I. History of Antitrust Litigation
   a. Monopolization
      i. Definition: (1) The possession of monopoly power in a relevant market, and (2) the willful acquisition or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes.
      ii. *Aspen Ski* refusals to deal can amount to monopolization
         1. Essential Facilities Doctrine With an essential facility, there is an obligation to provide access to a competitor.
      iii. With attempts to monopolize, there is a requirement to demonstrate specific intent, but not with monopolization cases.
   b. Vertical Restraints
      i. Intrabrand competition is w/in one brand, on the distribution level. Interbrand competition is among different brands.
      ii. Horizontal restraints are analyzed under the “per se” rule; the effects do not have to be apparent. Vertical restraints are analyzed under the “rule of reason.”
      iii. There is the possibility of free-riding in the form of cream-skimming, selling the product w/out allocating the resources.
   c. Conspiracy to Restrain Trade
      i. Modified Rule of Reason (*Rothery Storage* [agents cannot contract w/ competitors if using Atlas’ resources]):
         1. Naked horizontal restraint that does not accompany a contract integration is per se illegal.
         2. Ancillary horizontal restraint that is part of integration of economic activities of the activities of the parties and is appears to be capable of enhancing efficiency is judged by its purpose and effect.
      ii. See Chart
   d. Mergers
      i. Merger resulting in large market share is presumptively illegal, rebuttable only by a demonstration that the merger will not have competitive effects. [*Philadelphia National Bank* - SC]
      ii. The market share figure is not accurate in representing ease of entry or future market share. There should be greater attention to entry conditions in determining the legality of exclusionary practices and mergers. [*Waste Management* – 2nd Cir.]
      iii. There are two types of potential errors: In Type 1, the firm or firms get away with activity that has anticompetitive effects; in Type 2, the activity is held illegal even though it may not be anticompetitive. Type 2 errors are potentially dangerous b/c of the chilling effects.
   e. Standing [*Mid-Michigan Radiology*] Radiology firm, which is seeking to provide for its own self-interest is not an adequate representative of the class of consumers that are supposed to be protected by the antitrust laws.
II. Conspiracies in Restraint of Trade
   a. Classic Cases:
      i. *Trans-Missouri* → Court took literal reading of “every restraint” in condemning all agreements in restraint of trade, not just unreasonable ones.
      ii. *Joint Traffic* → Trans-Missouri analysis will result in Type 2 errors. Efficiency will justify arrangements that may otherwise restrain trade.
      iii. *Addyston Pipe* → All price-fixing agreements are per se illegal unless ancillary to a legitimate purpose. Ancillary means that an agreement has to be reached for some larger purpose to be accomplished.
      iv. *Trenton Potteries* → Reasonableness of prices cannot be a defense. What is reasonable today may be unreasonable tomorrow. Proof of existence of price-fixing agreement establishes illegal purpose, and there is no need to show that the fixed prices are unreasonable.
      v. *Appalachian Coals* → In applying the essential standard of reasonableness, there must be a close and objective scrutiny of particular conditions and purposes. Realities must dominate the judgment.
   b. Per Se Rule [horizontal price-fixing, horizontal boycotting, horizontal territorial allocations]
      i. *Socony Vacuum (Madison Oil)* [independent dealers were matched w/ major oil firms] → rigid per se rule condemning all price-fixing arrangements; if the purpose is to raise prices, then “per se” illegal.
         1. Dicta - §1 conspiracy violations require no overt act to be shown other than the conspiracy. NO §1 requirement to demonstrate both power (to control prices) & purpose.
         2. In order to establish horizontal price-fixing, there must be (1) agreement, combination, conspiracy; (2) among actual competitors; (3) with the purpose of raising, depressing, pegging, or stabilizing prices; (4) in interstate commerce.
      ii. *Fashion Originators* [group boycott of retailers who distributed goods of “style pirates”] → social purpose of limiting style piracy was heavily outweighed by the dangers extra-governmental guild. Some have read this as applying a per se test to group boycotts, but it seems to be a narrow rule of reason or limited per se approach. The court considers the group’s power and purpose, as well as less restrictive alternatives.
      iii. *Topco* [territorial restraints among smaller grocery chains selling generic-branded products] → condemned as per se illegal for the market divisions’ elimination of competition among sellers.
         1. The court says that is not up to the organization which kind of competition is more advantageous to the market.
2. If looked at today, the courts would view this as intrabrand competition and a vertical restraint, applying the rule of reason in order to determine if there is an impact on interbrand competition.

c. Rule of Reason
   i. *Chicago Board of Trade* [special after-hours sessions where the call rule was in effect] → Legality of agreement cannot be determined by simple test of whether it restrains competition. New rule of reason analysis: pro-competitive or anti-competitive effects.
      1. The critical factors to be considered evaluation are the purpose and effects.
   ii. *Society of Professional Engineers* [professional society’s canon of ethics prohibits competitive bidding] → Purpose of the rule of reason analysis is to form judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.
      1. Justifications are confined to consideration of the impact of the restrain on competitive conditions.

d. Modern Cases - Per Se Loosening
   i. Price-Fixing
      1. *BMI* [effect of arrangement was that organization acted as license clearing house for composers] → the marketing arrangements (blanket licenses) seemed reasonably necessary for development of new music
         a. Threshold inquiry as to whether horizontal collaboration “facially appears to be one that would always or almost always tend to restrict competition and decrease output” or is designed to “increase economic efficiency and render markets more, rather than less, competitive.”
      b. Even horizontal price-fixing agreements may serve necessary and beneficial purposes and analyzed under the rule of reason.
      c. The teaching force of this case is that what can technically or on its face as price-fixing under Madison Oil may, under certain circumstances be viewed under the rule of reason. These circumstances include the existence of other products, the value of the new product and efficiencies that result, and the effect of increasing output and driving down the price.
   2. *NCAA* [restricting how often each team’s games could be broadcasted] → Quick-look rule of reason instead of per se b/c of horizontal restraints may be necessary if the product
is to be available. In this application, an exhaustive, fact-intensive analysis is not required and proves that II’s can prevail under rule of reason.

3. *Abbott Labs* [exclusive marketing agreement] → Licensing agreement was pro-competitive b/c it introduced a new product into the market. II cannot artificially create antitrust claim by narrowly defining the relevant market.

4. Procompetitive Justifications: tendency to reduce transaction costs and increased efficiency (BMI, NCAA, NW Wholesalers)

ii. Concerted Refusals to Deal

1. *NW Wholesalers* [member of office supplies cooperative expelled b/c it expanded activities from retail to wholesale] → modified per se rules for boycotts: “Unless the coop possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have anticompetitive effect is not warranted.”
   a. Where the joint activity does not seek to disadvantage rivals, it is unlikely to have predominately anticompetitive effects.
   b. If there are likely anticompetitive effects from a group boycott, then per se rule applies. If anticompetitive effects are not likely, then apply two-step analysis:
      i. Is there market power?
      ii. Does this result in anti-competitive effects?
   c. Quick look has circular reasoning b/c there must be enough facts to determine pro-competitive effects, but not so much that the entire rule of reason analysis should be carried out.

2. *IN Federation of Dentists* [collective refusal by dentists to provide x-rays to insurance company] → Together with NW Wholesalers, this case suggests that group boycotts are only per se illegal when there is market power or some other control of competition.

   e. Modern Cases - Per Se Reaffirmance
      i. *Maricopa County* [physicians set max fees] → Reaffirmance of per se rule against maximum price-fixing; maximum price becomes the minimum price when collective action exists.
      ii. *SCTLA* [lawyers refused to represent indigent Δ’s until fees were raised by gov’t] → Boycotts by rivals constitute naked restraints which are per se illegal (return to the dichotomy model).
      iii. *Palmer* [selling HBJ bar review materials] → Agreements by competitors not to compete in each other’s territories are illegal per
se, “whether the parties split a market w/in which both do business or whether they merely reserve [markets].”

f. Modern Rule of Boycott Decisions: (1) An agreement by direct rivals to withhold their services until the price for such services is raised is a “naked” restraint on output and is condemned summarily [SCTLA]; (2) Concerted refusals to deal that pose remotely plausible efficiency rationales are evaluated with a truncated rule of reason that begins (and sometimes ends) with a preliminary assessment of the conduct’s purposes and effects [IN Federation of Dentists]; (3) Suits challenging memberships policies of efficiency-enhancing collaborations require a fuller reasonableness inquiry, including a determination of the Δ’s market power [NW Wholesalers].

g. Lower Court Interpretations [Polk Bros. (7th Cir.)(one store sells some items, the other sells the rest)] ➔ Challenged market division facilitated the accomplishment of productive endeavor that would not have occurred w/out restraint. This is ancillary, subject to rule of reason.

III. Other Issues Concerning Collusion

a. Applicability of Sherman Act

i. Brown University [overlap group for determining students’ need] ➔ Educational institutions are not exempt from antitrust analysis; financial aid is part of tuition-setting process and therefore, part of commerce.

1. Quick look rule of reason analysis is not appropriate in cases where there are pro-competitive justifications. Here, there must be a full-blown rule of reason approach.

2. Rule of reason inquiry should consider Δ’s non-economic justifications.

3. Narrows the per se application only to most direct price-fixing agreements while more readily finding agreements not covered by the per se rule under the rule of reason.

ii. DELTA [humane society has majority share of market] ➔ charitable organizations are not in commerce, and therefore, not subject to the Sherman Act.

b. Evidentiary Standards - Mashushita [Japanese electronics manufacturers sell at below-market prices in US] ➔ alleged conspiracy’s failure to achieve its end in two decades is strong evidence that conspiracy does not in fact exist; according to Monsanto, the evidence must tend to exclude the possibility that petitioners underpriced respondents to compete for business (acting independently) rather than to implement an economically senseless conspiracy.

i. There is a difference b/t predatory pricing schemes and garden variety price-fixing. W/predatory, if inferences are drawn wrong, we could chill decisions to reduce prices.

ii. The success of any predatory scheme depends on maintaining that power for long enough both to recoup the predator’s losses and to harvest some add’l gain.
iii. From Monsanto, a “conscious commitment to a common scheme” can be shown by direct or circumstantial evidence.

c. Ambiguous Practices – Conspiracy to Monopolize
d. Ambiguous Practices – Information Exchange
   i. *Container Corp.* [informal price information exchange]
      → condemning of information exchanges because of tendency towards price uniformity; §1 bans stabilizing prices as well as raising them
   
   ii. An exchange of price information among competitors, w/out an agreement to fix prices, is sufficient as an antitrust violation only when:
       1. Market is highly concentrated by few sellers
       2. Fungible product
       3. Competition based upon demand
       4. Inelasticity of demand
   
   iii. *Gypsum* [large companies were part of association] → (1) Standard to be recognized for Sherman Act is that for criminal proceeding rather than civil; (2) Mere exchange of information is not violation of antitrust laws. This creates rule of reason standard for exchange of information.
   
   iv. *Five Smiths* [exchange of salary information among players] → Rule of reason should apply b/c information exchange among competitors does not necessarily have anticompetitive effects. W/o market concentration, information exchange is pro-competitive.
       1. What difference does elasticity make? If you are part of an elastic demand curve, change in quantity is larger w/ change in price. If on inelastic part of the demand curve, there is less change in quantity needed to change price.
   
   v. *Petroleum Products* [oil price changes posted publicly] → Earlier cases were asking whether you can infer an agreement from the exchange of info. These cases are asking whether there was an agreement and did the exchange of info. facilitate this agreement.

e. Ambiguous Practices – Oligopoly
   i. *City of Tuscaloosa* [sales through submission of sealed bids at lust prices] → The test to determine whether there is an antitrust violation of dealing w/ conscious parallelism exists w/o direct evidence, depends on showing of (1) Δ’s acting in conscious parallel fashion, and (2) ‘plus factors’ that tend to exclude the possibility if non-collusive action.
       1. Daubert says for scientific evidence to be admissible, it must (1) reliable, and (2) relevant.
   
   ii. *Catalano* [beer distributors agree to eliminate short-term credit] → agreements which are inseparable from prices are governed by the per se rule.

f. Horizontal v. Vertical Restraints [Toys-R-Us]
IV. Monopolization
   a. Monopoly Power
      i. ALCOA
      ii. Grinnell
      iii. Blue Cross Blue Shield
      iv. American Key
   b. Exclusionary Conduct
      i. Exclusionary Contracts – United Shoe
      ii. Essential Facilities - Florida Fuels
   c. Predatory Pricing
      i. Rose Acre
      ii. Brown & Williamson
   d. Attempted Monopolization - AMI
   e. Price Squeezes – Town of Concord
   f. Non-collusive, non-monopolizing, non-competitive conduct – DuPont
V. Vertical Restraints
   a. Dr. Miles
   b. State Oil
   c. Sylvania
   d. St. Martin
   e. Monsanto
   f. Sharp
VI. Tying
   a. International Salt
   b. Chicken Delight
   c. Jefferson Parish
   d. Town Sound
   e. Kodak
   f. Microsoft
VII. Exclusive Dealing
   a. Standard Stations
   b. Tampa Electric
   c. Roland Machinery
   d. Parikh
VIII. Mergers & Acquisitions
   a. Classic Cases
      i. Von’s Grocery
      ii. Proctor & Gamble
      iii. General Dynamics
   b. Modern Cases
      i. Hospital Corp.
      ii. Staples