ANTITRUST LAW

I. Sherman Act - may be little more than a legislative command that the judiciary develop a common law of antitrust
   a. Sec 1 - Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
   b. Sec 2 - Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
   c. Sec 7 - The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing
under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

d. Sec 8 - Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

II. Clayton Act (Supplementary to Clayton Act)
   a. Makes illegal "tying" - telling a buyer they must purchase product A if they want to purchase product B
   b. Makes "exclusive dealing" illegal - You can only buy product A from me if you don't buy it from anyone else
   c. FTC can enforce Clayton Act but not Sherman Act
   d. Damages - Treble + cost of suit + attorney fees

III. FTC Act Sec. 5
   a. (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b) ], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

   (3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless--

   (A) such methods of competition have a direct, substantial, and reasonably foreseeable effect--
(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or
(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and
(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

IV. Enforcement of Antitrust Laws
   a. Antitrust Division of the DOJ
   b. FTC
   c. National Association of Attorney's General
   d. Private Plaintiff's Antitrust Bar

V. Federal Trade Commission Act Section 5

VI. (Supp. 1) "Original intent" of Antitrust Law, conflicting conclusions
   a. Bork: Consumer welfare/productive efficiency
   b. Pitofsky: Excessive concentration will breed antidemocratic political pressures
   c. Lande: Preventing unfair transfers of wealth from consumers to firms with market power
   d. When reading decisions, try to decide what formal economic objective is underlying the decision

VII. Two Simple Analyses helpful in antitrust analysis
   a. Ellis
      i. What competition does
      ii. How its force can be stifled
      iii. Who gains and loses from stifling measures
   b. Book
      i. What is the underlying Social problem? What interests are affected and how? What is the possible benefit to a party? Possible harm to society? The alternatives?
      ii. How should the particular problem be solved by a legislature that appreciates the limitations of judicial and other relevant institutions, the need for general solutions and the desire for sound doctrinal development?
      iii. Is such a solution available to the court, agency, or private planner in light of the relevant precedents?

VIII. Antitrust Economic Theory
   a. Definitions
      i. Consumer Surplus - amount of benefit the consumer gets above and beyond th price paid for good
      ii. Deadweight Loss - net loss in social welfare that results the benefit generate by an action differs from the foregone opportunity cost.
Biggest detriment of monopoly power is inefficiency from deadweight loss.

iii. Price elasticity

iv. Market shortage - when this happens, someone has to choose how to allocate goods in different ways, value choice: political, economic class, etc...

v. Fixed costs - do not tell you how much to produce, only whether to produce or not

vi. Product Identification - may exploit consumer ignorance, promotional expense to effectuate a waste of resources

vii. Product differentiation

viii. Marginal Firms - Firms in the competitive market place who make little or no profit

ix. Pareto Efficiency - efficiency that results if one person can not be made better off without making someone else worse off. Not attained if some resources are idle or unemployed. By engaging idle resources in production, some people can have more production without reducing that available to others. Pareto efficiency is based on the existing distribution of income and wealth.

b. Competition will be perfect when: (pg 5)
   i. Sellers and buyers are so numerous that no one's actions can have a perceptible impact on the market price, and there is no collusion
   ii. Consumers register their subjective preferences among various goods and services through market trans. at fully known mkt prices
   iii. All relevant prices are known to each producers, who makes input/output decisions solely to maximize profits
   iv. Every producer has equal access to all input mkts and there are no artificial barriers to the production of any product
   v. A perfectly competitive market will be Pareto efficient - no one will be better off without making someone else worse off

c. Competitive forces generate efficiency by (pg 5)
   i. allowing low cost producers to displace less efficient
   ii. causes production to shift from producing goods less valued to those more valued

d. III Cournotia Example
   i. Cartels are often difficult to run, expensive and fragile because of cheaters (see Cournotia notes)
   ii. The closer to perfect substitutes for any good are available, the more elastic the demand for that good
   iii. Exhibit 4, Supp 1 - Market spoilage causes a decrease in producer surplus and market expansion causes an increase in consumer surplus

e. When competition is unhelpful or limited (pg 8)
   i. Externalities -
ii. Public goods - private firms are not likely to produce the socially optimal amount of partially public goods

iii. Economies of scale - production at least costs will sometimes be possible only at a scale of production where a few firms or a single firm can satisfy the entire demand

iv. Imperfect knowledge

v. Inertia, ignorance

f. Differences between competitors, monopoly, oligopoly
   i. Monopolist will increase revenue as long as marginal revenue exceeds marginal cost. It is able to maximize revenue this way because the quantity it produces affects the market price, decreasing it as it expands production. The producer in a competitive market is unable to change price, so it simply maximizes its production to produce all it can at the market price. (pg 12)
   ii. Oligopoly (limited competition) - a central antitrust problem. Try to prevent markets from becoming oligopolistic or allow oligopolists from coordinating their behavior

g. (pg 14) Monopolies affect allocative efficiency by causing consumers who would have bought the overpriced good to spend their money on less efficient goods

h. (pg 15) Barriers to entry
   i. Major overpricing by monopolist creates smaller barrier to entry
   ii. Barriers depend on perceived profits after entry
   iii. Barriers also face smaller producers when expanding
   iv. Four main sources
       1. Blocked access: Established firms might control the supply of raw materials, patents, supply chain.
       2. Scale economies: entry at efficient scale would depress prices so as to be unprofitable
       3. Capital requirements: the vast initial outlay of capital may make investors hesitant
       4. Product differentiation - newcomer will have to bear higher promotional cost or suffer lower selling price in order to counteract consumer loyalty

i. Other values of competition (pg 20)
   i. Income distribution - monopolists receive more income that would be necessary to induce their production
   ii. Distribution of opportunities -
   iii. Control of unchecked power - big firms may have unwanted political power that is not democratic
   iv. Fairness of economic behavior -
   v. Economic stabilization -

j. Situation Where a Monopoly is tolerated
   i. Monopoly considered worth the price for innovations --> patents
ii. Natural Monopoly - public utilities, etc
iii. Different reasons, like liquor or insurance
iv. National security
v. Competition is too harsh, farmers

k. A monopoly does not always reduce consumer surplus. If you have long run declining costs, economies of scale may outweigh monopoly premiums.

l. Intent in antitrust cases is a way to give content to evidence that otherwise may be ambiguous. Ex. "We are going to cut off Netscape's air supply."

m. Social Benefits to Price fixing
   i. Ex. of Korean Monopoly Act, exceptions for:
      1. Industrial Rationalization, Promoting research and tech dev., overcoming economic depression (but don't we want to wipe out the bad firms), promoting Industrial restructuring (think steel industry), rationalizing terms of trade (over-fishing)
      2. Intersate Commerce Act (Railroads) -
         a. gave gov't land grants in exchange for "just and reasonable" rate charges, other restrictions against price discrimination, territory discrimination
         b. Railroads

n. Signs a market is unworkably competitive
   i. Profits consistently above usual invetsment returns
   ii. Scale of many firms seriously outside the optimal range considerable chronic excess capacity not justified by secular change or reasonable stand-by provision
   iii. excessive selling costs
   iv. persistent lag in adoption of cost reducing technical changes or persistent suppression of product changes which would advantage buyers
   v. Structural variables
      1. number and size of sellers
      2. conditions of entry by other firms

IX. Criminal and Equitable Penalities
   a. Almost always in horizontal, pre se violations.
   b. Vertical or rule of reason cases are civil
   c. Antitrust decrees, ordering d's to:
      i. dispose of subsidiary companies
      ii. make patents available
      iii. provide goods and services to all
      iv. revise the terms of buying or selling
      v. cancel, shorten or modify outstanding agreements
   d. Consent decrees with DOJ
   e. FTC cease and esist orders, subject to judicial review by COA
   f. Parties are jointly and severally liable for conspiracy in antitrust

X. Antitrust Injury
a. Supreme Ct Req for establishing injury
   i. P must show it Suffers injury that is both (1) actually caused by the defendants illegal conduct and (2) of the kind that the antitrust laws were designed to protect
   ii. must show more than causal link - P must prove antitrust injury - show that the injury was what antitrust law was designed to protect and that injury flows from that which makes d's acts unlawful

XI. Litigation: RoR v Per se
a. Full blown RoR case very expensive to try b/c of expert witnesses (economist), conflicting views, outcome unpredictable
b. Whether per se or RoR has a big impact on settlement amount due to risk analysis

XII. Horizontal Restraints: Collaboration Among Competitors
a. Two parts to a violation of Sherman Act s 1
   i. Must be a "contract, combination, or conspiracy" (agreement)
   ii. Must be an "unlawful restraint"
b. Cartels
   i. In some ways worse than monopolies b/c less efficient
   ii. Cheating in Cartels
      1. In the absence of sales quotas, price fixing induces each collaborator to win add'l sales by expanding production, etc
   iii. Cartel justifications
c. Original interpretation of Sherman by Judge Peckham was that Sherman act restrict all restraints of trade. This is inconsistent with allowing corporate contracts, etc, which always restraint trade. Peckham instead used a direct/indirect test
d. Addyston introduced the reasons approach, but Justice White ultimately asserted the rule of reason in Standard Oil, tacitly overruling Joint Traffic & Trans Missouri,
e. In summation
   i. Sherman s 1 - every restraint of trade
   ii. Packham: all restraints (except collateral)
   iii. Taft: Common law exceptions for "ancillary" restraints
   iv. Peckham 2: every direct and immediate restraint
   v. White: Rule of reason
f. Rule of reason is nothing more than shorthand of saying that action must be consistent with antitrust laws, which is a circular line of reasoning
g. General principle - The rule of reason is the primary line of analysis in Sherman Act. Per se illegality only when conduct is manifestly anticompetitive.
h. Chicago Board of trade
   i. Rule of reason - "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."

ii. Three factors
   1. Facts particular to the business in which the restraint is applied
   2. Industries condition before and after the restraint
   3. The effect of the restraint, actual or probable

iii. Relevant facts include
   1. the History of the restraint
   2. the evil believed to exist
   3. the reason for adopting the particular remedy
   4. the purpose or end sought to be attained

iv. Good or bad intent will not save an unreasonable restraint, but may help interpret findings of fact

v. Restraint was not unreasonable - rule that prohibited members from charging a different price for grain from the close to open of the market
   1. Only affected small part of the market
   2. had no appreciable effects on market prices
   3. created a public market for grain -- a pro-competitive effect.

i. Trenton Potteries
   i. Establishes per se rule for price fixing
   ii. Distinguishes Chicago Board of trade, since it only fixed the price for a short while that which was set by open competition

j. Appallacian Coals
   i. A depression era case
   ii. Court allows price fixing, citing that the members in the arrangement had not power over price, the agreement helped to eliminate "cut throat competition"
   iii. State of the coal industry was very bad at the time

k. Socony
   i. Another depression era case
   ii. Does not overrule Appallacian coals directly, but how can it survive?
   iii. Fixing of reasonable prices is still price fixing
   iv. "A combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity is illegal per se"
   v. Power to fix prices exists if the combination has control of a substantial part of the commerce in the commodity

vi. Footnote 59 -
   1. No overt act is necessary to find a section 1 combination
   2. No actual power to fix prices is necessary, only an agreement (this is the important part). Or do we simply assume market power for price fixing? If it applies to all s 1 injury, why does
justice breyer's lingering look, infra, contain a market power analysis?
   a. Compare BMI, where there was clearly an agreement & market power - which the court looked at as an exceptional situation

3. "Whatever economic justification particular price fixing agreements may be thought to be have, the law does not permit an inquiry into their reasonableness. They are all banned...'

l. Depressing prices by use of a buyer conspiracy is also price fixing
m. We assume that price fixers are rational business people. Thus, why else would they enter into a price fixing agreement if they didn't believe they had the power to affect prices. Why second guess them. If the goal is to maximize prosecution on anticompetitive agreements, then a per se rule is good because there will be very few times where prosecution of a price fixing agreement has a deleterious effect on the economy.

n. There is not porhibition against attempting to enter into an agreement to fix prices, there must exist an agreement

o. Topco
   i. Agreement between grocery stores that limited each to selling of Topco products in designated territories
   ii. Territorial restraints are per se violation of section 1 (agreements to allocate territory)
   iii. On remand, Topco was allowed to designate areas of "prime responsibility", designate the locations of trademarke licenses, determine warehouse locations to which Topco will ship -

p. BMI, pg 149 (price fixing only in a "literal" sense)
   i. As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business practices to which the per se rule has been held applicable
   ii. We would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted (under the Copyright Act) would be deemed a per se violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all...
      1. But See Topco
   iii. Our inquiry must focus on whether the effect (and because it tends to show effect), the purpose to threaten a free market economy.
      1. That is, whether the practice appears facially to be one that would always or almost always tend to restrict competition and decrease output
      2. OR, one designed to increase economic efficiency and render markets more rather than less competitive
   iv. Why blanket license not a per se violation
1. Necessary consequence of making a blanket license was to establish its price
2. The blanket license was conducive to sales, monitoring, and enforcement of copyright use
3. Blanket license helped to reduce transaction costs
4. "Bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established"
5. Creates vast economies of scale
6. Whole is greater than the sum of its parts... blanket license essentially a different product
7. practice does not threaten the "central nervous system of the economy". Central nervous system of the economy = price.
v. Alternatives to blanket license
   1. composers might essentially become employee of record company
   2. Composers license individually, but lose enforcement capabilities
   3. Less music composed b/c it is less profitable
   4. Firms might spawn which purchase music and then market the collection
vi. Questions raised by BMI -
   1. Price fixing - rule of reason or per se?
   2. How decide when price fixing falls into per se?
   3. Is BMI an anomaly like Appallacian coals?
q. Maricopa
   i. Physicians agreed to maximum prices they could charge for their services
   ii. agreements to fix maximum prices fall into the same category as those to fix minimum - "the per se rule is grounded on faith in price competition as a market force and not on a policy of low selling prices..."
      1. In this case the rule is violated by a restraint that provides same rewards to physicians regardless of skill, expertise, etc (does not take into account third party payers, which would make consumers price insensitive)
      2. Deters innovation
      3. May be a masquerade for a minimum price restraint
   iii. Procompetitive justifications cannot cure facial invalidity of price-fixing agreements
   iv. Court rejects argument that professionals not governed by antitrust provisions
   v. Distinguishes agreement among physicians from BMI,
      1. No different product
2. Did not place restraints on individual composers

3. Was a necessary consequence of marketing the product

r. National Society of Professional Engineers (quick look)
   i. Engineers not allowed to disclose price prior to being selected
   ii. Court Elaborates the rule of reason
       1. The inquiry mandated by the rule of reason is whether the challenged agreement suppresses or promotes competition
       2. The rule does not open antitrust to any argument that may fall within realm of reason. Instead it focuses directly on the challenged restraint's impact on competitive conditions
       3. The rule of reason does not support a defense based on the assumption that competition itself is unreasonable.
   iii. "We adhere to the view expressed in Goldfarb that, by their nature, professional services differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote competition, thus falling within the rule of reason.
   iv. However the societies restriction does not fall under RoR. No way that a total ban on competitive bidding is necessary to promote competition. Accepting engineers justification would allow almost any manufacturer of potentially dangerous devices to set prices.
       1. Quick Look - Court did not conduct full RoR inquiry, but did consider the justification before rejected it

s. NCAA (quick look)
   i. Quick look appropriate where per se condemnation is inappropriate, but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint
       1. Defendant must give competitive justification for restraint, even in the absence of detailed market analysis indicating proof of anticompetitive effects
   ii. Restraints prohibited broadcasters from competing against each other on basis of price as well as other broadcasting rights - Found a violation of the Sherman Act
   iii. Horizontal price fixing and output limitation are ordinarily condemned as a matter of law as illegal per se
   iv. Court uses RoR since this is an "industry in which horizontal restraints on competition are essential if the product is to be available at all."
   v. Absence of market power does not justify a naked restriction on price or output
   vi. "If the NCAA faced intrabrand competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to complete. See Sylvania."
   vii. Rule of Reason as applied in this case balances the pro-competitive with the anticompetitive effects
t. MIT (Guest lecturer) - 3rd circuit
   i. MIT argues that because it was "dispersing charitable funds" does not implicate trade or commerce, and should be exempt from antitrust scrutiny
   ii. "Although nonprofit organizations are not entitled to a class exemption from the Sherman Act, when they perform acts that are the antithesis of commercial activity, they are immune from antitrust regulation."
   iii. Under Rule of Reason, plaintiff bears burden of showing anticompetitive effects
      1. Plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects
         a. Reduction in output
         b. Increase in price
         c. Deterioration of goods or services
      2. Or, as a surrogate for actual effects, show proof of "market power"
      3. If plaintiff meets this burden, the burden shifts to the defendant to show challenged conduct promotes a sufficiently procompetitive objective -
   iv. Where bona fide non profit professional orgs adopt a restraint which they claim is motivated by public service or ethical norms, economic harm is less predictable and certain.
      1. Thus, overlap, is judged under the rule of reason
   v. RoR Applied to overlap
      1. Overlap directly affects price [which is the "central nervous system of the economy"]

u. Polygram: "It would be somewhat misleading, however, to say the quick look is just a new categoryof analysis intermediate in complexity between per se and full blown rule of reason treatment, for that would suggest the Court has moved from a dichotomy to a trichotomy, when in fact it has backed away from any reliance upon fixed categories and toward a continuum." Instead, "the court must make an enquiry meet for the case, looking to the circumstances, details, and logic of the restraint."

v. California Dentist Association (Quick Look Not appropriate)
   i. Dental association restricted "discount" advertising by its members, in violation of FTC Act Section 5
   ii. Quick look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained. Anticompetitive effects must be readily apparent.
   iii. This case is not appropriate for quick look
      1. Restrictions might have procompetitive effect
      2. Prevent false misleading advertising
      3. In mkt for prof services, the difficulty for customers or potential competitors to get and verify information about the price and
availability of services magnifies the dangers to competition associated with misleading advertising. The quality of professional services tends to resist either calibration or monitoring by individ patients or clients, b/c of specialized knowledge req’d to evaluate those services

4. The CDA’s rule appears to reflect the prediction that any costs to competition associated with the elimination of across the board advertising will be outweighed by gains to consumer information created by discount advertising

iv. Focus is not on limitatation on advertising, but on whether limitation on advertising necessarily is a limitation of output on dental services

1. Advertisements may reduce demand because of lessened knowledge about availability of dental services. Might cause increased prices b/c of less price competition

v. Counter arg to majority

1. Anticompetitive effect of "market for lemons" - if consumers cannot distinguish between good and bad versions of same good, via advertising, they will stop paying premium for good -

vi. There is no bright line between per se and rule of reason, since considerable inquiry into market conditions may be required before the application of a per se rule

1. There is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry met for the case, looking to the circumstances, details, and logic of the restraint.

vii. Justice Breyer's Lingering Look (This is a very good modern antitrust analysis)

1. What is the specific restraint at issue?
2. What are its likely anticompetitive effects?
3. Are there any offsetting procompetitive justifications?
4. Do the parties have sufficient market power to make a difference?

w. Joint ventures - comonly describes a combined undertaking requiring some degree of integration

i. Joint venture guidelines issued by the FTC

1. Agreements of a type that always or almost always tends to raise prices are reduce output are per se illegal
2. Agreements where nature is not evidently anticompetitive will not be challenged absent extraextraordinary circumstances

x. Oligopoly theory, pg 203 (same as cartels, without express coordination)

i. In a completely open market, a small firm will not restrict output b/c they cannot affect price. A monopolist will restrict output b/c they can
restrict price. However, oligopoly is more reflective of the realistic conditions of much of the American Market.

ii. Prisoners dilemma

```
<table>
<thead>
<tr>
<th></th>
<th>6</th>
<th>8</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>60,60</td>
<td>30,80</td>
</tr>
<tr>
<td>8</td>
<td>80, 30</td>
<td>40, 40</td>
</tr>
</tbody>
</table>
```

- Instead of two firms arriving at their joint profit maximizing position, each firm will produce 8, and end up in the south east corner of the grid
- So the firms can collude to produce only the amount of 6 and thus maximize profits

iii. Where there are few firms in a market, each firm will know reductions in their price will not go unnoticed, thus they will continue to charge the monopoly price

iv. Oligopoly behavior options (Ellis)
   1. overt collusion - per se unlawful
   2. Tacit Collusion: Unlawful?
      a. This term is used very loosely. Can me either circumstantial evidence of overt collusion or conjectural variation which involves no agreement
      b. When it is circumstantial of overt -- then per se unlawful.
      c. Questionable unlawfulness, however, when it is conjectural variation
   3. Conjectural variation (interdependence) - he knows that i know that he knows, etc
      a. Unlawful? Posner thinks this should be unlawful
   4. Independence - each firm undercuts the other, takes to bottom left corner of the grid, above
      a. This is lawful

v. Firms may also use merger or joint venture to get into the upper left quadrant. May be lawful or unlawful, see clayton act s 7

vi. oligopoly firms reach the monopoly price by realizing that competitors will realize what they are trying to accomplish with a price increase

vii. Four factors to successful oligopoly
   1. must be able to come to a consensus on cost
   2. firms must be able to compare each others prices
   3. Cheating must be detectable and punishable
   4. Producers of a given product may coordinate their behavior, but they must collectively enjoy market power

viii. No more than 30 firms, plausible at up to 10

ix. Conditions favorable to coordination w/o overt agreement (Ellis)
   1. Few Firms
2. Similar Costs
3. Homogenous Products
4. Frequent and transparent transaction (not customized)
5. History of interaction in the market

x. Factors that affect likelihood of oligopolistic coordination
1. Divergent interests - due to product and cost differences between firms
2. Available channels of verbal and nonverbal coordination
3. Price comparability of products
4. Nonprice competition

xi. Evidence of oligopoly pricing in the economy
1. Noncompetitive performance could be indicated by prices greater than marginal cost or by profits greater than the cost of capital.
2. Empirical evidence - profits are usually higher in markets in which the eight leading firms have accounted for 70+% of sales

y. Dagher, S3 (9th Cir)

i. Defendants sold gas on the East Coast through a joint venture, combining their downstream operations. It ended competition between the defendants in the areas of downstream refining and marketing of gasoline.

ii. The defendants also decided to fix their prices in the relevant market areas

iii. Question is whether economically integrated joint venture can agree to price fix

1. There are some price fixing agreements that violate the letter of the Sherman Act, but are legal. For ex. when two companies merge and combine their product lines. See also BMI - When two partners set the price of their goods they are literally price fixing, but not illegally.

2. "The issue with respect to legitimate joint ventures is whether the price fixing is naked (in which case the restraint is illegal) or ancillary (in which case it is not).

3. Must look to see whether the setting of a uniform price is reasonably necessary to further the legitimate aims of the joint venture

iv. Court finds that there was no legitimate reasons why two competing brands, with different customer bases, and different chemical make ups, needed to unify their prices

1. "Our analysis would be different if we confronted a joint venture in which former competitors agreed to jointly research, produce, market, and sell a new product, or a joint venture in which competitors agreed to merge their current product lines into one collective brand. Nor would we necessarily reach the same result if the defendants had independently decided to charge the same
price, or had come forward with persuasive evidence why a single price was important to accomplish the aims of the joint venture."

2. One possible counterargument is that if defendants did not fix profits, one would begin shaving their prices, taking more of the profits derived from the joint venture.

v. Court decided this under a per se analysis, viewing as exceptions the cases Maricopa, NCAA, BMI.

vi. How would the supreme court decide "whether it is per se illegal concerted action under s 1 for an economically integrated joint venture to set the selling price of its own products." On exam? Maybe. Go to Westlaw and print out amicus briefs and what not.

z. Polygram Holdings
   i. Two record companies agreed to jointly distribute a Three Tenors album. Agreed to an advertising moratorium on previous three tenors albums surrounding the release.
   ii. "An agreement between joint venturers to restrin price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement, which would normally be condemned as per se unlawful."
   iii. Polygram advances argument that restrictions enhanced long term profitability of all products, including product in agreement. If one company advertised, the other would simply free ride on their advertising, selling more records as a result.
      1. Court does not buy its argument, holding that it violated FTC s 5 -
      2. Gives example - If General Motors were vigorously to advertise release of new SUV, other manufacturers might benefit, but this does not mean that all manufacturers could conspire to restrict advertising or prices. However differences exist in this case from that example. There is a joint venture here, and it is possible that the success of the joint venture depends on the restrictions.

aa. WHERE DOES AN AGREEMENT EXIST?
bb. Sherman Act S1 is not addressed to individual conduct, no matter how anticompetitive or otherwise reprehensible.
cc. Tacit and Inferred Express Agreements
   i. Three categories of behavior
      1. Express Agreements -
         a. Express agreements are undoubtedly covered by the Sherman Act
         b. Difficulty lies, of course, in deciding how much of what kind of evidence suffices to imply that an express agreement exists although it has not been established by direct evidence
2. Interdependent - decisions made independently of express agreement, but depending on rivals behavior
3. Independent - decisions made w/o regard to rivals behavior
   ii. Whether a court that allows an inference of agreement from parallel behavior has held an express agreement may be inferred from circumstantial evidence or that interdependent behavior may be deemed to be an agreement
   iii. Whether a court insisting that no agreement can be found where the evidence is consistent with independent behavior intends to protect only entirely independent behavior or also interdependent behavior short of express agreement
   iv. Thus, whether the court is asking whether an overt agreement can be implied by circumstantial evidence or whether the observed behavior is tantamount to overt collusion and therefore unlawful

dd. Eastern States Retail, pg 216
   i. Found that retail lumber dealers had agreed that they would not buy from wholesalers who had sold directly to consumers
   ii. Evidence - Dealers circulation among their members of lists of offending wholesalers

ee. Interstate Circuit
   i. Movie theatres in market all started raising prices on movie admission
   ii. Evidence to take "tacit" arrangement to be evidence of an overt agreement
      1. letterhead that included all movie theatres names
      2. no witnesses provided by defendants
      3. Individual meetings between producer and distributor
      4. Uniform change in the way defendants conducted business (most important)
   iii. This is a "wheel and spoke" conspiracy, between distributors and seller
   iv. 

     Court hints that a finding of overt agreement not necessary to collusion --> "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which, we will presently point out, was unreasonable within the meaning of the Sherman Act, and knowing it, all participated in the plan.

   ff. Theatre Enterprises
   i. Court finds there was no agreement to exclude suburban theatre from showing first run cinema
   ii. Fact that there were legitimate business justifications for exclusion may have swung the balance of circumstantial evidence in the defendant's favor
iii. "this court has never held that parallel business behavior conclusively establishes agreement"

iv. "Consious parallelism has not yet read conspiracy out of the Sherman Act entirely"

gg. Look up FTC v Toys R Us, 221 F3d 928, on Westlaw

hh. American Tobacco
   i. Court found agreement
   ii. Evidence solely consisted of smaller tobacco companies following large tobacco company's price hike
   iii. Does this case stand for the proposition that tacit agreements can be illegal?
   iv. Agreement can be found when "the conspirators had a unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement."
   v. Judge Posner, s 1's language is "broad enough to encompass a purely tacit agreement to fix prices, that is, an agreement made without any actual communication among the parties to the agreement." Cf. Other circuits have gone the other way.
   vi. However, what the difference if the same evidence is used to support tacit or express collusion as long as liability is found?

ii. United States v GM (E.D. Mich) - Neither a pricing move by a competitor, a requested price change by a customer or a public announcement of a pricing decision can be twisted into an invitation or signal to conspire

jj. The courts approach unanimity in saying that mere parallelism does not establish the contract, combination or conspiracy required by Sherman Act s 1. Sometimes the formula is that conscious parallelism does not itself establish a violation of s 1, but is a factor "to be weighed", and generally to be weighed heavily." Usually, they say that parallelism accompanied by some other fact supports a jury verdict or that parallelism is insufficient to take the case to the jury in the absence of a satisfactory independent explanation of the uniformity. Plus factors that tend to transform parallelism into conspiracy:
   i. Indications of express collusion: identical sealed bids on a complex product, unexplained period of clearly noncompetitive behavior in a market characterized by intense competition,
   ii. Motivation and acts against self interest
      1. reverse: parallelism loses conspiratorial connotations when each firm's action is independently explained
   iii. Poor economic performance - excessive prices even with declining demand

kk. Burden of proof for agreement
   i. Matsushita (1986) - conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.
ii. Monsanto - "Permitting an agreement to be inferred merely from the existence of complaints from dealers...could deter or penalize perfectly legitimate conduct...There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.

iii. Matsushita - if the factual context renders respondents claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

iv. Matsushita Screen - Alleged conspiracy must make economic sense

v. Monsanto Screen - Evidence must 'tend to exclude' unilateral explanation of conduct

vi. What sort of error are you trying to minimize? Blue - antitrust violation, red = anticompetitive conduct. Purple - what we can and should prosecute.

Monsanto

II. INTRAENTERPRISE CONSPIRACY - Joint action by commonly owned corporations and by single entities in conjunction with agents have been examined under s 1.

mm. Copperweld

i. Court considers whether a parent and its wholly owned subsidiary are capable of conspiring in violation of s1.

ii. No section one violation for coordination within a firm or between a firm and its unincorporated division (obviously).

iii. For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise.
iv. Consumers benefit from competition between parent and subsidiary + efficiencies from consolidated management
v. overrules keifer stewart
vi. What about partially owned subsidiaries?
   1. ND Ga - 51% ownership sufficient for immunization under copperweld
   2. de facto control?
vii. Dissent - question should be "why two corporations that engage in a predatory course of conduct which produces a marketwide restraint on competition and which, as separate legal entities, can easily fit within the language of s1 should be immunized from liability b/c they are controlled by the same godfather."
   1. Intraenterprise conspiracy doctrine fills gap between s1 conspiracy and s2 monopoly
viii. Shouldn't corporations be forced to choose that if they wish single entity treatment under the antitrust laws, they cannot simultaneously insist they are separate for tax or limited liability purposes?
nn. 9th Cir - Copperweld also precludes liability for conspiracy between two subsidiaries wholly owned by a parent corporation
oo. FACILITATING PRACTICES (trade ass'n meetings, etc)
pp. American Column - finding of liability from trade organization data
   i. membership in lumber organization req'd each member to submit:
      1. daily sales and shipping report
      2. Monthly report of production
      3. price list
   ii. Each member received other's information
   iii. "only element lacking in scheme is a definite agreement to production and prices" - but this is supplied by the "disposition of men to follow their most intelligent competitors"
iv. What we have here is the distribution of information, the effect of which allows the firms to coordinate without any express agreement. It also provides mechanism for disciplining a cheater by spreading around price decreases.
v. "Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals"
qq. Maple Flooring Manuf. Assn., pg 249
   i. Similar to american column, but no finding of liability
   ii. Data collected
      1. average costs
      2. freight rates
      3. Summaries of quantity and kind of flooring sold and prices received, and amount of stock on hand
   iii. Note that current prices, as well as other "future" info, was omitted from the reports
iv. It is also important to examine the effect of the information dissemination on price levels. Did they stabilize?

v. Counsel advised association not to discuss future prices

vi. Distinguish American Column
   1. more detailed info
   2. req'd immediate notice of price cuts, which inhibited cheating
   3. Req'd inspections
   4. Imposed sanctions to noncomplying members
   5. **We decide only** that trade associations ...etc. which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption ... and who meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

vii. Basically the court is saying that talking about past transactions is okay, but when you start discussing current or future transactions you can get into trouble.
   1. look to see if info is available to gov’t or general public as a clue.
      Cf Am. Column, however, where court disregarded the fact that the meetings were open to the public

rr. Container Corp
   i. Defendants requested from each other information as to the most recent price charged or quoted whenever it wanted the information. Entered into reciprocal agreement to do this
   ii. Douglas majority (tries to fit the agreement into a per se category via Socony)
      1. market analysis
         a. examines number of producers
         b. barriers to entry
         c. most importantly: what effect did the price information have on price levels
         d. *Since the product is fungible and demand inelastic, the exchange of price data tends toward price uniformity*
   iii. Fortas:
      1. thinks we should apply rule of reason test to price exchanging
   iv. In Gypsum, a later case the court cites Fortas, not Douglas, saying that exchanges of prices do not constitute a per se violation.
v. Five Smiths Thus container corp teaches that the exchange of price information raises antitrust concerns only where the market is characterized by:
   1. a highly concentrated market dominated by a relatively few sellers
   2. a fungible product
   3. competition, primarily based on price
   4. inelasticity of demand

vi. Get Ellis to explain his market spoilage slides that are relevant to this case

ss. Gypsum
   i. Defense tried to use Robinson Patman Act
      1. RPA: Prohibits price discrimination where effect may be substantially to lessen competition or tend to create a monopoly
      2. RPA2: Nothing herein shall prevent a seller from rebutting the prima facie case by showing that his lower price was made in a good faith to meet an equally low price of a competitor.
   ii. This was a criminal case
   iii. Court reversed conviction because there was no evidence of criminal intent, and the court was "unwilling to construe the Sherman Act as mandating a regime of strict liability criminal defenses" as they were unwilling to presume wrongful intent from effect on prices.

tt. BASE POINT PRICING
   i. Steel industry: seller charges the same transportation costs, those from Pittsburgh, regardless of where they are located, thus if seller is located in Chicago, and trasp cost from Pitt to Chi are $10, then they will a $10 "phantom freight" charge
   ii. "freight obsorption" - paying less than actual freight costs, phantom freight is paying more
   iii. Other variations use multiple basing points
   iv. Economic effects
      1. buyers have no incentive to minimize trans cost by purchasing from nearest seller
   v. Analysis of base point pricing, competitive or collusion, pg 263
   vi. Express agreement to use base pt pricing is illegal

uu. FTC v Cement Institute
   i. Punished cheaters by making them an involuntary base point
      1. This way all cement sold by them would have to compete with cement that was the same price as far as transportation costs go
   ii. Court assumes agreement can be inferred from the fact that the entire industry is using basing point pricing
   iii. Need slides for this case
vv. CONCERTED REFUSAL TO DEAL
   i. Eastern States (1914)
      1. Defendants agreement not to trade with any wholesaler who
         sells directly to consumer held unreasonable
   ii. Cement Manuf
      1. Distribution of information on credit of buyers held reasonable
         since it enabled sellers to prevent fraud and they were free to
         act on the information if they chose, or not
ww. Fashion Originators Guild (FOGA)
   i. involved a group boycott of retailers who sell "copied" patterns
   ii. Used a design registration bureau for garments and textile
      1. Court found that the combination was an extragovernmental
         agency "which trenches upon the power of the national
         legislature and violates the statute"
   iii. A violation of Clayton Act Section 3 - it shall be unlawful...to ...make a
      sale or contract for sale of goods on the condition ... that the purchaser
      thereof shall not use or deal in the goods ... of a competitor where the
      effect ... of such condition ... may be to substantially lessen competition
      or tend to create a monopoly in any line of commerce
   iv. Court also finds violation of Sherman Act
      1. narrows outlets to which manufacturers can sell
      2. subjects manuf to boycott
      3. etc...
   v. Note, that making this conduct illegal may reduce output because
      innovation to come up with unique designs is no longer protected
xx. Sears Roebuck
   i. To allow a State by use of its law of unfair competition to prevent the
      copying of an article which represents too slight an advance to be
      patented would be to permit the State to block off from the public
      something which federal law has said belongs to the public.
yy. Klors
   i. Two appliance stores competing next to each other. One entered into
      agreement with manufacturers not to sell their appliances to the other.
   ii. Effects of the boycott
      1. cripples freedom of traders to sell to Klor's
      2. Takes from klor's its freedom to buy appliances in an open
         competitive market
      3. Deprives manufacturers of their freedom to sell to Klors
      4. Interferes with interstate commerce
   iii. Court found that the behavior should not be tolerated merely because
      it makes little difference in the actual economy. (?)
1. Effect on consumer was not really what was important to the court, but instead the monopolistic actions of a big giant to crush a small company

iv. Klor's puts group boycotts into the per se category (later, with Northwest Wholesale, we see that courts start to back away from this categorization)
   1. However, sometimes there seems to be legitimate reasons for boycotts. See FOGA, or para 264 (safety concerns)
   2. Shouldn't then, the court use a RoR approach, distinguishing between those boycotts that serve the public good or legitimate business ends, and those that seek to drive out competitors

zz. Northwest Wholesalers
   i. Per se = 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
   ii. Types of group boycott cases to which court has taken a per se approach
      1. directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need
         a. Cut off access to a supply, facility or market
      2. Boycotting firms represented dominant market position
      3. Practices not justified by plausible arguments
   iii. Case involves a wholesale purchasing cooperative that expelled one of its members, court analyzes the cooperative under a RoR analysis
      1. wholesale cooperative must establish and enforce reasonable rules in order to function effectively
      2. expulsion would not always result in anticompetitive effects
   iv. "Not all concerted refusals to deal should be accorded per se treatment"
   v. When the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition.
      1. This is paradoxical since usually market power is ignored when applying a per se rule.

aaa. Indiana Federation of Dentists
   i. Group of dentist boycotted insurance company's which required submission of patient x-rays along with claim
   ii. adds another element to Northwest Wholesalers per se boycott
      1. "per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor
iii. Court finds that it is not necessary that a finding of increased prices be made, or a finding of market power be made. This calls into question the courts genuineness in applying the rule of reason.

iv. Court also discards the "quality of care" argument by the dentist, citing engineers.
   1. Counter-arg: here it is not the customer of the dental services, but a third party making a decision to require x-rays. There is a discord between the people who are making the choices to use the product and those that are making the decision to pay. Significance?

bbb. IMMUNITY UNDER "INFLUENCING GOV'T ACTION DOCTRINE

ccc. Missouri v NOW
   i. "Using a boycott in a noncompetitive political arena for the purpose of influencing legislation is not proscribed by the Sherman Act"
   ii. Boycott should be non-economic and not undertaken to advance the economic self-interest of participants

ddd. FTC v Superior Court Trial Lawyers Ass'n
   i. Agreement was a refusal to represent indigent criminal defendants because of low rates for appointed counsel
   ii. The boycott would fall in the per se category since it was a naked restraint on price and output
   iii. Defendants offer a number of defenses
      1. Say that prices they are asking for are reasonable.
         a. Court invokes professional enginers
      2. Noerr doctrine - permissible to boycott competitors in order to influence government action (doesn't apply here)
      3. First amendment Rights (Claibourne Hardware)
         a. distinguishes civil rights boycotts from those in the present case, as they seek to provide special economic benefits to the boycotters, not just achieve equal rights with other citizens
      4. O'Brien -

iv. Brennan dissent
   1. wants RoR analysis for "expressive" boycott
   2. takes as evidence that they had great media coverage as evidence the boycott was politically expressive

eee. PATENTS and ANTITRUST
   i. Patent is a government grant of monopoly for 20 years to exclude others from making, using, or selling the invention.
   ii. Trade Secret-
   iii. copyright
   iv. Ratinale for patent system
      1. incentive for innovation due to economic monopoly
2. Disclosure - encourage the full and desirable propagation of knowledge
3. Natural Property claim - inventors have a property right in their ideas
   v. Patents as incentives
      1. patent monopoly is best when granted for inventions that would not otherwise have occurred
   vi. Patent validity - alternative to antitrust litigation is patent validity litigation
   vii. Antitrust remedies to suits involving patents
      1. compulsory licensing with reasonable royalties
      2. patents controlled in some other way
   viii. IP Overview
      1. patents
         a. covered by fed statute
         b. disclosed to patent office
         c. 20 year life
      2. Trade secrets
         a. state law
         b. once discovered secret is lost
         c. Unlimited life as long as not disclosed
         d. Why trade secret?
            i. some trade secrets not patentable (for ex, "obvious to one skilled in the art")
            ii. patent allows others to improve then patent and steal market
      e. fed statute
      f. registered with registrar of copyrights
   3. Remedies for infringement
      a. patent - injunction + damages
      b. Trade secret - damages
      c. copyright - injunction + damages
 ix. Resolving the conflict between IP and antitrust (Antitrust - to promote competition; IP - to prevent competition)
   1. "The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare
   2. Innovation creates new markets for competition. Also, competition spurs innovation.
   3. Justice Douglas; Patent rules are an exception to antitrust laws and the exceptions are to be tightly construed.
   4. Patent monopolies =/= antitrust monopolies. Think of patent as property right, you have right to exclude others from your property, this is not necessarily market power
5. Economic arguments for patents
   a. So patentee can charge a high enough price to recoup cost of IP Development
      i. Ex. Software: Marginal costs very low, but fixed costs very high. No IP would give incentive to others who did not share in fixed costs to market the product and drive down prices.

fff. INTELLECTUAL PROPERTY LICENSING AND SETTLEMENTS
   i. Restrictions in licensing are particularly likely to violate the antitrust laws if the restriction and not the license is the primary purpose of the transaction
   ii. Case law is very limited. Risk of having patent declared invalid is one reason litigation uncommon. However litigation of invalid patents IS good for society because if the patent really is invalid we get the benefits of no patent monopoly. Thus, a settlement agreement secured to avoid an open fight over patent validity may be at least "presumptively" illegal. (Singer - SCt concurrence)

ggg. United States v General Electric
   i. GE licensed patent to make lamps to another firm, provided that firm adhered to prices set by GE
   ii. Court held an exception to price fixing when the product is produced under a patent license
   iii. "The patentee may grant a license to make use and vend articles under the specification of his patent for any royalty or upon any condition the performance of which it is reasonably within the reward which the patentee by the grant of his patent is entitled to secure."
      1. "Price fixing is usually th essence of that which secures proper reward to the patentee"
      2. only limitation is that restrictions must be legal (allows loophole, since isn't price fixing illegal?)
   iv. Reasons to allow this exception
      1. If you can't restrict price in license, firm may not license at all, reducing output
      2. If firm keeps patent to itself it can set the price, so the world is no less worse off than if it licenses the patent
      3. Restricted licesne is less restrictive than refusal to license, which is clearly legal
      4. Some innovations simply improve a product that may be in widespread production
   v. Reasons a firm would choose to license patent
      1. promote wide acceptance of product (IBM v Apple)
      2. Firm lacks manufacuturing capacity to meet immediate demand
      3. Share risk of developing a market
      4. disincentivize competitors from innovating around the patent
5. Utilize existing capital
6. Reduce risk for purchasers, because of multiple suppliers there is less risk of stoppage

vi. Reasons firm would restrict licensing's pricing
   1. Licensee may have lower costs and undercut licensee, thus destabilizing monopoly price.
   2. Or licensee may try to charge monopoly price, cutting down on royalties paid to licensor. Solution: maximum price restrictions OR license to multiple competitors.
   3. ...

vii. Patentee monopolist will set the marginal license fee at their marginal profit so that no matter how many units the other firms moves, the monopolist will be the same or better off

hhh. But does General Electric Survive?
   i. Its application has been limited, but it has not been expressly overruled
   ii. Limitation
      1. Patentees have not been allowed to fix the price of an unpatented product made with a patented component, machine or process
   iii. Limitation: Cross licensing
      1. Cross licensing with territorial restrictions
      2. Patent pool - where everybody puts patents in a pool for communal use. You could run into an Associated Press problem if you exclude other firms
      3. Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for his licensees. It is an exploitation of the patents. (Line Material - Two firms holding patents, one of an original device and the other an improvement requiring license of the original, cross-licensed to each other with a price restriction.)
      4. Most cases involving patent pooling or cross licensing is approached under the Northwest Wholesalers / Rule of Reason analysis, unless the purpose of the cross licensing or patent pooling is intended to cartelize the industry
   iii. Test for resolving conflict between patent and antitrust - Whether the challenged practice contributes more to inventive activity than it costs in terms of lost competition
   jjj. Other restrictions in licensing
      i. Output limitation - ceiling on output serves same function as floor under prices.
1. It is not clear whether these limitations are lawful since there is scant case law
   ii. Territorial limitations - several courts have declared these restrictions permissible

kkk. Why to grant an exclusive v. multiple licenses
   i. Exclusive may induce more investment by licensee
   ii. Exclusive license as masquerade for dividing markets (a per se violation)
   iii. District court held Exclusive licenses illegal if they are an intent to confer a monopoly (analyze under RoR)
   iv. Troublesome areas, pg 350

III. COMPULSORY LICENSING / SUPPRESSION OF PATENT
   i. Why would patentee suppress patent
      1. patentee may not find it profitable to scrap existing machinery to use new process, even though in the long run it might be socially beneficial
      2. IP owner practicing better technology would refuse to license older patents to competitors to keep them further behind in technology
   ii. Courts have not held failure to use IP to be an antitrust offense, some other nations have
   iii. Compulsory licensing
      1. Seems attractive since it can reduce IP system's social costs
      2. But how to set royalties for licensor? Reasonable? See pg 353 for how this is impracticable.
      3. Is there such thing as an unreasonable royalty? Kodak v Imagetech -
         a. Courts are not best able to handle administration of prices, determining what is reasonable
         b. Kodak is entitled to monopoly profits on intellectual property
         c. Requirement that Kodak charge only reasonable profits would detract from Kodak's incentive for innovation
         d. IP holder is entitled to whatever market will bear
         e. Cf. Europe, where courts do determine reasonable royalties
      4. Except as a remedy in an antitrust decision, there is no other compulsory licensing in US
      5. In Europe, compulsory licensing is forced if the product is an "essential facility," defined broadly

mmm. Licenses that exceed the length of the patent
   i. Supreme court has held these illegal
   ii. But why not allow this? You are not really extending life of the patent, only extending the length of the period for which the licensee has to
pay back a loan. For ex. If a patentee will only accept a lump sum as payment for a license to use the patent until expiration, then and the licensee goes and obtains a 25 year loan to pay for the patent, how is this any different than a 25 year licensee agreement? After all, the licensee is simply paying the present value of the 20 years of the patent anyways.

USE RESTRICTION (PATENT)

i. Use restriction is that licensee may only employ IP for certain things
ii. Case law is limited
iii. Use restrictions are also motivated by a desire to price discriminate
iv. General Talking pictures
   1. SCt upheld use restrictions tangentially
   2. Lower courts have upheld use restrictions
v. Lower courts have declared illegal restrictions on subsequent use by a purchaser of a patent product
   1. restriction on use of a purchased metal alloy was declared illegal
   2. Cannot be distinguished from Baldwin

IP Settlements

XIII. Section 2 Conduct - MONOPOLY

a. Requires only one party, unlike the multiple parties required for s 1 violation. No cooperations, only exclusion.
b. MONOPOLIZATION, what constitutes it?
c. Remedies
   i. Dissolve the monopoly by splitting it up into separate entities
   ii. Enjoin the defendant from other monopolistic actions
   iii. deprive monopoloy of "fruits" of its activity
   iv. private treble damages
d. United Shoe approach to Remedy -- it is the duty of the court to prescribe relief which will
   i. terminate the illegal monopoly
   ii. deny to the defendant the fruits of its statutory violation, and
   iii. ensure that there remain no practices likely to result in monopolization in the future
e. Oligopoly compared with single firm monopoly
   i. oligopolies vary greatly in the degree to which they approach monopoly results
   ii. oligoplies may produce more innovation, but may have less efficiencies due to wasted advertising costs
   iii. Oligopolies may exceed the minimum efficient scale by less than monopoly
   iv. Oligopoly, or shared monopoly, has not been held covered as section 2 monopolization
f. Grinnell monopolization test (the modern doctrine)
   i. Monopolization has two elements
1. The possession of monopoly power in the relevant market
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 historical accident.

ii. The central issue in this definition is whether the monopolist is competing on the merits. Requires that monopoly's high market share be due to desirable products or low prices. If competing firms are shown to have better products at same prices, or lower prices and same products, this is evidence that monopolist is not competing on the merits.

g. Alcoa
   i. it is no excuse for monopolizing that the monopoly has not been used to extract more than a fair profit
   ii. It does not follow because Alcoa had a monopoly that it monopolized the market. Monopoly may have been thrust upon it.
      1. Size does not determine guilt
      2. "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry."

iii. Thus, Monopolization = monopoly power + exclusionary act
iv. Monopolization requires intent, but not specific intent, since no monopolist monopolizes unconscious of what he is doing (purposeful conduct)
v. Once the plaintiff shows monopoly power, the burden is on the defendant to prove otherwise.
vi. How might firm become monopoly without monopolization?
    1. Economies of scale make it necessary
    2. Patent
vii. Contradiction in Alcoa analysis - court condemns alcoa for constantly expanding whenever it had opportunity to do so, yet says monopolization does not exist when a company becomes a monopoly do to superior skill, etc. Does a monopoly monopolize when it breaths?

h. Griffith
   i. "the use of monopoly power, however lawully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful"
   ii. Monopolist owned a lot of theatres, some in competitive towns, some not. It was accused of using its monopoly power in the non-competitive towns to acquire exclusive licenses to show movies in the competitive towns.
      1. Of course it is questionable whether monopolist had market power at all, considering the distributor wants to maximize viewers, not towns.
i. Another way firms have been held to monopolize is by using monopoly profits in one market to fund below-cost prices in a competitive market, thereby driving out competitors. However this theory is flawed. That is, if it is profitable to do this, why does a firm simply borrow capital to fund the lower prices?

j. United Show Machinery (Fsupp)
   i. Defendant leased shoe making machines
   ii. Their leases created barriers to entry by competitors
       1. 10 year lease makes it hard to dispose a United machine
       2. Defendant gives more favorable terms to a buyer who replaces a united machine with a united machine
       3. Free service has the effect of forcing competitors to offer free service if they want to enter the market
   iii. Three different approaches to Section 2:
       1. Pre-Alcoa - an enterprize has monopolized if it has acquired or maintained a power to exclude others as a result of using an unreasonable restraint of trade in violation of section 1
       2. Griffith: violate section 2 if (a) have the power to exclude competition and (b) have or have purpose to exercise that power
       3. Alcoa: Monopoly monopolizes whenever it breathes unless it can show that it owes monopoly to superior skill, products or natural advantages (like accessability to raw materials), economic or technological efficiency, low margins of profit, liceneses (like patents)
   iv. Court likens exclusionary clauses in contract to "unnatural barriers" to entry - "the law does not allow an enterprise that maintains control of a market through practices not economically inevitable"
   v. How are long-term leases exclusionary?
       1. (1)If you have a short term lease, a rival can offer their competing product at a lower price than a renewal lease. (2)If you sell out right, the competitor can offer a lower price that would give incentive for buyer to sell their old equipment. (3)But if you have a long term lease, the buyer would have to breach their contract to acquire competitors machinery.
       2. Note: for (2) Every time a potential competitor displaces a buyer using a monopolist product (assuming the machines are then sold to a rival shoe manufacturer), they are losing a future sale. Also, what price are you going to offer? if less than what shoe manufacturers can buy a used machine for, then who would buy a used monopolist machine when they could get one from the rival?
   vi. How are early cancellation charges exclusionary?
       1. cancellation charges may be necessary to recover transaction costs
2. However, if you are a monopoly, your transaction costs are much lower because marketing costs are lower. United was using cancellation clauses to exclude competitors by only charging them if the shoe makers were switching to competitors machines, not if they were simply going to stop using the machine.

vii. Bundled service issue (capital with labor/service)
   1. Don't automobiles, computer co's do this all the time?

viii. Price discrimination issue
   1. In order to get all the consumer welfare from its sales, Alcoa was basing the lease price on machine usage rates
   2. hard to remedy since you would have to judicially implement what rates Alcoa could charge OR order no price discrimination, a practice that almost all firms do
      a. There are different demand curves for different products (or uses of the same machine)
   3. Legitimate justification to price discrimination via lease, versus selling outright
      a. If sell outright, the low value consumer will engage in arbitrage and resell high to the high value consumer, thereby stealing consumer welfare from the producer. Ultimately this will drive up prices making both the producer and low value consumers worse off, and the high value consumer is better off.

k. What are barriers to Entry? (two theories)
   i. Harvard school: some factor in a market that allows incumbent firms to earn monopoly profits without attracting new entry
   ii. Chicago School - cost of production that must be borne by firms seeking to enter an industry, but is not borne by firms already in the industry

l. Why shouldn't we punish monopoly for the sake of punishing monopoly, it is harmful to society, after all?
   i. We do see the court bordering on this approach in Alcoa, United Shoe, which were arguably not actually monopolizing, although the court says otherwise, but fails to demonstrate

m. Microsoft
   i. Charges
      1. maintained monopoly in OS market in violation of s 2 - illegally maintained barrier to entry in PC OS mkt
      2. Attempted to gain monopoly in violation of s 2 --> entered exclusionary agreements with ISPs and PC makers, tried to cut off consumer access to Netscape, subverted Java's effort to develop cross-platform functionality
      3. illegally tied Windows and IE in violation of s 1
a. But what exactly is an "operating system"

ii. Java and Netscape APIs were a threat to Microsoft's OS monopoly since programmers could write end user applications for these APIs and as long as a virtual machine was developed the for an OS that program could run on it w/o modification

iii. Networking effect - the utility that a user derives from consumption of the good increases with the number of other agents consuming the good
   1. MS has high average costs and low variable costs due to large R&D expenditures, thus networking effect creates much profit
   2. Competition in industries characterized by the network effect is "for the field rather than within the field"

iv. Think about how MS's extremely low marginal costs might affect theories for predatory pricing

v. What is an "exclusionary act" according to monopolization principles? (this looks like a RoR analysis)
   1. Monopolist's act must have "anticompative effect." That is, it must harm the competitive process and thereby harm consumers. Harm to competitors does not suffice AND
   2. The plaintiff, on whom the burden of proof rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect
   3. Third, if a plaintiff establishes a prima facie case, the monopolist may proffer a "procompetitive justification"
   4. Then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit
   5. Areeda and Turner - Exclusionary Conduct is conduct other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or mainint monopoly power

vi. Under the above test, the focus is upon the effect of the conduct, not upon the intent behind it. Intent only relevant to understand effect

vii. Concerning MS justification for license restrictions --> "intellectual property rights do not confer a privlege to violate the antitrust laws"

viii. Integration of IE and windows
   1. Monopolist does not violate the antitrust laws simply by developing a product that is incompatible with its rivals
   2. Judicial deference to product innovation, however, does not mean that a monopolist's product design decisions are per se lawful

ix. Causation issue
   1. To require that s 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's
anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action

2. We may infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well when it is aimed at producers of established substitutes

3. The question is
   a. whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and
   b. Whether java and navigator reasonably constituted nascent threats at the time microsoft engaged in the anticompetitive conduct at issue

x. Possible Remedies - difficult because there was no original "fragmented" industry, like united shoe
   1. Divide Microsoft into OS/APPs/MiddleWare
      a. barred from engaging in joint venture, exclusive deals, licensing each other's products on terms not equally available to others
      b. Executives could retain interest in only one company
      c. Conduct Restrictions:
         i. Binding middleware without separation
         ii. discriminating among "allies" and "rivals" of MS
         iii. Forcing OEMs to take bundled MS products as condition of licensing windows
         iv. Compelling OEMs to promote MS products
   2. Baby bills
   3. EC Commission Remedy -
      a. interoperability
         i. Micfosoft must disclose interface documentation
         ii. Some source code
      b. Tying
         i. Must not tie products like WMP and Windows
      c. Enforcement
         i. committee will oversee this decision

n.  VERTICAL INTEGRATION AND MONOPOLY
   i. A firm may choose to vertically integrate so that it can price discriminate raw materials. It will make the low value goods itself (pots and pans), then sell the raw materials to the high value producers (airplane manufacturers).
   ii. Vertical integration in order to prevent a monopsonist from exploiting the secondary market
   iii. overall, vertical integration may les innovation and competitive stimulus at integrated level
Kodak

Kodak introduced a new camera and new color film. The new film was incompatible with other cameras and equipment.

Court held "an integrated business does not offend the Sherman Act whenever on of its departments benefits from association with a division possessing a monopoly in its own market.

Court based its reasoning on intellectual property concerns.

Aspen (exception to right to refuse to deal)

Ski slope owner discontinued its joint arrangement with its smaller rival.

In the absence of any purpose to create or maintain a monopoly, Sherman does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

Ski Co's decision changed the character of the market.

Ski Co was unable to offer any business justifications for its conduct.

1. it also forgoed daily ticket sales, short run profits, in order to exclude its competitor, allegedly hoping to drive them out of business.

2. It changed the character and pattern of distribution that had existed for several years.

The jury may well have concluded that the defendant elected to forgo short run benefits because it was more interested in reducing competition over the long run by harming its smaller competitor.

How does this case get interpreted?

1. Areeda: "Thus, exclusionary comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

2. The rule established by Aspen and Kodak -- a firm with monopoly power violates Sherman Act s 2 if it excludes rivals from the monopolized market by restricting a complementary or collaborative relationship without an adequate business justification. The rule does not require proof of harm to competition; harm is inferred if the dominant firm exploits the complementary or collaborative relationship to exclude and the legitimate bus justification is insufficient.

3. There appears to be an emerging consensus, that anticompetitive conduct is conduct that serves no legitimate purpose, and is undertaken in order to exclude or weaken competitors.

This case looks like an essential facilities case.

Essential Facilities doctrine -
i. acts to preclude the dominant firm in an industry from refusing to grant competitors access to its essential facilities. See Aspen, Associated Press, Terminal Railroad, Otter Tail

ii. One test
   1. control of the essential facility by a monopolist
   2. a competitors inability practically or reasonably to duplicate the essential facility
   3. denial or the use of the facility
   4. feasibility of providing the facility

iii. Verizon - essential facilities claims should be denied where a state or federal agency has effective power to compel sharing...This is because there is an entity already, instead of the courts, that can decide how to share services

iv. Verizon establishes that the essential facilities doctrine is on "life support"
   1. Verizon - "We have never recognized such a doctrine, and we find no need either to recognize or repudiate it here"
   2. No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by antitrust law when compulsory access requires the court to assume the day to day controls of a regulatory agency

r. Verizon
   i. In 1982 AT&T agreed to an antitrust settlement which broke up the Bell system into baby bells.
   ii. The 1996 Telecommunications Act required the incumbent local exchange carrier (baby bills) to provide competitors with interconnection to its network
   iii. The first issue is whether violation of the 1996 Act can give rise to an antitrust claim
      1. "Indeed a detailed regulatory scheme such as that created by the 1996 act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity"
      2. The TCA itself was put into place to conduce competition
      3. However, Congress put a savings clause in the 1996 act which says it shall not be interpreted to impair antitrust claims
      4. Conversely, the act does not create any new claims
   iv. Monopolization claim
      1. "Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers."
2. Firms also have a right to refuse to deal. However, under certain circumstances, a refusal to deal with rivals can violate s 2. Exceptions:
   a. Aspen (outer boundary)
3. Distinguishes this case from Aspen
   a. Aspen defendant turned down proposal to sell at retail price
   b. Aspen - established course of dealing
   c. Verizon - the services allegedly withheld are not otherwise marketed or available to the public (services exist deep within the bowels of Verizon)
4. Court does not believe this case should lead to new exception
   a. There is already a regulatory structure in place - "regulation significantly diminishes the likelihood of significant major antitrust harm"
   b. No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by antitrust law when compulsory access requires the court to assume the day to day controls of a regulatory agency

s. PREDATORY PRICING
t. Barry Wright (1st Cir)
i. Plaintiff argues that snubber prices given defendant were 'unreasonably low' so as to be predatory
ii. "A legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risks interference with one of the Sherman Act's most basic objectives: the low price levels that one would find in a well functioning competitive marketplace"
iii. But when are prices predatory, therefore hurting consumers in the long run?
   1. First, when would a firm predatorily price? If it knows:
      a. it can cut prices deeply enough to outlast and drive away all competitors
      b. and that it can then raise prices high enough to recoup lost profits+ before new competitors can enter the market
   2. Problematic, is that firms are rarely confident that they will be able to recoup their "investment" after the predatory pricing
   3. Ninth Circuit Rule (bad rule)
      a. p < avc --> presumption predatory
      b. p > avc, but < atc --> plaintiff must show by preponderance of evidence that defendant's pricing is exclusionary
      c. p > atc --> plaintiff must show clear and convincing evidence that conduct is exclusionary
4. Court does not adopt Ninth Circuit rule
   a. price cut where price exceeds total cost moves price in "right" direction
   b. does not include limit pricing (the practice of not pricing too high, for fear of attracting new competition)
   c. Impossible to discern whether price cut is meant to displace rival or to better compete --> lead to many claims asserted against innocent firms

iv. Exceptions to prices that would test positive as predatory
   1. promotional
   2. free sample
   3. firm expects costs to fall as sales increase

v. Court finds that intent is not an issue in predatory pricing since intent is always to increase their bottom line, of which harming competitors might be a goal. Cf Verizon, what role did intent play in the courts reasoning?

vi. This is another case where you would have many false positives if you implemented too vague a predatory price rule, see the graphic above

u. Brooke Group (Supreme Court)
   i. This is a Robinson Patman Act case - It shall be unlawful for any person engaged in commerce,... to discriminate in price between different purchasers of commodities of like grade and quality, ...where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them
      1. RP Act no longer Enforced by FTC or DOJ
      2. enacted on behalf of mon & pop grocery stores
   ii. Utah Pie (an antitrust zombie)
      1. Court found violation of RP Act due to rapidly declining price structure in the frozen pie market
   iii. It has become evident that "primary line competitive" injury under the RP Act is of the same general character as the injury inflicted by the predatory pricing schemes actionable under s 2 of the Sherman Act
   iv. Plaintiff's theory in this case is that Defendant engaged in predatory pricing on its economy cigarettes to force the plaintiff to raise its prices on its branded line in order to cover for losses on its economy line, thus restoring a greater industry margin to branded cigarettes
   v. Two prequisites to recovery for claim alleging either Sherman act predatory pricing OR R-P primary line price discrimination:
1. Plaintiff must prove that rival's low prices are below an appropriate measure of its rival's costs to establish competitive injury
   a. What measure? Ct uses AVC...
2. Demonstration that the competitor had a reasonable prospect (RP) or dangerous probability (Sherman) of recouping its investment in below-cost prices.
   a. unsuccessful predation is a boon to consumers --> thus, for recoupment to occur, below cost pricing must drive rival firms out of the market (or get them to raise prices back to supracompetitive levels in the case of disciplining a cheater)
   b. The inquiry is whether, given the aggregate losses caused by the below cost pricing, the intended target would likely succumb
   c. tacit coordination more difficult than formal cartel arrangement
vi. Plaintiff could show defendant had dangerous probability by showing
   1. generic cigarette output or price information indicated that oligopolistic price coordination in fact produced supracompetitive prices in the generic segment
   2. Alleged scheme would have likely brought about oligopoly pricing
vii. An act of pure malice from one competitor to another is not by itself evidence of an antitrust violation
v. AMR (10th Cir)
   i. Major airline would match Low cost carrier prices and add capacity until the LCC left the hub, then it would raise fares back to original price
      1. They wanted to acquire a reputation for predation to deter future LCC's from entering market
   ii. Chicago School --> predatory pricing is bullshit
      1. Post-chicago - predatory pricing not bullshit --> not only plausible, but profitable in multimarket context, where predation can occur in one market and recoupment can occur rapidly in others
   iii. Revisits the question of how measure costs for the first step of the Brooke Grp test
      1. Marginal cost is optimum measure, but impossible to measure
      2. Average variable costs is thus the best proxy for marginal cost
      3. Sole reliance on AVC may obscure the nature of a particular predatory scheme...
   iv. Court refuses to include opportunity costs in predatory pricing analysis
1. If a manufacturer sells 1M computers at $1000 each, and it order to sell the 1,000,001th computer, it must lower its price to $999, shouldn't the marginal cost include the $1M revenue loss?

2. In AMR, the tickets purchased for new capacity added by American may exceed costs for flight, but not if you include the profits possible if using capacity in different market 

v. Court left out that when American added capacity to its flights, it was not only lowering the price, but increasing the quality of its products

w. MONOPOLY POWER

i. Since market power is derived from market share, market definition is critical to analysis.

ii. Microsoft Court definition of monopoly power

1. Firm has in fact profitable raised price substantially above competitive levels 

2. possession of a dominant share of a relevant market that is protected by entry barriers 

iii. Grinnell monopolization test requires a substantial degree of market power

iv. Market power does not require you be sole supplier of product, only the power to control prices or exclude competition 

1. A dominant firm with 90% may control market, but a firm with 100% may not if customers are readily satisfied by substitutes.

v. Need a substantial degree of market power

vi. Market power is measured by the extent to which price profitable can be elevated above the competitive level (which is equal to cost) 

1. Ability to charge 50% or more than the competitive price is generally understood to show market power

vii. However, measuring market power directly is difficult because relevant data is not available. 

1. Clear evidence of a substantial divergence between price and cost does not merely suggest market power, it is the very definition of market power. 

2. But surrogates are required when such evidence is not available.

viii. Surrogates

1. power inferred from conduct - United Shoe would not sell machines b/c it felt 'protected'

2. Buyer responsiveness (firm elasticity) 

   a. the more massive is buyer response to small changes in price, the less a firms power, and vice versa 

   b. Depends upon attractiveness of alternatives available to buyers 

      i. To do without 

      ii. suppliers of same product in same vicinity 

      iii. potential suppliers, who will export at higher price
iv. new entrants
v. Substitute products

3. Expansion capability of other firms
   a. If other firms are to limit a firm's market power, they must be able to expand their production to meet demand when another firm reduces its output and raises price

4. Share of the Relevant Market (Conventional surrogate)
   a. Market definition of the relevant product --> including only those suppliers (of the same or related product, in the same or related geographic area), whose existence significantly restraints the defendant's power
   b. Divide sales volume of defendant firm by the dollar amount in sales of this market
   c. Can be misleading (firm has 100% of canoe market, but only 10% of pleasure boat market)
   d. more than 90% is enough, and 50% may be insufficient
   e. Examles
      i. Alcoa - 90%
      ii. Grinnell 87%
      iii. Kodak 80%
      iv. Cellophane 75%
      v. Microsoft - 95%

ix. Product Market Definition
   1. Different brands - If a defendant would have to sacrifice a substantial portion of its sales for a slight increase in price, then the market is not limited to its product brand alone
   2. Different products (physically different)
      a. can be good or even perfect substitutes
      b. Trucks and barges (good substitutes) vs. wine and milk (not good substitutes)
   3. Cross elasticity v elasticity
      a. Cross elasticity - refers to the rate at which consumers change their consumption of one product in response to a price change for another
      b. More important, is elasticity of demand faced by defendant, which may include effects by several cross-elasticities.
      c. Market power of defendant in relevant market may depend on the makeup of the cross elasticities (defendant with 50% share in market including one strong substitute may have more power than defendant holding 90% market share in market that does not include dozens of weak substitutes)
      d. Cellophane Fallacy -
The Cellophane Fallacy: [T]he prevailing price for cellophane was arguably supra-competitive and at that price consumers regarded a number of other flexible wrapping materials as good substitutes for cellophane. If consumers regarded these other products as good substitutes for cellophane at the prevailing, supra-competitive prices, then they probably would not have regarded them as good substitutes if cellophane were priced competitively. By charging a supra-competitive price, then, du Pont (the producer of cellophane) had already exercised most or all of its market power, i.e., it had raised the price of cellophane until other flexible wrapping materials were regarded as good substitutes.

e. Thus, if the product in question is already being supplied by a monopolist, and a monopoly price is being charged for it, then by definition no further price increase will be profitable, although a product might indeed have been defined as a market if a lower price had been taking as the starting point for analysis. Implementing the SSNIP test from the current monopoly price will lead us to define the relevant antitrust market too widely, and we will incorrectly conclude that a monopolist has no market power. The solution to this of course is to take the "competitive" market price as the starting point.

4. Merger Guidelines - SSNIP test - "the agency will delineate the product market to be a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products (monopolist) likely would impose at least a small but significant and nontransitory increase in price".

x. Geographic Market definition
   1. Include local firms
   2. Include actual imported items
   3. Perhaps include potential imports
   4. Including imports may understate defendant's market power, since their price may include high transportation costs, and would not otherwise be sold if the defendant was not extracting monopoly premiums. Thus, pay attention to transportation costs, if high, do not include those firms within the relevant market.

5. See Brown Shoe, pg 689
   a. "Although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area.

x. Alcoa -
   i. How many percent (Alcoa)?
      1. 80-90% enough to constitute a monopoly
      2. 60-64% is doubtful
      3. 33% is not enough
   ii. Court decides not to include "secondary ignot" in the market
1. Secondary ignot presents a "ceiling" over virgin since it is nearly perfectly substitutable and its price will always depend upon the expense of scavenging and reconditioning.

2. However, since secondary was once virgin, Alcoa must have known this, and accounted for its effect when the future secondary was in its control.

iii. But why limit the market to aluminum? Based on cross-elasticity... compare substitutability of secondary with wood.

iv. Imports
   1. Suppose Alcoa is charging 20 cents per pound and it has 90% market share. The remaining 10 percent is supplied by foreign imports, whose taxes and transportation costs come to 1 cent per pound. If Alcoa is making a profit of .25 cents per pound, what does that tell us?

y. See staples for good summary of functional interchangeability.

z. Cellophane
   i. Deals with cross-elasticity in the flexible wrapping materials market.
   ii. Test for Cross elasticity? "Commodities reasonably interchangable by consumers for the same purpose
      1. "if a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them, and that the products compete in the same market"
      2. We conclude that cellophane's interchangeability with other materials mentioned suffices to make it part of this flexible packaging material market.
   iii. But BEWARE, the Cellophane Fallacy! --> cross elasticity of demand should only be an important factor in determining monopoly if you can determine the competitive price for the good.

aa. Microsoft
   i. "Monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers."
      1. entry barriers are factors that prevent new rivals from timely responding to an increase above the competitive level.
   ii. Court excludes MacOs and PalmOS from relevant market, as well as middleware (the court focuses on the 'reasonably interchangable to consumers' language.
      1. There are too many switching costs
         a. Cost of acquiring new hardware
         b. effort involved in learning new system
         c. transferring files to new format
2. However, isn't the OS world idiosyncratic in that there really can be only one product in a relevant market? Thus, we should include other products as equity.

iii. Court finds MS has 95% share, but "because of the possibility of competition from new entrants, looking to current market share alone can be misleading"
   1. Must analyze barriers to entry
   2. Applications barrier to entry
      a. most consumers prefer operating systems for which a large number of applications have already been written
      b. most developers prefer to write for OS that already have substantial consumer base

bb. ATTEMPT TO MONOPOLIZE
   i. Spectrum Sports
      1. Elements of attempt to monopolize
         a. specific intent to monopolize the market
            i. unfair or predatory tactics... something more than an intent to compete vigorously
         b. anticompetitive conduct in furtherance of attempt
         c. dangerous probability that the firm will succeed in the attempt, must consider:
            i. the relevant market, and
            ii. the defendant's ability to lessen or destroy competition in that market (market power?)

ii. M & M Medical Supplies (4th Circuit)
   1. Market share is relevant, but its relevance is tempered by evidence of the other two elements of the claim. Compelling evidence of an intent to monopolize or of anticompetitive conduct reduces the level of market share that need be shown. Conversely, weak evidence of the other two elements requires a showing of significant market share.
   2. Claims <30% mkt share should be presumptively rejective
   3. Claims 30-50% should usually be rejected, except when conduct is very likely to achieve monopoly
   4. claims > 50% should be treated as attempts at monopolization when the other elements are satisfied

iii. American Airlines (Circuit Ct)
   1. CEO of one airline solicited a CEO of another to raise their rates. Other CEO taped conversation and turned over to feds.
   2. The court found attempted monopolization. Adding that no evidence of an actual agreement between the two parties was necessary.
   3. Note: wording of section 1 does provide there must be an agreement -- no attempted conspiracy or combination
iv. It is unlikely there will ever be a case based on a section two "conspiracy to monopolize" theory - there will almost always be, instead, a violation of section 1 contract and restraint of trade - "you cant have one without the other"

XIV. VERTICAL RERAINTS
a. RESTRICTED DISTRIBUTION - Vertical Price Fixing
   i. Price setting, price ceilings and price floors (resale price maintenance, RPM)
   ii. Price ceilings
      1. In order to increase sales, a manufacturer may try to stop dealers from charging add'l mark ups through a price ceiling
         a. If this actually works, then consumers benefits --> has led courts, in recent times, to analyze under RoR
      2. Khan - Price ceilings come under RoR
         a. Abandons the per se rule for maximum retail prices
         b. Otherwise a dealer could exploit the products monopoly position and extract more profit, but reducing overall output and profit for the manufacturer
         c. Without price maximums, manufacturers will vertically integrate forward
         d. Court addresses fear that price maximums can be used to mask the objective, price minimums
            i. These concerns can be properly addressed under RoR
   iii. RPM
      1. A manufacturer may be able to increase quality of purchase distribution by guaranteeing a high profit margin to dealers thru RPM
         a. May be more apt to steer customers to one product over another
      2. Without RPM, free riding could limit dealer efforts
         a. If you have need for product differentiation, such as with sophisticated products, RPM may be the only way a dealer will spend the additional marketing efforts
      3. RPM may provide better market penetration
   iv. Justifications for RPM
      1. price increases through RPM could be viewed as equal to the additional service levels gained
      2. Why should courts care how the transaction between a manufacturer and consumer takes place? For example, under per se RPM, Dell can directly set the price of a computer, HP cannot.
      3. DOJ does not like Dr. Miles, per se RPM. They think it provides unfair liability for manufacturers from distributors.
Reasons against RPM

1. tool for tacit coordination. Under RPM a manufacturer has less reason to cut wholesale prices because dealers cannot pass on the price cut to consumers.

Dr. Miles (1911)

1. Holds RPM per se illegal (vertical price restrictions same as horizontal among dealers)

GE

1. Allowed a consignor to set a retail price minimum for their agent

Simpson - confined GE to its facts (agent’s bore risk and GE had patented process)

i. found RPM in consignment unlawful
ii. but see Colgate

Sylvania calls into question the per se legality of agency restrictions — it calls Schwinn’s distinctions between sale and nonsale transactions irrelevant, then analyzes vertical restrictions under the rule of Reason.

The Colgate Doctrine

i. Colgate doctrine - *In the absence of any purpose to create or maintain a monopoly, the Sherman act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal, and, of course, he may announce in advance the circumstances under which he will refuse to sell*

ii. Parke Davis (guts Colgate - found RPM illegal)

1. Parke Davis announced its continuing policy to sell only to wholesalers and retailers who maintained the resale prices
2. However,
   a. The entire policy was tainted when Parke Davis used it as a vehicle to gain the wholesaler’s participation in a program to get retailers to adhere to RPM.
   b. PD used cooperation of one dealer to induce others
   c. Did not cut off offending dealers, but bargained with them, seeking promises to adhere to RPM
   d. PD used wholesalers to enforce RPM scheme (agreement?)
3. Court had to struggle to find agreement. But did agreement really even matter to the court? It stated that economic effect was the same whether agreement existed or not.

iii. Monsanto (SCt, breathes new life into Colgate)

1. Distributor sued Monsanto after it dropped it as a distributor. Distributor claimed it was because its prices were too low. There was evidence of prior complaints by other dealers about Distributor’s low prices.
2. Since section 1 requires an agreement --> "Under Colgate, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply"

3. Non price restrictions are judged by RoR, whereas vertical agreements to set prices are per se illegal

4. The economic effect of all of the conduct described above -- unilateral and concerted vertical price setting, agreements on price and nonprice restrictions - is in many, but not all cases, similar or identical.
   a. constant communication about prices between vertically integrated parties does not necessarily imply concerted price setting activity

5. Plaintiff must carry the burden of proving vertical price fixing agreement
   a. There must be evidence that tends to exclude the possibility that a manufacturer and nonterminated distributors were acting independently.
   b. This burden shift evidences the courts increasing skepticism towards finding vertical price restraints unlawful
   c. Complaints about price-cutting distributors from other distributors is not enough, by itself, to infer concerted action
      i. complaints are natural, especially where manufacturer has imposed a set of costly nonprice restrictions

6. Solicitor General by amici suggested court overturn per se rule on RPM

7. Ellis: In reality, nonprice restrictions can be more restrictive than RPM.

iv. Business Electronics
   1. "We have recognized that the scope of per se illegality should be narrow in the context of vertical restraints"
   2. Business Electronics Corp dropped a price cutter after another dealer complained
   3. Creates a Rule of Reason presumption with vertical restraints
   4. Interbrand competition is the primary concern
   5. "There has been no showing here that an agreement between a manufacturer and a dealer to terminate a "price cutter'' without further agreement on the price or price levels to be charged by the reamaint dealer, almost always tend to restrict competition and reduce output.
   6. Business Electronics seems to obliterate the per se rule for vertical price restraints --> "All vertical restraints, including
territory arrangements, have potential to allow dealers to increase prices"

7. When conducting RoR analysis of nonprice restraint, make sure to point out factors that could justify the restraint, including:
   a. free riding
   b. profit margin to provide better services
   c. efficiencies in distribution

8. "In sum, economic analysis supports the view, that a vertical restraint is not per se illegal unless it includes some agreement on price or price levels.

c. RESTRICTED DISTRIBUTION - Sole Outlets; Territorial and Customer Limitation
   i. Why use independent multi-product retailer instead of a vertically integrated distributor?
      1. economies of scale - shared overhead cost for multiple products
      2. Economies of scope - customer comes in because they know they can get multiple products
      3. Positive externalities from customers who buy items they might note have thought they were going to
   ii. Reasons dealer territorial restrictions might be desirable
      1. less confusion (two dealers trying to sell to the same customer)
      2. encourages investment in marketing and reduces free riding
      3. Price discrimination (may be pro or anticompetitive, depending on whether the overall price would increase or decrease if the territorial restriction were absent)
   iii. Customer Limitations
      1. Manufacturer may want to confine wholesaler distribution to "authorized" retailers to avoid goodwill loss
      2. Manufacturer may want to allocate different types of customers to different dealers --> limit competition, price discrimination, or to achieve efficient specialization.
      3. Reserving customers to manufacturer --> my be more profitable to sell directly to bulk customers
   iv. Packard (DC Cir) (Sole Outlets)
      1. Auto dealer requested to be made sole area dealer of defendant's cars. Defendant subsequently terminated its relationship with other area dealers.
      2. Court held this not s 1 violation --> "When an exclusive dealership is not part and parcel of a scheme to monopolize and effective competition exists at both the buyer and seller levels, the arrangement is...per se legal."
   v. Sylvania (location restriction - required franchises to sell televisions only from location at which franchise was located)
1. The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition.
   a. Intrabrand competition is competition between distributors, etc.

2. The Schwinn court did not distinguish among challenged restriction on the basis of their individual potential for intrabrand harm or interbrand benefit, only categorized nonsale transactions as RoR, and sale transaction as per se illegal.
   a. Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.
   b. Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers.

3. Per se rule stated in Schwinn must be overruled
   a. Under Northern Pacific, some vertical restrictions may still be per se illegal.
   b. When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rOr.

4. Economic theory dictates that the more competitive retailers are, the more monopoly profits a manufacturer can achieve, since dealers are reducing output by extracting monopoly profits of their own. Thus, might we assume that vertical restrictions serve some other, perhaps legitimate, purpose besides achieving manufacturer monopoly.

vi. Schwinn (SCt, overruled)
   1. Each distributor was restricted to sell only within its exclusive territory and only to franchised retailers (franchisees acted as consignees).
   2. Found territorial and customer restrictions per se illegal.
   3. However when there is an agency relationship, like a salesman, then the relationship is governed by the rule of reason.
   4. Why would Schwinn use dealers as exclusive outlet
      a. Build brand cache
      b. Extract higher prices
      c. Greater value from service, greater perceived quality.

d. RESTRICTED DISTRIBUTION - Agency and Similar Relationship
   i. A manufacturer restraint placed on agents to sell only to particular persons or at particular prices can be understood as necessary and ancillary to the main lawful purpose of the agency relationship.

e. TYING ARRANGEMENTS (Clayton Act s 3)
i. The manufacturer ties the sale of the tying product (can closing machine) to the tied product (cans).

ii. Business reasons for tying (legitimate and illegitimate)

1. Monopoly in the tied product - however a monopolists will extract the same overall profits regardless of whether they have one or two monopolies. However this tying still might dampen innovation and raise barrier of entry to tied product entrants.
   a. However, if a purchaser MUST have an accompanying product for the tying product, a competing producer of the tied product may steal some of the monopoly profits. Thus distinguish from a firm that sells a one to many relationship product. What are the differences in analysis?

2. More efficient pricing of tying product, see page 590

3. Price discrimination
   a. sell a product for which you have market power tied with another product (like staples). Then charge a higher than competitive price on the tied product to exact a proportional "royalty" from the high and low value consumers.
   b. Metering - higher costs for heavy users and lower costs for light users
   c. If monopolists sells at single price then low value users will engage in arbitrage
   d. By tying a product to another a monopolist of the tying product can
      i. reduce/eliminate consumer surplus
      ii. eliminate welfare loss
      iii. increase profits
      iv. prevent arbitrage
      v. foreclose other sellers of tied product, thereby monopolizing that as well
         1. Or, alternatively, a monopolist may license from the competitors to produce its tied product

4. Diguising price

5. Cost savings
   a. licensing patents as package might save administrative costs

6. Quality control or improvement

iii. Why might we object to tying strategy

1. extends patent in tying product beyond its scope
2. coerces buyer to limit potentially better tied product substitutes
3. barriers to entry
4. dampen innovation
5. uses dominance in one market to achieve dominance in another?

iv. Patent tying cases
   1. Motion Picture (1917)
      a. Patentee licensed movie projector on basis that it be used only to show certain films --> "held an unlawful use of the patent since the patentee derived his profit not from the patent but from unpatented supplies"
   2. Court has later held unlawful "every use of a patent as a means of obtaining a limited monopoly on an unpatented material"
   3. Note these cases are under patent, and not antitrust, law.

v. Mandatory package licensing of patents
   1. Reasons
      a. package transactions for several patents reduce transaction costs
      b. patentee no longer has to worry about detecting the unlicensed use of a single patent
      c. value of a package of patents may be more readily ascertainable than the value of each patent individually
      d. a patentee can force licensees to accept less valuable patents by packaging them w/ more valuable ones
      e. licensees might be discouraged from litigating the validity of any single patent because the same price must be paid for all as for one
   2. Ordinarily refusal to license a patent except as part of a package is unlawful. But see BMI
      a. Exception, two patents that are "blocking", pg 605
      b. Identifying lawful or unlawful package, pg 606

vi. International Salt
   1. Plaintiff alleged to violate Sherman s 1 and Clayton s 3
   2. Defendant owned patent to salt machines, the "saltomat" - tied purchase of salt to these machines
   3. It is unreasonable, per se, to foreclose competitors from any substantial market (FOGA)
   4. Thus, foreclosing competitors dealing in salt was per se illegal
   5. Defendant contends that since it has obligation to repair machines, it must assure quality of salt
      a. This is something that could be worked out without a restraint of trade. Such as telling buyer what type of salt has to use.
      b. If others cannot produce salt to reasonable specifications to machine use it is another problem...

vii. Northern Pacific
   1. Defendant required leasees of its land to ship all commodities over its lines
2. **Note: the following test is under the Sherman Act**

3. Tying arrangements are per se unlawful whenever:
   a. a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product
   b. And a "not insubstantial" amount of interstate commerce is affected
   c. No need for monopoly power

4. Does not matter that product is not patent (as it was in int'l salt)

viii. **US v Loews**

1. Requisite economic power for per se violation presumed when product is patented or copyrighted
2. Addresses "package" deals
   a. "only non cost justified price differentials between individual films and package price are prohibited"
   b. Do these justified costs equal individual markups for increased transaction costs?

ix. **Jefferson Parish**

1. 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
2. Seller must have 'market power' to force purchaser
3. Per se condemnation is only appropriate if the existence of forcing is probable
   a. As a threshold matter there must be a substantial potential for impact on the competition in order to justify per se violation. Thus if a purchaser is forced to buy a product he would not have bought from another seller, no competition is affected
4. Court says in dicta (dangerous dicta) that patent tying per se illegal (does not distinguish between patent monopoly and market monopoly)
5. Must have two separate product markets --> there must be a market for anesthesiological services separate from hospital
   a. Not based on functional relation between the two, but rather on the character of the demand for the two items
   b. must be sufficient demand for the purchase of anesthesiological services separate from hospital services
6. We have often found arrangement involving functionally linked products at least one of which is useless without the other to be prohibited tying devices
7. Fact that 70% of patients in the relevant geographic market went to different hospitals meant that defendant did not have the required market power to force consumers
   a. could not show an actual adverse affect on competition

8. Oconnor Concurrence
   a. The per se doctrine in tying cases has always required an elaborate inquiry into the economic effects of the tying arrangement
   b. A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffice to demonstrate market power.
      i. Each of there are factors of market power

x. Microsoft
   1. We hold that the rule of reason, rather than per se analysis, should govern the legality of tying arrangements involving platform software products
      a. An extension of O'Connor's reasoning?
      b. Perhaps RoR could apply elsewhere
   2. IE and Windows Separate products?
   3. In previous cases Kodak, Int'l Salt, Northern Pacific, Jefferson Paris:
      a. The tied good was not physically and technologically integrated with the tying good
      b. Nor did the defendant argue that their tie improved the value of the tying product to users and to makers of complementary goods. Or, when it did, the courts reasoned that issuing quality specifications could accomplish the same thing: int'l salt
      c. Here this is not the case
   4. The separate products test is a poor proxy for net efficiency from newly integrated products. Per se analysis would condemn
      a. starter motor in cars
      b. stain resistant carpet
      c. RoR affords defendant to demonstrate that efficiency gain outweighs distortion in consumer choice

xi. Eastman Kodak (SCt)
   1. Principal issue is whether a defendant's lack of market power in primary market preclude possibility of market power in derivative aftermarket
   2. Tying agreement violates s1 if Sherman if seller has appreciable economic power in the tying product market and the arrangement affects a substantial volume of interstate commerce in the tied market
a. Why Sherman and not Clayton Act? Tying of services instead of goods

3. Kodak contends that it does not have market power over parts for its machines since it does not have market power in the machine market. Thus, any monopoly profits it gained off parts would be matched by a loss in profits by lower equipment sales.
   a. Rule rests on assumption of cross-elasticity of demand in the equipment and aftermarkets. But even if Kodak could not raise its price without losing equipment sales does not tell us there is no market power. Kodak could already be charging the monopoly price for its parts, and not the competitive one.

4. Kodak contends that a higher service prices will lead to a disastrous drop in equipment sales. However information and switching costs may prevent this.
   a. For the service market price to affect equipment demand, consumers must engage in accurate life cycle pricing
      i. counter-arg: consumer magazines and stuff + these are sophisticated purchasers
   b. Switching costs - consumers will tolerate some level of service price increase before changing equipment brands

5. Court finds that since its arrangement is not one that always tends to enhance competition, that it is not entitled to summary judgment

6. Monopoly claim
   a. Kodak contends that a single brand of product cannot be a relevant market.
   b. Court disagrees - the relevant market for antitrust purposes is determined by the choices available to kodak owners

f. EXCLUSIVE DEALING
   i. Objects of exclusive dealing
      1. Forclose the market opportunities for seller's competitors
      2. Assured markets or prices for sellers and buyers
         a. stable sales and can plan products and sistribution operations with greater precision and efficiency
      3. Promoting dealer loyalty and investment (exclusive benefit of dealer's energies)
      4. Transaction costs savings
   ii. Standard Oil
      1. Exclusive supply arrangements with operators of gas stations
      2. Dicta Side note: Only situation in which the protection of good will may neccessitate the use of tying is where specifications for a subsitute would be impracticable
3. Pg 658, which requirements contracts are good
   a. The coverage by req contracts of a substantial amount of business is not presumptively as anticompetitive as a tying contract

4. Factors to consider in determining legality of req contract
   a. whether competition has flourished in spite of K
   b. conormity of the length of their term to the reasonable requirements in the respective field of commerce
   c. status of the defendant as a struggling newcomer or an established competitor
   d. defendants degree of market control -- the more control, the more likely contracts were used to stifle competition

5. Test: An exclusive dealing arrangement does not violate the section unless the court believes it is probable that performance of the contract will foreclose competition in a substantial line of commerce affected
   a. The line of commerce must be determined
   b. the competition must be charted in the market area in which the seller operates
   c. the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market

6. Dissent: banning req contracts will induce vertical integration
   iii. Courts have not declared requirements contracts illegal per se
   iv. Barry Wright
      1. Why isn't grinnel's contract to buy all Snubbers from Barry an illegal requirements contract?
         a. fixed dollar amount not complete requirements contract
         b. three separate contracts instead of one big one suggests more legitimate ends
         c. Snubbers are typically ordered well in advance of expected deliver
         d. Buyer was not a small firm that could be builled

XV. Mergers
   a. Clayton Act s 7
      i. No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the FTC shall acquire the shole or any party of the assets of anther person engaged also in commerce, where in ay line of commerce, the effect of such acquisition may be substantially to lessen competition
b. Hart Scott Rodino Act
   i. Premerger notification to be filed with FTC, DOJ
      1. If one of the parties has sales or assets of at least 100M and the other at least 10M, and if
      2. as a result of the transaction, the acquiring person will hold an aggregate amount of the stock and assets of the acquired person valued at more than 50M
   ii. Second request for more info by FTC
      1. no second request =/= approval
      2. typically negotiation follows second request

c. Concentration levels and merger motivations
   i. Vertical mergers do not increase market concentration except in long run, through foreclosure effects
   ii. HHI (Herfindahl-Hirschman Index) - the sum of squares of the market share for all sellers in an industry

d. Merger motives
   i. Anticompetitive reasons (gain monopoly)
   ii. Easier expansion or entry - easier to buy a going business than build one from the ground up
      1. may have pro or anti competitive effects
   iii. Operating efficiencies
   iv. Financial gains without new efficiencies
   v. Diversification of risk
   vi. Management goals -
   vii. Substituting better management
   viii. Defensive mergers - firm may believe that it lacks power to compete with rivals

e. Market definition
i. Market definition is frequently the critical factor in determining the legality of a merger

ii. Less precise inferences seem more tolerable in merger than in monopoly cases

iii. Three questions with multiple markets
   1. Are anticompetitive affects in one market sufficient to condemn the whole merger? Yes (but remedy be excising this market from the merger)
   2. Where merger must stand or fall as a whole, can an anticompetitive effect in one market be redeemed by a procompetitive effect in a different market? No
   3. Should different low-order possibilities of a competitive harm in several markets be cumulated somehow to condemn the merger? mostly no, but sometimes yes

f. Different types of mergers
   i. Horizontal - firms in direct competition, in same market, at same level of production or distribution
      1. concern: elimination of competition between them
   ii. Vertical - firms in the same market, but at different levels of production or distribution
      1. concern: foreclosure of actual or potential competitors
   iii. Conglomerate - firms in different markets
      1. concern: impede competition? economic concentration?

XVI. Horizontal Mergers
   a. Brown Shoe (*protection of competition, not competitors -- dominant theme pervading section 7 is rising tide of economic concentration*)
   i. The validity of a horizontal merger will depend upon
      1. the relative size and number of parties to the arrangement
      2. whether it allocates shares of the market among the parties
      3. whether it fixes prices at which the parties will sell their product
      4. whether it absorbs or insulates competition
   ii. Where the arrangement effects a horizontal merger between companies occupying the same product and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated --> Clayton s 7
   iii. Court contradicts itself by saying it is competition, not competitors, Clayton act was meant to protect, then says that congress desire is to promote competition through the protection of viable, small locally owned businesses even though higher prices might result
   iv. "may" be to substantially lessen competition... concern with probabilities, not certainties
   v. Relevant Geographic Market
      1. cities with population exceeding 10000 and their environs
   vi. The probable effect on merger
1. in 32 cities, the combined market share of Brown and Kinney shoes was over 20%
2. in 7 cities, B&K had over 50% of women's shoes
3. The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effect of merger in the relevant market
4. look to tendency toward concentration in the industry

vii. Mitigating factors that can justify merger
   1. business failure
   2. inadequate resources that may have prevented party from remaining competitive
   3. need for small companies to compete against large one

b. Philadelphia National Bank
   i. a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.” --> when cited by modern law this reads "by showing a transaction will lead to undue concentration... the govt establishes a presumption that the transaction will substantially lessen competition"
   ii. Merger of two banks will result in a 30% share for a single bank -- > this will threaten "undue concentration"
   iii. Percentage required for mergers to be illegal is the same as others under the Clayton Act
       1. Std. stations: 23% (top 6 firms = 65%)
       2. Motion Picture (four firms = 75%)
       3. This case (four firms = 78%)
   iv. Affirmative justifications for proposed merger
       1. Only through mergers can banks follow their customers to the suburbs (but why can't banks just build new branches?)
       2. Increased lending limit will enable bank to compete with out-of-state banks (anticompetitive effects in one market are not outweighed by procompetitive consequences in another)

c. Von's
   i. Relevant geographic market was grocery stores in LA
   ii. Number of single stores had fallen by 2000 in the past 13 years
   iii. Merger would create second largest chain, with 7.5% of market
   iv. Held: merger violates s 7
   v. Dissent: 7.5% is hardly "undue" percentage
       1. perhaps this is just a fragmented industry undergoing dynamic change?
vi.  *Lower courts today allow mergers at much higher percentages than this*

d. **REDUCED ANTAGONISM TO MERGERS**


e. **The failing Company defense**
   i. **Rationale**
      1. failing firm's contribution to competition is so modest that its absorption would not reduce competition significantly
      2. merger is preferable to failure from society's perspective
   ii. **International Shoe**
      1. the court found no s 7 violation where the acquired company's resources were so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure
   iii. **U.S. V. General Dynamics Corp.**
      1. Found no "substantial probability" of anticompetitive effects
      2. Other pertinent factors that mandate a conclusion competition is not substantially lessened ("failing company" defense)
         a. Companies that have controlled sufficiently large shares of concentrated market are barred from merger by s 7 because their past performance implies an ability to continue to dominate --> However, in the coal market, this is not the case. Defendant was weak as a competitor.
         b. A more significant indicator of a company's power effectively to compete with other companies lies in the state of a company's uncommitted reserves of recoverable coal
         c. Irrespective of the company's size when viewed as a producer, its weakness as a competitor was properly analyzed by the Dist Ct
   f. **HORIZONTAL MERGER GUIDELINES (do not bind courts)**
      i. Concentration Rations - "The department accords primary significance to the size of the market share held by both acquiring and acquired firms"
Section 1 - General standards for horizontal mergers

1. The unifying theme of the guidelines is that mergers should not be permitted to create or enhance market power or facilitate its exercise.

2. Market determination
   a. Product: The agency will delineate the product market to be a product such that a hypothetical profit-maximizing firm (monopolist) likely would impose at least a small but significant nontransitory increase in price (SSNIP).
   b. Firms: All firms that currently produce or sell in the relevant market + other firms whose inclusion would accurately reflect probable supply resources.

3. HHI (reflects concentration of entire industry, but gives greater weight to those with greater market shares)
   a. Post-merger HHI below 1000 - region is unconcentrated. Merger unlikely to have adverse competitive effects. (per se legal)
   b. Post-merger HHI 1000-1800 - Moderately concentrated. Increasing HHI by less than 100 points are unlikely to have adverse competitive consequences. Mergers increasing by more than 100 points raise significant competitive concerns.
c. HHI >1800. Highly concentrated. Mergers incr>50 points raise significant competitive concerns. Merger >100 pts it is presumed that merger is likely to create market power or facilitate its exercise.

4. If merger likely to have adverse effects, Analyze under s 2-5 of guidelines

iv. Section 2 - Potential Adverse Competitive effects of mergers
   1. Coordinated interaction (tacit and express collusion)
      a. need to analyze whether market conditions may be conducive to or hinder coordination
      b. Whether detection and punishment would be likely
   2. Lessening of competition through unilateral effects
      a. Watch for mergers by two firms in a highly differentiated market that, although they compete with a number of other firms, have products that are substantially similar to each other, but not to other firms in the market
      b. They might then be able to raise prices to customers who regard the two firms as their first and second choice

v. Section 3 - Entry Analysis
   1. A merger is not likely to create or enhance market power if entry into the market is so easy that post-merger, the new firm could not profitably maintain a price increase above premerger levels
   2. Look at sunk costs, time to entry,

vi. section 4 - Merger Specific Efficiencies
   1. consider efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of the merger
   2. Examples
      a. shifting production to different facilities
      b. R&D

vii. Section 5 - failure & exiting assets (Cf General Dynamics / Boeing v McDonnel Douglas)
   1. allegedly failing firm would be unable to meet its financial obligations in the future
   2. it would not be able to reorganize under Ch 11
   3. it has made a good faith effort

g. FTC v Staples,
   i. standard for granting preliminary injunction to enjoin merger is that FTC show "reasonable probability that the transaction will substantially impair competition"
   ii. The general rule when determining a relevant product market is that the outer boundaries of a product market are determined by the reasonable interchangeability of use by consumers or by the cross-elasticity of demand between the product itself and substitutes for it
1. Whether two products can be used for the same purpose and to what extent purchasers are willing to substitute one for the other

iii. Court does not include non-superstore suppliers of consummable office supplies in its analysis
   1. Functional interchangeability not determinative of cross elasticity
      --> a raise in prices at office superstore does not necessarily shift customers to places like Best Buy
   2. Within a broad market, "well-defined submarkets may exist which, in themselves, constitute a market for antitrust purposes"
      a. unique production facilities, distinct customers, distinct prices, sensitivity to price changes, specialized vendors, industry or public recognition of the submarket as a separate economic entity
   3. Uses SSNIP test --> shows that it will not cause a significant number of customers to turn to non-superstore alternatives

iv. By showing that the proposed transaction between staples and office depot will lead to undue concentration in the market for consumable office supplies sold by the office superstores, the commission establishes a presumption that the transaction will substantially lessen competition
   1. Once such a presumption has been established, the burden of producing evidence to rebut the presumption shifts to the defendants

v. Entry defense
   1. The existence and significance of barriers to entry are frequently of crucial considerations in rebuttal analysis because in the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time

vi. Efficiencies defense
   1. Rejected in this case, but now considered a valid defense

vii. Equities defense
   1. Unscrambling the eggs
   2. As a result the court finds it extremely unlikely that if the court denied the plaintiffs motion, that the merger could be effectively undone and the companies divided if the agency later found the merger violated the antitrust laws

h. Dairy Farmers (antitrust zombie)
   i. even though dupont would not gain effective control over the company it was acquiring, the court held that anticompetitive effects could still occur because a group with similar interests as duponts, its shareholders, held the voting rights

XVII. VERTICAL MERGERS
   a. Yellow Cab (SCt)
      i. cab manufacturer acquiring taxi operating companies
ii. court held a violation would be established if Checker's power over the cab companies was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control
   1. Consider the leverage on the market which the particular vertical integrate creates
b. A&P - grocery store threatening to stop purchasing from supplier if lower prices not given, and manufacturer item itself
   i. held illegal, abuse of power by threats to boycott suppliers
c. Brown Shoe (foreclosure)
   i. Relevant Market (geographic and product) analyzed same as in horizontal merger case
   ii. Size of share of market foreclosed from competition is the important part
       1. if size is of monopoly porportions the Clayton Act is violated
       2. If de minimis, then competition is not substantially lessened
   iii. If neither monopoly nor de minimis, then market share foreclosed not decisive
       1. Purpose and nature of arrangement
           a. Ex. compare tying contract with exclusive dealing contract. More foreclosure need by latter than former for violation
       2. Size or viability of companies merging
       3. trend toward concentration in the industry
       4. Consider economic way of life sought by congress: numerous independent units, not oligopoly of large industries
d. Modern times
   i. Chicago school argues that vertical mergers are likely to be procompetitive - Single monopoly profit therorem champions the theory that monopoly does not increase its profits by integrating vertically unless the integration yields efficiencies
   ii. Guidelines suggest nonhorizontal mergers are only of concern if they have horizontal effects (elaborated on pg 771)
       1. Merger could raise barriers to entry
       2. facilitate collusion among upstream or downstream firms
       3. might involve regulatory invasion
   iii. More weight given to efficiencies in vertical than in horizontal mergers

XVIII. CONGLOMERATE MERGERS
a. Toehold doctrine - acquisition of market's leading firm should be banned, and acquiring firm should be obliged to take a "toehold" instead
b. Actual Potential Competitor Doctrine (Clorox)- Firm is not yet present in the market but, the merger not being possible, it would have entered de novo, thus increasing the number of competitors
c. Perceived Potential Competitor (Falstaff) - Would, never in fact enter market de novo. But existing firms think it would and therefore restrain themselves
to an "entry-preventing price" below the price they think would trigger entry [limit price]

i. Since Falstaff could have been perceived as a potential entrant into the new england beer market, its acquisition of New Englands largest brewery deemed illegal

d. **Above doctrines mostly abandoned**
e. Merger illegality due to potential for price predation?
f. Merger guidelines applied to conglomerate mergers, pg 787
g. United States v IT&T
   i. Law is settled that when a company which is the dominant competitor in a relatively oligopolistic market is acquired by a much larger company, such acquisition violation s 7 of the clayton act if the acquired company gains marketing and promotion competitive advantages which will further entrench its position of dominance by raising barriers to entry to the relevant market and by discouraging smaller competitors from aggressively competing
   
   ii. Reciprocity
      1. When the acquiring conglomerate would be able to force its suppliers to purchase the merging company's product or else threat to cut off business with it

h. GE/Honeywell - announced 42 billion dollar merger. Europeans objected
   i. worried that merged firm would bundle their respective product lines together, both which are needed for airplanes