> Except for Mr. Justice Holmes' dissent (which suggested that the manufacturer might indeed be the person in the distribution chain with the information and incentive to choose prices which would promote long run competition), ... the Court was concerned with maximizing the individual decisional freedom of participants in the distribution chain as a matter of liberty, rather than considered economic judgement. And, in *Dr. Miles*, Mr. Justice Hughes erroneously assumed that, without need for further inquiry, a series of vertical agreements are indistinguishable from horizontal agreements, a proposition which would be almost universally rejected today.
>
> The list of what is missing from the decsion is instructive:
>
> *Dr. Miles* did not state that all vertical agreements referring to price were designed to prevent competition.
>
> *Dr. Miles* did not state that conduct having an effect on price was tantamount to an agreement restricting pricing independence. It did not even concern itself with indirect price effects.
>
> And *Dr. Miles* did not hold that all debate about price activity was to be halted under the guise of a *per se* rule.
>
> Quite the opposite: In *Dr. Miles*, the Court recognized that one can look to other evidence (if there is other evidence) to see if there is something more than interference with pricing independence designed to prevent competiton, before classifying the agreement as one which falls within the per se rule....

Whatever the economic merits of the *per se* approach, where it applies antitrust liability will be found when all the elements of RPM have been established, notwithstanding any attempt at justification and regardless of the market position of the seller. It must be noted, however, that although vertical price fixing clearly contravenes the law, not every means of achieving resale price control will be considered unlawful resale price maintenance.

There are essentially four avenues available to exercise resale price control:

(a) unilateral conduct by a seller or manufacturer, including announcement of a suggested price policy and a simple refusal to deal, or acquiescence in the suggested pricing by the dealer;
(b) certain *bona fide* consignment and agency agreements;
(c) specific promotional pricing agreements which are not seen as RPM; and
(d) licensing agreements where the license involves an intellectual property right such as a patent, copyright, trademark or know-how.

Only the first two will be considered below. The fourth turns upon the relationship between antitrust and intellectual property law and thus lies beyond the scope of this Paper.