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Cover Page Footnote
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PROTECTION OF COMMERCIAL SPEECH
CRAIG R. MAGINNESS*

INTRODUCTION

THE market behavior of oligopolists,1 particularly their ability to combine for the purpose of stabilizing prices at a noncompetitive level, has been the subject of critical scrutiny by the government and by antitrust theorists over the past two decades.2 The regulation of

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1. The seminal work on industrial concentration in America is The Modern Corporation and Private Property, by Adolf A. Berle, Jr. and Gardiner C. Means, originally published in 1932. Berle and Means found that, in 1929, the 200 largest corporations in America controlled 38% of all business wealth and 22% of the total national wealth. A. Berle & G. Means, The Modern Corporation and Private Property 33 (rev. ed. 1967). The authors also found that the gross assets of 150 of these corporations had increased 63% between 1919 and 1928, or 5.6% annually, and had increased 31% between 1924 and 1928, an annual rate of 7.0%. Id. at 35. Based on these figures, Berle and Means predicted that by 1950, 70% of all corporate activity would be carried on by the 200 largest corporations, who would control half the national wealth. Id. at 41. The steady trend of increased industrial concentration has continued. In 1929 the top 100 industrial corporations controlled 25% of the total industrial corporate assets. R. Heilbroner, The Worldly Philosophers 295 (4th ed. 1972). In 1960 the figure had increased to 31%, and by 1970 the top 100 industrial corporations controlled nearly 50% of corporate wealth in the United States. Id.

oligopolistic behavior through the Sherman Act, however, has presented some significant problems. Clearly, no single firm in an oligopoly can be considered to have a monopoly or, without proof of more than market power, to have "attempt[ed] to monopolize" within the proscriptions of section 2 of the Sherman Act. Further, the Supreme Court has held that "conscious parallelism" in an oligopoly is not sufficient proof of the agreement necessary to establish a violation

of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969). A special presidential commission formed to study current problems in antitrust recommended the passage of a Concentrated Industries Act which would permit the Justice Department to bring proceedings against firms in an oligopoly market seeking decentralization in the same manner in which the Department currently brings action against monopolies under § 2 of the Sherman Act. Trade Reg. Rep. (CCH) No. 415 (Supp. May 26, 1969), discussed in Brozen, The Antitrust Task Force Deconcentration Recommendation, in The Competitive Economy 113 (Y. Brozen ed. 1975). Although that proposal has never been adopted, industrial concentration has remained under close scrutiny. A recent address prepared by Attorney General Benjamin Civiletti for the 13th New England Antitrust Conference listed a "close study of concentrated industries" among the top priorities of the Justice Department antitrust enforcement division. Trade Reg. Rep. (CCH) No. 413 at 5 (Nov. 27, 1979). In delivering that address, Acting Associate Attorney General John Shenefield expressed support for new legislation that would impose liability for "unambiguously anticompetitive conduct by firms with less than a near-monopoly market share." Id. at 10.

3. 15 U.S.C. §§ 1-7 (1976). The effects of industrial concentration and oligopolistic markets have been dealt with prophylactically through the antimerger provisions of the Clayton Act, 15 U.S.C. § 18 (1976), but the provisions of the Clayton Act and attempts to regulate oligopolistic behavior through antimerger legislation are beyond the scope of this Article.

4. 15 U.S.C. § 2 (1976). Monopolization and attempt to monopolize are two distinct offenses. The first requires that a two prong test be met: 1) the individual corporate defendant must possess sufficient market power to control prices and exclude competition, and 2) the defendant must possess a general intent to exercise the monopoly power. See, e.g., American Tobacco Co. v. United States, 328 U.S. 781 (1946). The requisite intent may be inferred from the existence of monopoly power, however, when the monopoly power was obtained by illegal or abusive business tactics, United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. Griffith, 334 U.S. 100 (1948); United States v. American Tobacco Co., 221 U.S. 106 (1911), when the monopoly power was lawfully obtained but is maintained by illegal or abusive tactics, United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954), or when the monopoly is lawfully obtained but is maintained through willful and conscious business policies rather than natural competitive advantages, United States v. Grinnell Corp., 384 U.S. 563 (1966). The degree of market power necessary to constitute a monopoly has ranged somewhere between 75% and 95%. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (87%); American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946) (75-80%); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (90%). The result of this market power-general intent test is an offense which is essentially structural. Because of the requirement of a substantial market share, no single firm in an oligopolistic market may be prosecuted under the monopolization provision of § 2 of the Sherman Act.

The offense of attempt to monopolize condemns conduct rather than market structure, but unlike monopolization requires a specific intent which "cannot be inferred merely from the general course of the defendants' business acts or conduct." J. Von Kalinowski, 16 Business Organizations—Antitrust Laws and Trade Regulation § 8.01 at 8-4 (1979) (footnote omitted). Thus, absent some specific evidence of an intent to monopolize, a firm in an oligopoly cannot be attacked under the attempt provision of § 2. This raises many of the same problems discussed in note 5 infra with respect to proving an agreement under § 1 of the Sherman Act.
of section 1 of the Sherman Act (section 1). Therefore, the plaintiff must prove an actual "contract, combination . . . or conspiracy" to fix prices among the firms in a relevant market. This is not an easy burden: there is no need for firms in a true oligopoly to agree expressly to fix prices because it is arguably in each firm's interest to follow the price leader.

In *United States v. Container Corp. of America*, the Justice Department successfully circumvented this obstacle. The government first established that competing firms had, by agreement, exchanged price information. It then argued that this information exchange had the necessary effect of fixing prices, thereby constituting a violation of section 1. Despite contradictory evidence, the majority of the

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5. Evidence of similar business behavior, even if consciously parallel, is not sufficient to establish the requisite agreement. See Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954); Klein v. American Luggage Works, Inc., 323 F.2d 787, 791 (3d Cir. 1963); Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 661 (9th Cir.), cert. denied, 375 U.S. 922 (1963). Thus, in the typical oligopoly, more is required than proof of similar prices or other similar modes of conduct.


7. The fundamental theory of microeconomics, which regards profit maximization as a primary goal of each individual firm, would suggest that firms in an oligopoly might best serve this interest by colluding to charge higher prices than would otherwise be dictated by the interaction of the supply and demand functions with each firms' marginal costs, thereby yielding monopoly profits. See generally Stigler, A Theory of Oligopoly, in The Competitive Economy 215 (Y. Brozen ed. 1975). As Stigler points out, however, in the real world, factors not considered in pure economic theory may create an environment in which collusion is disadvantageous for reasons other than price maximization. Id. at 217-18. Also, while there may be a decrease in price competition in a particular product market that has become dominated by a few large firms, there still may be a sufficiently high elasticity with other products so as to exert an influence on prices vis-à-vis other product markets. R. Heilbroner, supra note 1, at 298.


9. Although the violation charged in *Container Corp.* was an agreement to fix prices, the government proved only that the firms had requested price information from competitors when it was unavailable from other sources. Despite the infrequency of these informal exchanges, the Court found that the combination or conspiracy requirement of § 1 was satisfied. Id. at 335; see note 39 infra and accompanying text.

10. The government argued that the information exchange must inevitably result in price stabilization because of the defendants' 90% market share, and the Court found the inference "irresistible." Id. at 337. Yet the same inference could be drawn in any restraint of trade case involving oligopolists, since knowledge of the market conditions is generally available. In fact, much of the information exchanged in *Container Corp.* was available from each defendant's own records or from its customers. Id. at 335. Save for the evidence of the exchange information, the case was virtually indistinguishable from decisions that have held conscious parallelism to be insufficient as evidence of the requisite agreement. See cases cited note 5 supra.

11. Despite the low elasticity of demand between corrugated cardboard containers and other potential substitutes, the low entry barriers seemed to prohibit the defendants from raising their prices beyond the level dictated by normal market factors. The industry had expanded significantly in recent years, and prices had experienced a downward trend. Id. at 336. Not surprisingly, therefore, the government relied exclusively on its oligopoly theory and did not call a single customer to testify to the actual profits or price levels within the industry. Id. at 345 (Marshall, J., dissenting).
Supreme Court accepted the government's position. The Court's application of the per se rule against horizontal price fixing resulted in a holding that the very exchange of price information in an arguably oligopolistic market is, in itself, a restraint of trade in violation of section 1.

Container Corp. was decided while the commercial speech exception to the first amendment was a viable doctrine. Seven years later,

[12] The Court held that, even though prices were subject to a downward trend, the very fact of an effect on prices brought the case within the rule of United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). 393 U.S. at 337.

[13] Per se rules operate to create a conclusive presumption that a particular practice is illegal despite any lack of actual anticompetitive effect in a particular case. The rationale for per se rules is that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). Many cases have applied per se rules. See, e.g., International Salt Co. v. United States, 332 U.S. 392, 396 (1947) (tying arrangements); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 467 (1941) (group boycotts); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing); Addyston Pipe & Steel Co. v. United States, 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899) (market allocation). See also notes 125-28 infra and accompanying text (discussing the justifications for per se rules).

[14] The commercial speech exception had its genesis in Valentine v. Chrestensen, 316 U.S. 52 (1942). Although voicing its traditional concern for the protection of speech from unduly burdensome government regulation, the Chrestensen Court, upholding the appellant's conviction under an ordinance banning public distribution of commercial advertisements, stated that "the Constitution imposes no such restraint on government [regulation] as respects purely commercial advertising." Id. at 54. Initially, the test for determining when speech was purely commercial was based on the speaker's motive. Compare Breard v. Alexandria, 341 U.S. 622 (1951) (ordinance prohibiting door-to-door canvassing upheld where defendant was soliciting popular magazine subscriptions) with Martin v. Struthers, 319 U.S. 141 (1943) (ordinance prohibiting door-to-door solicitation held invalid with respect to distribution of advertising for a religious meeting) and Murdock v. Pennsylvania, 319 U.S. 105 (1943) (ordinance requiring licensing of door-to-door canvassing held invalid with respect to distribution of religious literature, notwithstanding the nominal charge for the material). In the three decades following Chrestensen the commercial speech exception was treated equivocally by the Court. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court allowed the newspaper to raise a first amendment defense to a libel suit even though the statements were contained in a paid commercial advertisement. Relying on the political content of the advertisement rather than its format, the Court stated that first amendment protection was unavailable because the classified advertisements under scrutiny represented "classic examples of commercial speech." Id. at 266. Nevertheless, in Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973), the Court distinguished Sullivan on the basis of the content of a newspaper advertisement in order to uphold the commission's ban on sex-designated column headings for classified advertisements. Id. at 384-85. The Court stated that first amendment protection was unavailable because the classified advertisements under scrutiny represented "classic examples of commercial speech." Id. at 385. The underlying rationale of the decision, however, was not so much that the speech involved was commercial as that the use of gender-based classifications was contrary to public policy. This approach was followed by other courts. See Barrick Realty, Inc. v. City of Gary, 491 F.2d 161 (7th Cir. 1974) ("for sale" sign proposes a commercial transaction; municipal ordinance banning
however, the Supreme Court held that "commercial speech, like other varieties, is protected" by the first amendment, and the following year held that a regulation that "impairs the flow of truthful and legitimate commercial information" is constitutionally infirm. Consequently, the extension of this first amendment protection to price information raises significant questions concerning the application of the Court's analysis in Container Corp. to future cases involving the exchange of price information by competitors.

Accordingly, this Article is concerned with the first amendment rights of antitrust defendants and the resultant effect on the evidentiary burden in a price information exchange case. The Article begins with a discussion of the development of the Court's price exchange analysis and the application of the per se rule, and then discusses the parameters of the first amendment protection afforded commercial speech. After examining the interrelationship of these two discrete aspects of the exchange of price information, the Article contends that the government should not be permitted to rely on speech among competitors as the only significant evidence of a Sherman Act violation, as was permitted in Container Corp. It is asserted that, in all

such signs upheld as preventing racial discrimination in housing). But see Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977), discussed at notes 73-78 infra and accompanying text. By 1975 the Court had become so dissatisfied with the inconsistent application of the commercial speech exception that it expressly overturned the assumption "that advertising, as such, is entitled to no First Amendment protection." Bigelow v. Virginia, 421 U.S. 809, 825 (1975). It has been suggested that reliance on the commercial speech exception "was so infrequent that it has a history but barely any development." Schiro, Commercial Speech: The Demise of a Chimera, 1976 Sup. Ct. Rev. 45, 45-46 (footnote omitted). Nevertheless, the exception seems to have deterred the raising of first amendment issues in the first instance. Thus, any claim of a violation of first amendment rights is conspicuously lacking in Container Corp. itself.

15. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). While Virginia Pharmacy did not present the issue of commercial speech in the antitrust context, it is worth noting that the content of the speech which the Board of Pharmacy sought to suppress was strictly limited to the price at which products were sold. Id. at 761. It is clear, therefore, that the content of a price exchange is within the general ambit of the Court's reversal of the commercial speech exception.


17. While defendants in price information exchange cases will invariably be corporations, the Supreme Court has expressly held that the worthiness of speech for first amendment protection "does not depend upon the identity of its source, whether corporation, association, union, or individual." First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978).

21. As the majority opinion stated in Container Corp., "all that was present was a request by each defendant of its competitor for information as to the most recent price charged or quoted." 393 U.S. at 335. It is conceded here, however, that if the government were to prove with competent economic evidence that an information exchange is intended to be or is in fact used to stabilize prices at a noncompetitive level, then it should be held that the regulation is constitu-
information exchange cases, the government should be required to prove an intent to maintain noncompetitive prices or the actual maintenance of such prices by introducing significant economic data relating to supply, demand, marginal costs, marginal revenue, and other market data necessary to prove a restraint of trade. Courts should then base their decisions on whether the evidence establishes a course of conduct, in conjunction with the speech, that is intended to achieve, or that results in, fixed prices. Such an approach prevents the direct regulation of speech, in contravention of the first amendment, that the continued application of Container Corp.'s lesser burden of proof would permit.

I. INFORMATION EXCHANGES AND THE APPLICATION OF PER SE RULES

By adopting the theoretical approach to information exchange analysis advocated by the Justice Department in Container Corp., the Supreme Court departed from its earlier exchange decisions. The Court acknowledged that "[t]he case as proved is unlike any other price decisions we have rendered." Rather than focusing on the procedural details of the price exchange to determine the degree to which sufficient evidence of price fixing was introduced, the Court looked to the structure of the market in which the exchange took place to find the necessary effect on prices.

A. The Pre-Container Corp. Analysis

In the early case of American Column & Lumber Co. v. United States, the Supreme Court condemned a plan whereby manufacturers of hardwood exchanged detailed information regarding inventory, production, shipments, prices, and the names of customers. The information was disseminated in digests supplemented by business analysis and suggestions, and was discussed at regular meetings. The
tionally permissible as a secondary restriction on speech incident to a valid regulation of non-speech activity. See notes 105-19 infra and accompanying text.

22. While specific figures on marginal cost and revenues should be the best indicator of monopoly profits, it is acknowledged that this data is not always significant on other than a theoretical basis. At the very least, however, the government should be required to introduce evidence of actual prices charged in the particular market. Cf., United States v. Container Corp. of America, 393 U.S. 333, 345 (1969) (Marshall, J., dissenting) (government failed to introduce evidence of price levels).

23. Id. at 334.

24. Id. at 336-37. One commentator has suggested that Container Corp. may be read so broadly as to lay "the basis for the use of economic theory to shorten the process of proving the anticompetitive effects of both formal and informal exchanges of all types of price information by a wholesale incorporation of interdependence theory into the law of section 1." Note, Antitrust Liability for an Exchange of Price Information—What Happened to Container Corporation?, 63 Va. L. Rev. 639, 656 (1977) [hereinafter cited as Antitrust Liability].

Court found the exchange of detailed information, coupled with the agreement’s enforcement provisions, objectionable:

[The plan is] not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce and as, therefore, a direct restraint upon that commerce, . . . that conclusion must inevitably have been inferred from the facts which were proved.

This “inevitable inference” must have been based on the extreme conduct of the defendants rather than on the market structure in which they operated, for the 365 participants in the plan operated only 470 of the region’s 9,000 lumber mills, and accounted for only about one-third of the national hardwood production.

The importance of conduct evidence within the pre-Container Corp. analysis, as opposed to inferences based upon market theory, is further illustrated by Maple Flooring Manufacturers Association v. United States, which has been “referred to as the Magna Carta of statistical reporting programs.” In Maple Flooring, the defendants were twenty-two corporations that produced almost seventy-five percent of finished flooring shipped in interstate commerce. The government proposed a theory strikingly similar to that on which it was to rely in Container Corp., arguing that “the effect of the activities of the defendants carried on under the plan of the Association must necessarily be . . . to maintain prices.” The district court accepted the government's position, and stated that the information exchange “had a direct and necessary tendency to destroy competition . . . had at all times a controlling influence to impeding the economic laws of supply

26. The express agreement entered into by the members of the defendant association in American Column & Lumber provided that “[a]ny member who fails to report shall not receive the reports of the secretary, and failure to report for twelve days in six months shall cause the member failing to be dropped from membership.” Id. at 395 (emphasis in original). The Court also noted that compliance was fostered by the real threat of “trade punishment by powerful rivals.” Id. at 399. No such provisions existed, or at least none was proved, with respect to the implied agreement relied on in Container Corp.

27. Id. at 410.

28. Id. at 391; id. at 413 (Brandeis, J., dissenting). Indeed, the Court devoted a considerable portion of its opinion to the specificity of the membership’s suggestions, which evidenced an intent to fix prices. Id. at 401-09. The Court’s emphasis was similar in United States v. American Linseed Oil Co., 262 U.S. 371, 389-90 (1923).


30. Antitrust Implications, supra note 2, at 723 (citing G. Lamb & S. Kittelle, Trade Association Law and Practice 33 (1956)). Included with Maple Flooring in this description was Cement Mfrs. Protective Ass’n v. United States, 268 U.S. 588 (1925), which created a limited exception from antitrust liability when the exchange of specific price information is necessary to prevent active fraud. Cement Manufacturers, along with the other earlier price exchange cases, was distinguished by the Container Corp. Court. 393 U.S. at 334-35.


32. 268 U.S. at 568.
and demand [and] that in consequence the actual results flowing from such a plan and the execution of it are of secondary importance." Thus, the market power wielded by the defendants was apparently a weighty factor in the district court's decision.

The Supreme Court, however, reversed the district court holding. Despite proof of an overt agreement to exchange and discuss information regarding inventory, production costs and volume, shipping costs point-to-point, and actual prices charged in past transactions, the Court found that section 1 had not been violated because the evidence had failed to establish any agreement to take "concerted action with respect to prices or production or restraining competition." The Court indicated, however, its unquestioned belief that information exchanges lead to stabilization and price uniformity within an industry. Thus, in holding that the exchange of information among members of the Association was not an illegal restraint of trade, the Court refused to base a violation on the necessary effect that such information would have on prices. The Court stated that to do so would be to condemn "the intelligent conduct of business operations." Instead, the Court required "the character of the information ... and the use which was made of it" to be such as would lead to the irresistible conclusion that the defendants engaged in concerted action to affect prices if the government were to prove a proper case.

B. Container Corp. and Its Implications

In Container Corp., the Court was presented with facts which were similar in some key respects to Maple Flooring. Admittedly, no express agreement was involved in Container Corp., but the Court had little difficulty finding the requisite agreement on the facts. A comparable

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33. Id. at 575.
34. The direct appeal to the Supreme Court was made possible by the Expediting Act of February 11, 1903, ch. 544, § 2, 32 Stat. 823 (1903) (current version at 15 U.S.C. § 29 (1976)).
35. 268 U.S. at 586.
36. Id. at 582.
37. Id. at 583.
38. Id. at 584 (emphasis added). In his dissenting opinion in Container Corp., Justice Marshall noted that "the evidence establishes that the information was used by defendants as each pleased and was actually employed for the purpose of engaging in active price competition." 393 U.S. at 344. In light of the majority's opinion, it is clear that the Court in Container Corp., was concerned only with the character of the information and the character of the market in which it was exchanged, rather than the use which was made of it. Id. at 334-35.
39. The majority in Container Corp. found that "all that was present was a request by each defendant of its competitor for information as to the most recent price charged or quoted, whenever it needed such information and whenever it was not available from another source. Each defendant on receiving that request usually furnished the data with the expectation that it would be furnished reciprocal information when it wanted it. That concerted action is of course sufficient to establish the combination or conspiracy, the initial ingredient of a violation of § 1 of
number of firms was involved,\textsuperscript{40} and in both cases the defendant firms controlled a high percentage of the relevant market.\textsuperscript{41} Although Justice Douglas attempted to distinguish \textit{Container Corp.} from \textit{Maple Flooring} based on the different type of information exchanged in each case,\textsuperscript{42} the distinction was of little consequence in the decision because the Court found the structure of the market, rather than the conduct of the defendants, to be controlling.\textsuperscript{43} In addition, \textit{Container Corp.} found that stabilization of prices resulting from an exchange of price information was an irresistible inference;\textsuperscript{44} \textit{Maple Flooring} found the same conclusion “not . . . open to question.”\textsuperscript{45} Despite these similarities, the results of the two cases were directly opposite.

The divergent results may be explained by Justice Douglas’s reliance on the intervening case of \textit{United States v. Socony-Vacuum Oil Co.}\textsuperscript{46} \textit{Socony-Vacuum} involved an express agreement among several major oil refining companies to buy the surplus gasoline of smaller independent suppliers who, due to inadequate storage facilities, would otherwise have sold it at prices that would have depressed the entire industry. Although there was no agreement on resale price levels as such, the Court found that the plan to buy the surplus gasoline was a price fixing agreement within the scope of section 1.\textsuperscript{47} Having established that the scheme was an agreement to fix prices, the Court held that “[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per
Thus, under *Socony-Vacuum* a violation of section 1 is established whenever there is an agreement which affects, or has the purpose of affecting, the normal competitive price mechanism, regardless whether that price moves upward, downward, or is stabilized, and regardless of "the machinery employed." 49

In *Container Corp.*, Justice Douglas indicated that the exchange of price information is one form of "machinery" by which competitors can interfere "with the setting of price by free market forces" so as to be illegal per se under *Socony-Vacuum*. 50 Unlike the sweeping per se rule in *Socony-Vacuum*, which is applicable even in markets in which the combined power of the conspirators does not approach control, 51 Justice Douglas's formulation is limited to a market with structural characteristics similar to those under scrutiny in *Container Corp.* Accordingly, Justice Douglas stated that "[p]rice information exchanged in some markets may have no effect on a truly competitive price," 52 but held that *Socony-Vacuum* applied to the corrugated container industry because "[t]he inferences are irresistible that the exchange of price information has had an anticompetitive effect." 53

Justice Fortas's concurring opinion further illustrates the emphasis on market structure found in *Container Corp.* Justice Fortas initially stated that he understood the Court's opinion to apply a rule of reason rather than a per se rule. 54 Nevertheless, he declared that the purpose of the exchange of price information in the case—namely, determining the price to be quoted to the individual customer—"inevitably suggests the probability that [the price exchange] so materially interfered with the operation of the price mechanism of the marketplace as to bring it within the condemnation of this Court's decisions." 55 This language implies that the test for the legality of information exchanges is a rule of reason only in as much as it does not condemn the practice in every case. Instead, the practice may be upheld when the defendants do not possess significant market power. If, however, as in *Container Corp.*, the market structure gives rise to an "irresistible inference," or, in Justice Fortas's phrase, an "inevitable suggestion" of price interference, information exchanges are illegal per se under the *Socony-Vacuum* rationale.

*Container Corp.* has been described as creating a middle ground in

\[\text{references}\]

48. *Id.* at 223.

49. *Id.*

50. 393 U.S. at 337. Ironically, *Socony-Vacuum* expressly distinguished *Maple Flooring* on the grounds that a price exchange is not an agreement to fix prices. 310 U.S. at 217.

51. 310 U.S. at 224.

52. 393 U.S. at 337.

53. *Id.*

54. *Id.* at 338-39 (Fortas, J., concurring).

55. *Id.* at 339 (Fortas, J., concurring).
antitrust analysis\textsuperscript{56} between the structural offense of monopolization under section 2 of the Sherman Act\textsuperscript{57} and the traditional behavioral offenses under section 1.\textsuperscript{58} The structural component requires proof of sufficient market power to raise an inference of intent or effect, such as that relied on in \textit{Container Corp.} When this requisite is met, the section 1 requirement of an agreement remains, proof of which must rely on evidence of conduct. Because firms in an oligopoly have no need to agree to fix prices as such, the government was permitted to rely on the exchange of price information as sufficient evidence of a section 1 agreement. From a first amendment vantage point, the dangerous result of this analysis is that criminal and civil penalties may ultimately be based on nothing more than evidence of an exchange of information. If the plaintiff were able to attribute to the defendants the requisite degree of market power, the \textit{Container Corp.} test would permit a finding that defendant's speech concerning prices is a restraint of trade in and of itself.\textsuperscript{59}

\section*{II. The Degree of Protection Afforded Commercial Speech}

The commercial speech exception to the first amendment is well documented,\textsuperscript{60} and a historical digression would be of little benefit. It is important, however, to understand the first amendment test for protected speech which has developed through the Court's recent decisions. Questions remain as to the exact test which should be applied,\textsuperscript{61} but it is clear that the protection to be afforded commercial speech is considerable.

\textsuperscript{56} See \textit{Antitrust Implications}, supra note 2, at 728.

\textsuperscript{57} Offenses under § 2 are considered structural because the analysis depends on whether the defendant possesses the requisite degree of control in the relevant market, described in terms of a percentage share of the market. Thus, if a given firm controls 70 to 100\% of a relevant market, it may be considered a monopoly in violation of § 2. See note 4 supra.


\textsuperscript{59} At least one commentator has gone so far as to argue that the \textit{Container Corp.} Court did not intended to analyze information exchanges as an element of a price fixing offense, but intended to create an entirely new analysis for price exchanges as an offense in itself. See \textit{Antitrust Liability}, supra note 24, at 655-56.


A. Commercial Speech as Protected Speech

The first indication of the demise of the commercial speech exception came in *Bigelow v. Virginia*. Bigelow, the defendant, had placed a newspaper advertisement describing abortion services available in New York, and had been convicted under a Virginia statute prohibiting persons from encouraging the procurement of abortions. On appeal, the state argued that the case was outside the purview of the first amendment protection claimed by the defendant because the information had appeared in the form of a commercial advertisement. In rejecting the state’s argument, the *Bigelow* Court held that it was no longer valid to assume that information is entitled to no first amendment protection solely because it appears in a paid advertisement. Instead, the Court applied a three step balancing test—first, ascertaining the public interest in the speech; second, ascertaining whether a substantial government interest was served by regulation; and third, determining whether the method of regulation adopted was the least restrictive means. In ruling that the statute was unconstitutional, however, the Court relied more on the important social significance of the information contained in the advertisement in question than on a clear desire to overrule the commercial speech exception.

Any doubts concerning the exception were laid to rest one year later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* Overturning a statute which forbade advertisements that did nothing more than propose a sale of “‘the X prescription drug at the Y price,’” the Court squarely held that “commercial speech, like other varieties, is protected.” Although it has been argued that the Court reached this result by applying a balancing test similar to that used in *Bigelow*, the language employed by the Court suggests a stronger position was taken, one reminiscent of the first amendment “absolutists.” Thus, while discussing the interests of the speakers,

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63. Id. at 825.
64. Id. at 826-29. For a discussion of the *Bigelow* test, see Roberts, Toward a General Theory of Commercial Speech and the First Amendment, 40 Ohio St. L.J. 115, 121-26 (1979).
65. 421 U.S. at 822.
67. Id. at 761.
68. Id. at 770.
69. Roberts, supra note 64, at 127.
70. The approach taken by the absolutists is to determine whether the speech falls within a defined category of speech which is either protected or unprotected. If the speech falls within one of the protected categories, then the government is without power to regulate its dissemination except by a valid time, place, or manner restriction, regardless of interests involved. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-09 (1975); *Cohen v. California*, 403 U.S. 15, 24 (1971). See generally G. Gunther, Individual Rights in Constitutional Law: Cases and Materials 647-50 (1976).
listeners, and the government, the Court ultimately concluded that the choice between the suppression of potentially harmful speech and the dissemination of corrective speech "is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." The Court thereby acknowledged its own inability to condone restrictions on the content of legitimate commercial speech.

The strength of this first amendment protection is further evidenced in Linmark Associates, Inc. v. Township of Willingboro, decided the term following Virginia Pharmacy. In Linmark, the Court was faced with an ordinance prohibiting the use of front lawn "For Sale" signs as a means of advertising real estate. The underlying purpose of the ordinance was to prevent the practice of "blockbusting." As in Virginia Pharmacy, the Court expressly recognized the strength of the government's interest. The Court, however, was not persuaded that the ban on the signs was necessary to accomplish the government's objective, thereby indicating at least recognition of the third element of the Bigelow test. In the final analysis, however, the Justices were convinced that in any event, the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information. The Court further expressed its distaste for the repression of speech, and stated that "more speech, not enforced silence" is the remedy for speech that is perceived to have a harmful effect.

B. Commercial Speech Versus Other Varieties

Despite the emphatic language in the texts of Virginia Pharmacy and Linmark, the language of footnote twenty-four to the Virginia

71. In this context "corrective speech" means information disseminated by the government which is intended to combat the perceived evil inherent in the speech which, absent first amendment constraints, the government would otherwise seek to enjoin. As stated in Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

72. 425 U.S. at 770.


74. "Blockbusting" is the intentional inducement of white families to sell their houses based on claims by a real estate agent that minority families are moving into the neighborhood. The practice of blockbusting has been recognized as against public policy, Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126, 131-32 (N.D. Ind. 1973), aff'd, 491 F.2d 161 (7th Cir. 1974), and has been legislated against by the federal government, 42 U.S.C. § 3604(e) (1976). See generally Comment, Control of Panic Selling by Regulation of "For Sale" Signs, 10 Urb. L. Ann. 323 (1975).

75. 431 U.S. at 95.

76. Id.

77. Id. (emphasis added).

78. Id. at 97 (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).
Pharmacy opinion has caused confusion regarding the degree of protection to be afforded commercial speech:

In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.9

It has been argued that this footnote was meant to indicate that regulations of commercial speech are generally subject to a less strict standard of scrutiny than those affecting non-commercial speech.80 In the context of the Virginia Pharmacy opinion, however, the statement appears to have no such broad import. The footnote is appended to a textual statement which allows that the State is not prevented from dealing effectively with commercial speech that is "deceptive or misleading," although not "provably false."81 Speech having political or social utility may be regulated if it is empirically false,82 but may not be regulated simply because the format in which it is presented or because some opinion which pertains to it tends to mislead the recipient.83 This is the distinction which the Court thought unnecessary to apply to commercial speech. Because the Court perceived commercial speech to be "more easily verifiable" and "more durable than other kinds," it was thought to be "less necessary to tolerate inaccurate statements for fear of silencing the speaker."84 Following

79. 425 U.S. at 771-72 n.24 (citations omitted).
80. Roberts, supra note 64, at 126-32.
81. 425 U.S. at 771. The rationale for this position, as given by the Court in footnote 24, is that: "The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

Attributes such as these, the greater objectivity and hardness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. They may also make inapplicable the prohibition against prior restraints." 425 U.S. at 771 n.24 (citations omitted).

82. As the Court stated in Virginia Pharmacy, "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." Id. at 771 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) and Konigsberg v. State Bar of California, 366 U.S. 36, 49 & n.10 (1961)).
84. 425 U.S. at 771 n.24. .
this same logic, the Court also suggested that the prohibition against prior restraints might not apply to commercial speech.\textsuperscript{85}

Therefore, the import of the “commonsense difference” between commercial speech and other varieties of speech seems to be this: the Court would permit a prior restraint of commercial speech to determine if it were intrinsically or extrinsically misleading,\textsuperscript{86} and permit its regulation if either were found to be the case. If the Court were to decide, however, that the speech is neither intrinsically nor extrinsically deceptive, then it would be entitled to the same degree of protection as any other truthful speech. Whether this resulting protection is under an absolutist content or a strict balancing test,\textsuperscript{87} the protection afforded is clearly formidable.\textsuperscript{88}

The Court’s concluding statements in \textit{Linmark} substantiate this analysis of the intended scope of footnote twenty-four. Following its quotation of the “commonsense difference” language from \textit{Virginia Pharmacy}, the Court concluded that “[l]aws dealing with false or misleading signs, and laws requiring such signs to ‘appear in such a form, or include such additional information . . . as [is] necessary to prevent [their] being deceptive,’ therefore, would raise very different constitutional questions.”\textsuperscript{89} Without deciding those questions, the \textit{Linmark} Court simply and resolutely held that an ordinance “which impairs ‘the flow of truthful and legitimate commercial information’ is constitutionally infirm.”\textsuperscript{90}

\section*{III. The Impact of the First Amendment on the Government’s Burden of Proof in Information Exchange Cases}

\subsection*{A. The Public Interest in Information Exchange}

The speech at issue in information exchange cases such as \textit{Container Corp.} is clearly deserving of first amendment protection under the new commercial speech rationale. The Court in \textit{Virginia Pharmacy} ac-
nowledged that the effective allocation of resources in a free enterprise economy depends on “numerous private economic decisions,” and that the public interest lay in ensuring that “those decisions, in the aggregate, be intelligent and well informed.” Recognizing “society's strong interest in the free flow of commercial information,” one noted first amendment theorist has concluded that “[i]nformed decisions are essential to the free enterprise economy just as they are to our political order.”

The proposition that price information exchanged among producers and sellers is an integral part of this essential speech was expressly recognized by Justice Holmes in his dissent in American Column & Lumber Co. v. United States. Justice Holmes stated that “the ideal of commerce was an intelligent interchange made with full knowledge of the facts.” Further, he expressed surprise that the majority would render a decision invalidating the sharing of information “in a country of free speech that affects to regard education and knowledge as desirable.” Justice Brandeis adopted the same view, stating that “[s]urely it is not against the public interest to distribute knowledge of trade facts, however detailed. . . . Intelligent conduct of business implies not only knowledge of trade facts, but an understanding of them.” He concluded that “there is nothing in the Sherman Law which should limit freedom of discussion, even among traders.”

Four years later, in Maple Flooring, the majority of the Court adopted language similar to that of Holmes and Brandeis. The Court stated that the Sherman Act was not intended to “inhibit the intelligent conduct of business operations,” and concluded that trade is not restrained “merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.”

Admittedly, the recent commercial speech decisions are largely consumer oriented rather than seller oriented. In the traditional

91. 425 U.S. at 765.
92. Meiklejohn, supra note 83, at 440.
94. Id.
95. Id. at 413.
96. Id. at 416 (Brandeis, J., dissenting).
97. Id.
98. 268 U.S. 563, 583 (1925).
99. Id. (footnote omitted).
100. In Bates v. State Bar, 433 U.S. 350 (1977), Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), and Bigelow v. Virginia, 421 U.S. 809 (1975), there was as clear a concern with consumers' right to receive the information as it was with the advertisers right to disseminate the information. Similarly, in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the Court's concern with harassment of consumers was a consideration in denying any first amendment protection for the practices challenged in that case.
information exchange cases, however, the Court has acknowledged the importance of intelligent interchange on both sides of the economic equation: free competition requires "a free and open market among both buyers and sellers." Accordingly, the Court held that the defendants in Maple Flooring were not engaged in an illegal conspiracy "merely because they gather and disseminate information... bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses." Similarly, while admitting that the alleged combination involved sellers only, Justice Holmes argued that the information exchanged in American Column & Lumber was not secret, but public, and that those on the other side of the economic relationship, the buyers, were "not less active in their efforts to know the facts." Notably, in Container Corp. itself, most of the price information was obtained from the customers rather than the competitors, a practice not condemned by the government.

B. Indications from the Court: Conduct versus Speech

Only one of the modern commercial speech cases has alluded to the problem of price information exchanges as an antitrust violation. In Ohralik v. Ohio State Bar Association the Court cited price exchanges, along with securities and labor law violations, as examples of areas in which speech was subject to regulation. In order to be properly evaluated, however, this dictum must be analyzed in the context of the facts and holding of the case. Ohralik, an attorney, was sanctioned by the state bar association for engaging in the unethical activity of persistent in-person and by-mail solicitation of clients. The defendant challenged the association's regulations, claiming protection for his activities under the first amendment, but the Supreme Court rejected his claim and upheld the action taken by the bar association.

The reasoning of the Court merits close examination. Quoting a pre-Virginia Pharmacy decision, the Court reiterated that conduct of

The statement of facts in Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 89 (1977), does reflect, however, some concern for the seller's ability to market a product

101. 268 U.S. at 583 (emphasis added).
102. Id. at 584.
103. 257 U.S. at 412 (Holmes, J., dissenting).
104. 393 U.S. 333, 346 n.4 (1969) (Marshall, J., dissenting). In this context it is ironic to note that speech is more likely to be deemed deserving of first amendment protection where there are not "ample alternative channels" for the particular speech in question Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976). In Container Corp. the defendants only engaged in the prohibited information exchange where there were no other lawful channels for the communication. See 393 U.S. at 346 n.4 (Marshall, J., dissenting)
106. Id. at 456.
which speech is a part may be illegal without violating the first amendment. In keeping with this idea, the Court cited the regulation of information exchanges under the Sherman Act as an example which "illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." The Court then held that Ohralik's activities constituted "a business transaction in which speech is an essential but subordinate component."

The notion that the regulation of speech, pursuant to an important government interest, is permissible when it is only an incidental by-product of the legitimate regulation of nonspeech activity has not arisen only with the advent of the new commercial speech doctrine. For example, United States v. O'Brien upheld a regulation on conduct having an incidental effect on speech. O'Brien had been convicted for the knowing destruction of his draft card in protest against the Vietnam War. The circuit court agreed with O'Brien that his first amendment rights had been violated. On appeal, the Supreme Court rejected the first amendment argument, stating that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

Thus, Ohralik's recognition of the principle that regulation of speech incident to conduct may be permissible does not indicate any general lowering of the standard of protection to be applied to commercial speech. Commentators have conceded that the holding in Ohralik, the only one of the five major modern commercial speech cases in which the first amendment claim failed, can be explained on the basis of the conduct involved rather than on the basis of commercial speech. Indeed, the language of the Court seems to militate against any other conclusion. Thus, with the limited exceptions established in footnote twenty-four of Virginia Pharmacy, commercial speech is to be afforded the same first amendment protection, and is subject to the same limitations, as other varieties.

107. Id. at 456 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).
108. 436 U.S. at 456.
109. Id. at 457.
111. 376 F.2d 538, 542 (1st Cir. 1967) (upholding conviction on other grounds). In reviewing the Circuit Court's decision, the Supreme Court was not convinced that the defendant's actions constituted expressive conduct so as to warrant first amendment protection, but the Court accepted the speech element of the conduct for purposes of argument. 391 U.S. at 376.
112. 391 U.S. at 376.
113. Roberts, supra note 64, at 137 n.156. As Professor Roberts notes, Ohralik "recognizes that laws regulating, for example, securities, antitrust, and labor commonly make it illegal to pursue a course of conduct that necessarily implicates speech." Id. at 137 (footnote omitted) (emphasis added).
C. The Inappropriateness of a Per Se Rule

The emphasis placed on conduct in cases in which speech is an "essential but subordinate component" of the regulated activity has significant implications with respect to the per se approach to information exchanges adopted in Container Corp. The Court, in Ohralik, cited American Column & Lumber, rather than the more recent Container Corp., as authority for the government's power to regulate information exchanges. Yet American Column & Lumber required evidence of conduct, of which speech was only a component, in order to establish a violation of section 1. In light of the Court's recent extension of protection to commercial speech, it follows that the establishment of a violation based merely on proof of speech, without some further evidence of conduct, would not survive scrutiny under the first amendment.

The argument advanced by the government in Container Corp. was not dissimilar to that advanced by the state in Bates v. State Bar. In Bates, the Court was faced with a first amendment challenge to the state bar's prohibition on the publication of fees for basic legal services. The state argued that, due to the peculiar nature of legal services, the advertisement of fees was "inherently misleading," therefore placing the issue beyond the first amendment's protection. The Court rejected the notion that the government could regulate all speech of a certain type on such a general theory, instead requiring the state to prove that the particular speech to be regulated falls within the deceptive advertising exception of footnote twenty-four.

In Container Corp., the Court accepted the government's argument that the structure of an oligopolistic market is such as to make the exchange of detailed price information inherently a restraint of trade. It would seem incongruous for this argument to maintain vitality in the wake of Virginia Pharmacy, Linmark, Bates and Ohralik. Ironi-

114. 436 U.S. at 456.
115. See notes 25-28 supra and accompanying text.
116. The first amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const. amend. I. Although the infirmity in this case rests not in the act of Congress itself, but in the Court's application of the Sherman Act, it is clear that decisions of the Supreme Court may be invalidated as being unconstitutional. For example, in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the Court held that its earlier decision in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), was violative of the tenth amendment. In the context of the first amendment, court action may be restrained by the Constitution as evidenced by the prior restraint cases in which courts have been prohibited from enjoining speech prior to publication. See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).
118. Id. at 368-69.
119. Id.
120. In at least one instance, a government authority has suggested that first amendment protection of commercial speech may play a role in antitrust cases. In an opinion issued by the
cally, Container Corp. itself is the best example of the dangers of permitting such a sweeping theory of regulation where first amendment rights are involved. The government introduced no evidence as to levels of profits or prices, and relied instead on the theoretical assumption that prices must necessarily be maintained at a noncompetitive level. In fact, the relatively inelastic demand meant that lowering prices could allow a particular firm to capture a greater market share without increasing the aggregate demand, while the minimal entry barriers provided a disincentive to maintain prices at an artificially high level. As a result of these market forces, there was a "downward trend in prices, with substantial price variations among defendants and among their different plants," evidencing strong price competition.

Justice Marshall recognized these inconsistencies in the majority's approach, stating in his dissent that "[i]n the absence of any proof whatsoever, . . . [i]t is just as likely that price competition was furthered by the exchange as it is that it was depressed." Reviving the Maple Flooring standard, Justice Marshall concluded that the government failed to meet its burden of proof that the information exchange formed the basis of an agreement to fix prices at a noncompetitive level. Although agreeing with the underlying proposition of the majority, namely, that price exchanges may be condemnable in a truly oligopolistic market, Justice Marshall ultimately thought that the danger was not "sufficiently high to justify imposing a per se rule without actual proof." According to this analysis, the burden of proof should require the government to introduce evidence, in addition to the speech, that establishes an intent to fix prices at a noncompetitive level, or that noncompetitive prices actually resulted.

Vermont Attorney General's office, that state's antitrust enforcement agency argued that a Vermont Board of Public Accounting rule prohibiting solicitation of clients by direct communication poses first amendment problems in light of recent commercial speech cases. Antitrust & Trade Reg. Rep. (BNA) No. 932 at D-3, D-4 (Sept. 20, 1979). This, of course, presents a two-edged sword. It would be inconsistent for the government to assert first amendment protection of commercial speech as an additional ground for attacking information restraints imposed by professional organizations, while denying the impact of the first amendment on restrictions which the government itself seeks to impose.

122. The possibility of making disproportionately high profits would attract new firms into the market, encouraged by the low entry barriers. Because the aggregate market demand would not increase, each individual firm's market share would decrease, as more firms competed for a share of the market. Accordingly, despite the inflated price structure, total earnings would not increase. Thus, more rational behavior in this situation would be to engage in competition so as to capture a greater share of the market while keeping prices at a level which would not attract additional competition. This is, in fact, the scenario that the market in Container Corp. seemed to be following. See 393 U.S. at 342-43 (Marshall, J., dissenting).
123. Id. at 345 (Marshall, J., dissenting).
124. Id. at 345-46 (Marshall, J., dissenting).
125. Id. at 347 (Marshall, J., dissenting).
126. Id. at 343 (Marshall, J., dissenting).
The use of per se rules traditionally has been justified by an analysis approximating a due process balancing test. The per se rules are applied where "the gains from imposition of the rule will far outweigh the losses and . . . significant administrative advantages will result." This is deemed to be appropriate when "agreements or practices . . . 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." At the time Container Corp. was decided, the application of a per se rule could easily have withstood constitutional attack, if not criticism. Since Virginia Pharmacy, however, application of a per se rule to information exchanges, even in an oligopolistic market, would seem to be strictly prohibited by the Court's interpretation of the scope of first amendment protection of truthful and legitimate commercial speech. When first amendment rights are implicated, not even a vast administrative advantage should justify such an unforgiving standard of the defendant's guilt.

Of course, if the government were to meet the more stringent burden of proof argued for in this Article, the contested speech would be enjoined. This would not be objectionable even under traditional noncommercial speech notions as it would simply be an example of the O'Brien incidental regulation analysis. The government would not be regulating speech itself, as it was permitted to do in Container Corp., but, rather, would be regulating a broad course of conduct in which speech was an "essential but subordinate component."

Similarly, it is not suggested that the government be prohibited from introducing the speech as important evidence. First, there can be no objection to the initial facet of the Container Corp. holding—that an agreement may be inferred from an exchange of information. Thus, on this point, evidence of the speech might be crucial. What is objectionable is that an agreement to exchange information would be

127. Id. at 341 (Marshall, J., dissenting).
129. Generally, the due process clause imposes only broad limits on economic regulation. Friedman v. Rogers, 440 U.S. 1 (1979). Indeed, prior to the demise of the commercial speech exception, the Supreme Court was faced with a challenge on due process grounds to a proscription against advertising by optometrists. Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963). In Head, the Court held that the regulation of advertising did not violate due process. As to the questions of the evidentiary propriety of per se rules, it has been held in a different context that the creation of an evidentiary presumption does not violate due process. Purifoy v. Mercantile-Safe Deposit & Trust Co., 398 F. Supp. 1082 (D. Md. 1975), aff'd, 567 F.2d 268 (4th Cir. 1977). Despite the ability of per se rules to withstand a challenge solely under the due process clause, they have not escaped critical scrutiny. See E. Gelhorn, Antitrust Law and Economics in a Nutshell, 186-87 (1976). Mr. Justice Marshall in his dissent in Container Corp. noted that "[p]er se rules always contain a degree of arbitrariness." 393 U.S. at 341.
130. 393 U.S. at 335.
found to be illegal per se. Second, even as to the restraint of trade ingredient of a section 1 violation, the speech could be offered as important evidence. As already noted, *Ohralik* expressly recognizes that the first amendment does not prohibit regulation of a course of conduct “merely because the conduct was *in part* initiated, evidenced, or carried out by means of language.”

This Article argues for a position such as that recognized by Justice Holmes in acknowledging that, although an exchange of information among competitors may be important evidence of a section 1 conspiracy, when that is the only evidence on which the prosecution relies, it “only shows the weakness of the Government’s case.” A per se approach to horizontal price fixing may be appropriate in a case such as *Socony-Vacuum* in which the government proves the offense with evidence of conduct unrelated to speech, but when the government seeks to rely on the exchange of legitimate and truthful commercial speech as its primary evidence of price fixing, the Court should not apply a per se rule in deference to the important first amendment interests involved.

**Conclusion**

With the demise of the commercial speech exception, a significant inconsistency has been created in the law. The current activity directed against oligopolies makes it imperative that this inconsistency be reconciled. On the one hand, truthful commercial speech may form the sole basis for an antitrust violation because of the per se rule applied in *Container Corp.* On the other hand, that same truthful commercial speech is protected by the first amendment. If the Court were to resolve the problem by creating an exception for the *Container Corp.* scenario, it would be inviting the same kind of confusion that was attendant to the first commercial speech exception, and which took thirty years to unravel. There is a more straightforward way to reconcile the antitrust principles with the first amendment—requiring the government to prove that the defendants intended to establish noncompetitive prices or that such prices actually resulted from an exchange of price information. By the same token, if the defendants can refute the government’s case, then the price information should be deemed legitimate commercial speech and no penalty should result. The *Container Corp.* per se rule is inconsistent with the fundamental importance of free speech in our free market system. Thus, it should be abandoned in favor of a rule of reason which would admit of the vindication of the defendant’s first amendment rights.

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