.

[79] *Id.* at 356–57.

[80] United States v. Topco Assocs., 405 U.S. 596, 602–03 (1972).

[81] *Id.* at 600, 608.

association to sell Topco-branded products, the member had to "sign[] an agreement with Topco designating the territory in which that member may sell Topco-brand products."[82] No member could sell Topco-branded products outside its designated area, and many areas were either officially or effectively exclusive.[83]

The Court explained that "[o]ne of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition."[84] Turning to the licensing scheme, the Court found that "it is clear that the restraint in this case is a horizontal one, and, therefore, a *per se* violation of § 1."[85]

The *Topco* Court explained that *Sealy* was "on all fours with this case," pointing out how both cases involved supposed vertical agreements where, in fact, downstream members controlled the upstream participant.[86] *Topco* went even further than *Sealy*, however, holding that "[t]o the extent that Sealy casts doubt on whether horizontal territorial limitations, unaccompanied by price fixing, are *per se* violations of the Sherman Act," the Court eliminated the doubt.[87]

The criterion for per se illegality, though differently expressed, remained the same from early applications of the per se rule to its mid-century apogee: the restraint must "lack any redeeming virtue" or be "so obviously destructive of competition that [its] mere existence is enough." That criterion would persist over the next fifty years, but courts would narrow its application significantly.[88] Economic assessments of the context of both horizontal and vertical restraints would inform and limit the instances in which the Court would find that restraints lacked "any redeeming

[82] *Id.* at 602.
[83] *Id.*
[84] *Id.* at 608.
[85] *Id.*
[86] *Id.* at 609.
[87] *Id.* at 609 n.9.
[88] *See infra* Part IV.

virtue." The result would be a resurgence and expanded application of the rule of reason and a gradual but substantial restriction of the scope of the per se rule.

IV. THE RESURGENCE AND EXPANDED APPLICATION OF THE RULE OF REASON

The Court's overturning of *Schwinn*—perhaps its most aggressive application of the per se rule—on the basis of an economic assessment marked the start of the modern era of antitrust law. The lodestar thus set in the vertical context in the following years guided the way in horizontal cases. Consequently, in reviewing the resurgence of the rule of reason in the modern era, we use vertical and horizontal categories for organizational purposes instead of the price and non-price categories used above.

A. Vertical Restraints

In *GTE Sylvania*, the Court required the application of the rule of reason to the very restraints that *Schwinn* had declared ten years before to be "so obviously destructive of competition that their mere existence is enough."[89] *GTE Sylvania* reiterated *Northern Pacific Railway*'s formulation of the per se rule, which banned agreements with a "pernicious effect on competition [that] lack . . . any redeeming virtue,"[90] but it applied that formulation "only . . . to conduct that is manifestly anticompetitive."[91] Serving as the threshold of the modern era, *GTE Sylvania* applied the "manifestly anticompetitive" and lacking "any redeeming virtue" language to the alleged agreement in its full business context and in light of economic analysis.[92]

The Court found that vertical restraints were "widely used in our free market economy," that "there is substantial

[89] United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967), *overruled by* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[90] *GTE Sylvania*, 433 U.S. at 50 (internal quotation marks omitted) (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

[91] *Id.* at 49–50.

[92] *See id.* at 51–59.

scholarly and judicial authority supporting their economic utility," and that "[t]here is relatively little authority to the contrary."[93] In overturning *Schwinn* and returning to the rule of reason,[94] *GTE Sylvania* required that any future "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing."[95]

The Court also limited the extent to which the per se rule applies to tying arrangements imposed by a seller of services upon buyers. Recall that, in *Northern Pacific Railway*, the Court emphatically held that the tying arrangement there at issue had no "redeeming virtue."[96] By 1984, however, the Court had become more sensitive to economic context, and it was prepared to impose a "market power" screen on the application of the per se rule to tying arrangements.

In *Jefferson Parish Hospital District No. 2 v. Hyde*, the Court reviewed whether a contract between a hospital and a firm of anesthesiologists should constitute a per se violation "because every patient undergoing surgery at the hospital must use the services of one firm of anesthesiologists," or whether the restraint unreasonably restrained trade among anesthesiologists under the rule of reason.[97] The Court explained:

> that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.[98]

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[93] *Id.* at 57–58.

[94] *Id.* at 58–59.

[95] *Id.*

[96] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 7 (1958).

[97] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 4–5 (1984), *abrogated by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) (altering a presumption in patent cases endorsed by *Jefferson Parish*).

[98] *Id.* at 12.

The Court proceeded to qualify, however, that "[*p*]*er se* condemnation—condemnation without inquiry into actual market conditions—is only appropriate if the existence of forcing is *probable*."[99] Thus, the Court questioned "whether [the] arrangement involve[d] the use of market power to force patients to buy services that they would not otherwise purchase."[100] To determine market power, the Court first looked to market share and found that the hospital's thirty percent market share "do[es] not establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions."[101] The per se rule did not apply, and since there was no evidence of an "actual adverse effect on competition," the restraint survived rule of reason scrutiny.[102]

Four years later, in *Business Electronics Corp. v. Sharp Electronics Corp.*, the Court limited the scope of the per se rule of *Dr. Miles* by narrowing the proper understanding of a naked price restraint,[103] just as it had previously done in the horizontal context.[104] Sharp Electronics manufactured calculators and suggested their retail prices, but Business Electronics sold the calculators at lower prices.[105] Then, at another retailer's behest, Sharp terminated its relationship with Business Electronics.[106]

The Court held that, given the context of the challenged agreement (the elimination of a discounter at the request of competing distributor), the agreement had no "demonstrable economic effect, such as the facilitation of cartelizing."[107] After reviewing precedent, including *GTE Sylvania*, the Court

[99] *Id.* at 15 (second emphasis added).

[100] *Id.* at 26.

[101] *Id.* at 26–27.

[102] *Id.* at 28–29, 31.

[103] Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 735–36 (1988), *abrogated by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (extending the rule of reason even to vertically-imposed price restraints).

[104] *See infra* notes 129–35 and accompanying text.

[105] *Bus. Elecs.*, 485 U.S. at 721.

[106] *Id.*

[107] *Id.* at 726–27.

found that neither economic analysis nor precedent required the per se rule.[108]

The *Business Electronics* Court thus limited *Dr. Miles*'s per se prohibition to agreements on specific prices or price levels and noted that a supplier may have a legitimate interest in eliminating price cutters from its distribution system: "manufacturers are often motivated by a legitimate desire to have dealers provide services," and "price cutting is frequently made possible by 'free riding' on the services provided by other dealers."[109] While price-related, the restraint in *Business Electronics* did not meet an express criterion of *Dr. Miles*—price fixing[110]—so the Court applied the rule of reason to assess whether the agreement offered the prospect of a legitimate business or consumer benefit.[111]

Continuing the trend, in 1997 the Court overturned *Albrecht* in *State Oil Co. v. Khan*, "conclud[ing] that there is insufficient economic justification for *per se* invalidation of vertical maximum price fixing."[112] The Court noted that "the *per se* rule established [in *Albrecht*] could in fact exacerbate problems related to the unrestrained exercise of market power by monopolist-dealers."[113] Far from endorsing *Albrecht*'s assertion that maximum resale price maintenance "may severely intrude upon the ability of buyers to compete and survive,"[114] the *State Oil* Court observed that "courts and antitrust scholars" persuasively argued "that *Albrecht*'s rule may actually harm consumers and manufacturers."[115]

State Oil's holding reflects the Court's willingness in the modern era of antitrust law to consider the context of a

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[108] *See id.* at 726–27, 731–32.

[109] *Id.* at 731, 735–36.

[110] *See id.* at 721 ("Respondent published a list of suggested minimum retail prices, but its written dealership agreements with petitioner and Hartwell did not obligate either to observe them, or to charge any other specific price.").

[111] *Id.* at 731, 735–36.

[112] State Oil Co. v. Khan, 522 U.S. 3, 18 (1997), *overruling* Albrecht v. Herald Co., 390 U.S. 145 (1968).

[113] *Id.*

[114] *Albrecht*, 390 U.S. at 152.

[115] *State Oil*, 522 U.S. at 18 (collecting sources).

restraint and its prospect of producing a legitimate business or consumer benefit. An economic examination of the circumstances of a restraint to evaluate the "redeeming virtues" alleged by defendants was gradually replacing a broad reliance on per se rules of illegality.

Most recently, in 2007, just short of the hundredth anniversary of *Dr. Miles*, the Court reviewed the per se rule against vertical minimum price fixing in light of growing practitioner and academic commentary criticizing *Dr. Miles*'s inadequate economic grounding. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Court overruled *Dr. Miles*, which had "justified its decision based on 'formalistic' legal doctrine rather than 'demonstrable economic effect.'"[116] The Court undertook a thorough review of economic arguments that even an express agreement on minimum resale prices, in the context of a vertical supply chain, may produce business and consumer benefits.[117]

That review produced the conclusion that minimum resale price arrangements offer the prospect of legitimate business and consumer benefits. For example, the Court found that "[m]inimum resale price maintenance can stimulate interbrand competition."[118] It explained that "[a] single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts."[119] The Court also found that "[r]esale price maintenance . . . has the potential to give consumers more options."[120] "Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided . . . because discounting retailers can free

[116] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 887–88 (2007) (quoting Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977)), *overruling* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[117] *See id.* at 889–92 ("[E]conomics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance.").

[118] *Id.* at 890.

[119] *Id.*

[120] *Id.*

ride on retailers who furnish services and then capture some of the increased demand those services generate."[121] Further, the agreements could "facilitat[e] market entry for new firms and brands."[122]

Because "[v]ertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed,"[123] the Court held that the per se rule would no longer govern a vertical agreement even on specific prices and price levels. Under the new rule of *Leegin*, "[v]ertical price restraints are to be judged according to the rule of reason."[124]

B. Horizontal Restraints

While *GTE Sylvania* and a number of subsequent cases from 1977 into the twenty-first century focused on vertical restraints, other cases invited the Supreme Court to reevaluate the application of the per se rule to horizontal restrictions. Throughout its modern jurisprudence on the rule of reason and the per se rule, the Court has maintained a consistent focus on the context of the restraint and whether that context offered the prospect of a legitimate business or consumer benefit.

In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (*BMI*), the Court considered antitrust claims filed against the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).[125] The two entities were formed by and for the benefit of composition copyright owners and operated primarily by granting blanket licenses for copyrighted compositions.[126]

Columbia Broadcasting System (CBS) "argued that ASCAP and BMI are unlawful monopolies and that the

[121] *Id.* (citing *GTE Sylvania*, 433 U.S. at 55).

[122] *Id.* at 891.

[123] *Id.* at 894.

[124] *Id.* at 907.

[125] Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 4 (1979).

[126] *Id.* at 5.

blanket license is illegal price fixing, an unlawful tying arrangement, [and] a concerted refusal to deal."[127] CBS thus invoked three forms of per se illegal restraints, as recognized in *Socony*, *Northern Pacific Railway*, *Klor's*, and *Radiant Burners*.[128]

In determining whether to apply the per se rule, the Court observed that "easy labels do not always supply ready answers,"[129] rejected a "literal" approach to characterization,[130] and adopted a contextual approach:

> To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. But this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad.[131]

Rather, the Court focused its inquiry on

> whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always

[127] *Id.* at 6.

[128] *See supra* Part III.

[129] *BMI*, 441 U.S. at 8.

[130] *Id.* at 9. "Characterization" refers to the process of determining whether "conduct . . . fall[s] within or without [the per se] category." *Id.*

[131] *Id.* at 8–9 (footnote omitted).

> tend to restrict competition and decrease output, and in what portion of the market[.][132]

The Court found that the blanket licenses and the price restraints that they included were not naked and without redeeming virtue. Rather, they "accompan[ied] the integration of sales, monitoring, and enforcement against unauthorized copyright use."[133] Given the business context and economic realities, the Court explained, "the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors."[134] The Court further cautioned that "[n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints."[135] The Court remanded for further proceedings, including an analysis "under the rule of reason of the blanket license as employed in the television industry."[136]

Five years later, in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma* (*NCAA*), the court again rejected the application of the per se rule based on the context in which a restraint arose.[137] The National Collegiate Athletic Association (NCAA) appealed a decision by the Tenth Circuit that held that the NCAA's television plan "constituted illegal *per se* price fixing."[138] The NCAA required all member schools to follow its television plan,[139] which featured limitations on the number of times each member school could appear on television.[140] When a group of schools tried to form agreements with the television networks that

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[132] *Id.* at 19–20 (citation omitted).

[133] *Id.* at 20 (citing LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 154 (1977)).

[134] *Id.* at 23.

[135] *Id.*

[136] *Id.* at 24–25.

[137] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla. (NCAA), 468 U.S. 85, 100–02 (1984).

[138] *Id.* at 97 (citing Bd. of Regents of the Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 707 F.2d 1147, 1152 (10th Cir. 1983), *aff'd on other grounds*, 468 U.S. 85).

[139] *Id.* at 94–95.

[140] *Id.* at 94.

would exceed those caps, the NCAA threatened disciplinary action.[141] In response, the schools sought a preliminary injunction.[142]

The Court held that even restrictions—like those imposed by the NCAA—such as "[h]orizontal price fixing and output limitation [that] are ordinarily condemned as a matter of law" should be evaluated under the rule of reason where the restrictions offer the prospect of a legitimate business or consumer benefit (e.g., the effective presentation and administration of college sports).[143] The Court, however, ultimately found "that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."[144]

The next year, the Court narrowed the per se rule's application in refusal-to-deal cases in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*[145] Pacific Stationery and Printing Co. (Pacific Stationery) sued upon being expelled from a purchasing cooperative.[146] The cooperative, Northwest Wholesale Stationers, operated as the wholesaler for its members, around "100 office supply retailers."[147] Pacific Stationery insisted that it was expelled for selling at both the wholesale and retail level (ordinarily prohibited by cooperative members but permitted under a grandfather clause in the cooperative's bylaws), while Northwest Wholesale Stationers claimed the expulsion resulted from Pacific Stationery's failure to follow notification requirements after a change in stock ownership.[148]

The Court explained that refusal-to-deal cases, including *Radiant Burners* and *Associated Press*, in which the per se

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[141] *Id.* at 95.
[142] *Id.*
[143] *Id.* at 100–01, 103.
[144] *Id.* at 120.
[145] 472 U.S. 284 (1985).
[146] *Id.* at 287–88.
[147] *Id.* at 286.
[148] *Id.* at 287.

rule had been applied "generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'"[149] "In [those] cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firms possessed a dominant position in the relevant market."[150]

Further to those characterizations of *Radiant Burners* and *Associated Press*, the Court limited the application of the per se rule in *Northwest Wholesale Stationers* to agreements that were likely to produce anticompetitive exclusion rather than simple agreements not to deal with a competitor. Thus, "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted."[151] Because Pacific Stationery had not "made a threshold showing that these structural characteristics [were] present," the per se rule was inappropriate.[152]

The Supreme Court's last application of the per se rule—which came some thirty years ago in the per curiam decision of *Palmer v. BRG of Georgia, Inc.*[153]—helped to clarify what remains of the rule. The case concerned two providers of bar review courses, BRG of Georgia, Inc. (BRG) and Harcourt Brace Jovanovich Legal and Professional Publications (HBJ).[154] The two entered into an agreement "that gave BRG an exclusive license to market HBJ's material in Georgia and to use its trade name 'Bar/Bri'" and provided that "HBJ would not compete with BRG in Georgia and that BRG would not compete with HBJ outside of Georgia. Under the agreement,

[149] *Id.* at 294 (quoting SULLIVAN, *supra* note 133, at 261–62).

[150] *Id.* (citations omitted).

[151] *Id.* at 296 (first citing SULLIVAN, *supra* note 133, at 292–93; and then citing Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1563–65 (1982)).

[152] *Id.* at 297.

[153] 498 U.S. 46 (1990) (per curiam).

[154] *Id.* at 46–47.

HBJ received $100 per student enrolled by BRG and 40% of all revenues over $350."[155]

The Court noted that, immediately after the agreement, the price of BRG's course rose "from $150 to over $400."[156] The Court found that the revenue-sharing formula and price increase dictated "that this agreement was 'formed for the purpose and with the effect of raising' the price of the bar review course."[157] Under *Palmer*, naked market allocation agreements, as with naked price-fixing agreements, remain one of the limited categories of restraints subject to the per se rule.[158]

Returning to the rule of reason, in 1999 the Court rejected even the abbreviated competitive analysis proposed by the Federal Trade Commission (FTC) in *California Dental Ass'n v. Federal Trade Commission* based on the prospect of legitimate business or consumer benefits from horizontal, price-related advertising restraints.[159] The Court found "that the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated."[160] Such an abbreviated ("quick look") rule of reason analysis—which, unlike the per se rule, still would allow the defendant to justify the restraint—[161] required that one "with even a rudimentary understanding of economics could

[155] *Id.* at 47 (footnote omitted).

[156] *Id.*

[157] *Id.* at 49 (quoting United States v. Socony Vacuum-Oil Co., 310 U.S. 150, 223 (1940)).

[158] The Court applied the per se rule to a price-fixing agreement in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982). The Court, however, appeared to assess, and then reject, the defendants' procompetitive justifications rather than condemn the price-fixing arrangement summarily. *See id.* at 355–57. To that extent, *Maricopa* provides another example of the Court's willingness to consider context and possible justifications of a horizontal restraint before applying the per se rule.

[159] Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 778 (1999).

[160] *Id.*

[161] *Id.* at 775–76 (explaining that even the circuit court, which accepted abbreviated review, discussed "procompetitive justifications").

conclude that the arrangements in question have an anticompetitive effect on customers and markets."[162]

The Court emphasized the flexibility of the rule of reason and that its application can and should vary with the circumstances of the case. The "enquiry" should be "meet for the case," examining whether "the circumstances, details, and logic of a restraint" and "the experience of the market" have "been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look."[163] The Court later acknowledged that the rule of reason may not require a detailed analysis of all types of concerted activity; "it 'can sometimes be applied in the twinkling of an eye.'"[164]

In *California Dental*, the Court found that a full rule of reason inquiry was necessary and rejected the FTC's presumption of anticompetitiveness: "assumption alone will not do."[165] Despite the FTC's characterization of the dental association's restriction as horizontal and price-related,[166] the Court, because of context and the prospect of a legitimate benefit, required evidence of anticompetitive effect.[167]

In 2006, the Court again rejected a claim of per se price fixing on the basis of the context in which the price setting occurred. In *Texaco Inc. v. Dagher*, the defendants had entered into a joint venture for the marketing and refinement of gasoline.[168] The plaintiffs claimed that the venture was simply a joint selling agency and that the joint setting of the price of retail gasoline was per se illegal price fixing.[169]

The Court began its analysis by explaining that it "presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular

[162] *Id.* at 770.

[163] *Id.* at 781.

[164] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010) (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 110 n.39 (1984)).

[165] *Cal. Dental*, 526 U.S. at 775 n.12.

[166] *See id.* at 786 (Breyer, J., concurring in part and dissenting in part).

[167] *See id.* at 775 & n. 12 (majority opinion).

[168] Texaco Inc. v. Dagher, 547 U.S. 1, 4 (2006).

[169] *See id.* at 3.

contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful."[170] The Court reserves the per se rule for restraints that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[171]

The Court expressed reluctance to apply the per se rule where the anticompetitive effect was "not immediately obvious"—for example, where parties had joined efforts in furtherance of a productive goal.[172] The Court explained that "[a]s a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price."[173] In dicta, the Court alternatively sustained the pricing practice as an ancillary restraint.[174]

In 2013, a plaintiff again characterized a business arrangement as presumptively anticompetitive, and the Court again rejected that characterization. In *Federal Trade Commission v. Actavis*, the FTC challenged a so-called reverse payment settlement between a brand pharmaceutical company and its generic competitor.[175] Before *Actavis*, the FTC had claimed that such agreements were per se unlawful market allocations, because the generic competitor delayed its market entry and received a payment from the brand company in connection with the settlement of patent-infringement litigation.[176]

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[170] *Id.* at 5 (citing State Oil Co. v. Khan, 522 U.S. 3, 10–19 (1997)).

[171] *Id.* (internal quotation marks omitted) (quoting Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

[172] *Id.* at 5–6 (internal quotation marks omitted) (quoting *State Oil*, 522 U.S. at 10).

[173] *Id.* at 7.

[174] *Id.* at 7–8 ("And even if we were to invoke the [ancillary restraints] doctrine in these cases, Equilon's pricing policy is clearly ancillary to the sale of its own products.").

[175] Fed. Trade Comm'n v. Actavis, 570 U.S. 136, 145 (2013). The FTC argued for a quick look review. *Id.* at 158–59.

[176] *See, e.g.*, Corrected Brief of Amicus Curiae Federal Trade Commission, In Support of Appellants and Urging Reversal at 15–20, *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514 (E.D.N.Y. 2005) (No. 00MDL1383) (describing the settlements as "market division

But the circumstances of reverse payment settlements defied such simplified characterization. Although the generic company received payments and delayed its entry in agreement with the patent holder, the agreement warranted full rule of reason treatment due to the context of the patent litigation and the risk that, if the patent claims had succeeded, entry would have been delayed beyond the agreed-upon entry date.[177] The Supreme Court thus rejected the FTC's proposal of presumptive liability, insisted on an assessment of the "complexities" that accompanied the alleged market allocation, and required "the FTC [to] prove its case as in other rule-of-reason cases."[178]

Among the cases that the Supreme Court has not had occasion to revisit are *Sealy* and *Topco*, though those cases remain controversial and arguably in tension with the principles reviewed above. Judge Bork, in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, characterized *Topco* as holding "that horizontal eliminations of competition among legally independent persons or companies are automatically illegal, even though the restraint is ancillary to a partnership or a joint venture."[179] The D.C. Circuit found that *Northwest Wholesale Stationers*, *NCAA*, and *BMI* contradicted the *Topco* and *Sealy* holdings because the three former cases had "returned the law to the formulation of *Addyston Pipe & Steel* and thus effectively overruled *Topco* and *Sealy* as to the per se illegality of all horizontal restraints."[180]

agreements" and arguing that "[i]t is well established that antitrust law condemns restraints on potential, as well as actual, competition"), *aff'd*, 544 F.3d 1323 (Fed. Cir. 2008), *abrogated by Actavis*, 570 U.S. 136.

[177] *See Actavis*, 570 U.S. at 159 ("[T]he likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.").

[178] *Id.*

[179] *See* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224–25 (D.C. Cir. 1986) (stating that the proposition cited in the text relies "primarily" upon *Topco*).

[180] *Id.* at 229.

Rothery Storage bore some resemblance to *Sealy* and *Topco*, as *Rothery Storage* involved a moving company, Atlas, that used independent carriers as its agents.[181] The appellants challenged an agreement imposed by Atlas that "prevent[ed] them from maintaining an independent interstate carrier operation in the same corporation that acts as an agent of Atlas."[182] The court found that the restraints were "ancillary to the contract integration or joint venture that constitutes the Atlas van line. The restraints preserve the efficiencies of the nationwide van line by eliminating the problem of the free ride."[183]

In a 2018 case, however, a district court in the Northern District of Alabama assiduously followed *Sealy* and *Topco* as the governing Supreme Court law.[184] In a case attacking territorial restraints imposed by Blue Cross Blue Shield, the court held that "[d]efendants' aggregation of a market allocation scheme together with certain other output restrictions is due to be analyzed under the *per se* standard of review."[185]

As to viability of the precedent that Judge Bork had called into question, the district court stated, "The Supreme Court jealously guards the precedential effect of its opinions. This is even true in antitrust law, where the economic principles of competition policy are subject to continual evolution."[186] Courts, however, are not so bound when the facts of a case diverge from those of the precedent. In that instance, courts are called to apply principles from the Supreme Court's evolving jurisprudence, including the rationales that have supported the expanded application of the rule or reason reviewed above.

[181] *Id.* at 211.

[182] *Id.* at 223–24.

[183] *Id.* at 229.

[184] *In re* Blue Cross Blue Shield Antitrust Litig., 308 F. Supp. 3d 1241, 1279 (N.D. Ala. 2018).

[185] *Id.*

[186] *Id.*

V. CONCLUSION

We have seen that the rule of reason arose at the outset of the Sherman Act in the face of statutory language that, by its terms, bars all restraints of trade. In evaluating the reasonableness of a restraint, its context controlled—whether the restraint was ancillary to a legitimate collaboration or "naked" and without any "redeeming" business or consumer benefit.[187] If naked, the reasonableness of the fixed prices was not a defense. If the context offered the prospect of a legitimate business or consumer benefit, the Court assessed reasonableness in light of the circumstances.

The per se rule achieved its ascendency in the middle decades of the last century.[188] Although the per se rule retains vitality in the modern era, the circumstances in which it is applied are now narrower because the influence of economics in antitrust analysis has broadened. Courts have clarified that the rule of reason is the presumptive legal standard and identified potential business and consumer benefits in connection with vertical price fixing, market division, and horizontal arrangements in which competitive behavior, including pricing behavior, is coordinated and resources are shared.[189]

The context of a restraint is so important that the Supreme Court has attempted to eliminate the stark line between the per se rule and the rule of reason by inviting an inquiry that is "meet for the case." That approach is designed to ensure that no restraint is presumed illegal unduly and that others do not receive an unduly "sedulous" and expensive evidentiary analysis.[190] While the absence of any potentially legitimating procompetitive effect may justify per se condemnation, the Supreme Court has required that, before that conclusion is reached, the factual setting be carefully examined through an

[187] *See supra* Part II.

[188] *See supra* Part III.

[189] *See supra* Part IV.

[190] *See* Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 781 (1999).

economic lens for what may be "redeeming" business or customer benefits.

Whether that analytical paradigm will result in the overturning of *Sealy* and *Topco* must await the Supreme Court's review of a factually similar case and its examination of the arguably procompetitive aspects of such arrangements. The modern, contextual perspective, however, will govern that review and examination. The competitor collaboration will be assessed in its full commercial context for prospective business or consumer benefits and will not be condemned on the basis of labels or the single fact that competitors serve different territories.