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# LEGAL REASONING AND THE JURISPRUDENCE OF VERTICAL RESTRAINTS: THE LIMITATIONS OF NEOCLASSICAL ECONOMIC ANALYSIS IN THE RESOLUTION OF ANTITRUST DISPUTES

JOHN J. FLYNN\*  
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## INTRODUCTION

The question of how antitrust policy "ought" to treat vertical distribution restraints in the 1980s under section 1 of the Sherman Act<sup>1</sup> embodies the difficulties entailed when any field of law becomes captive to a single paradigm.<sup>2</sup> Inherently political assumptions concerning the proper scope of property and contract rights and government power to regulate the economy, and unrealistic factual assumptions concerning the nature of vertical economic relationships have come to the fore in currently fashionable analysis of vertical restraints.<sup>3</sup> Furthermore, executive

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<sup>1</sup> 15 U.S.C. § 1 (1982) (prohibiting "[e]very contract, combination . . . or conspiracy, in restraint of trade").

<sup>2</sup> See, e.g., F. Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* 3-7 (1959). In describing the analytical positivism of the late nineteenth century, Roscoe Pound described a state of affairs analogous to current undue reliance on neoclassical economic theory to decide antitrust cases.

In a developed legal system when a judge decides a cause he seeks, first, to attain justice in that particular cause, and second, to attain it in accordance with law—that is, on grounds and by a process prescribed in or provided by law. One must admit that the strict theory of the last century denied the first proposition, conceiving the judicial function to begin and end in applying to an ascertained set of facts a rigidly defined legal formula definitively prescribed as such or exactly deduced from authoritatively prescribed premises.

Pound, *The Theory of Judicial Decision* (pt. 3), 36 Harv. L. Rev. 940, 940 (1923).

<sup>3</sup> See, e.g., R. Bork, *The Antitrust Paradox* 289 (1978) ("When a manufacturer wishes to impose resale price maintenance or vertical division of reseller markets, or any other restraint upon the rivalry of resellers, his motive cannot be the restriction of output and, therefore, can only be the creation of distributive efficiency."); Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 13-14 (1984) ("No manufacturer wants to have less competition among its dealers for the sake of less competition. The reduction in dealers' rivalry in the price dimension is just the tool the manufacturer uses to induce greater competition in the service dimension."); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 11 (1981) ("[T]he manufacturer's objective in restricting competition among

and certain judicial applications of the Sherman Act to restrictive commercial agreements have increasingly been characterized by use of clichés<sup>4</sup> and deductive reasoning instead of reflective inductive analysis. When this occurs, the governing rules are detached from the legislative rationales that gave them birth.

Proper application of rules intended to govern commercial relationships must first identify the values that the relevant statute is meant to maintain. Traditional legal analysis addresses how, within the limitations of the judicial process, those values can be implemented in the context of disputes touching upon them. Antitrust jurisprudence of vertical distribution restraints has seldom addressed these deeper political and jurisprudential dimensions.<sup>5</sup>

Cognizant of historical shifts in the methodology and standards applied in antitrust analysis, particularly in the analysis of vertical restraints, this Article first considers the underlying jurisprudential nature of legal reasoning as background for determining what the law of vertical restraints ought to be. The Article then explores the implications of substituting "economic analysis"—in the narrow sense of the economic analysis advocated by the Chicago School of "law and economics"<sup>6</sup>—for

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its dealers or distributors is to induce them to provide greater services to the customer.").

Each of these assertions of the nature of vertical market restraints is unsupported by empirical evidence. Each is, rather, the product of deductive reasoning from the abstract and unrealistic normative and factual assumptions underlying the neoclassical model and, therefore, asserts merely that the sole goal of antitrust policy is to maximize the contract and property rights of the proponent of a restraint taking place in a perfectly competitive market. See Ponsoldt, *The Unreasonableness of Coerced Cooperation: A Comment Upon the NCAA Decision's Rejection of the Chicago School*, 31 *Antitrust Bull.* 1003 (1986).

<sup>4</sup> One of the more popular clichés is that the antitrust laws protect competition, not competitors. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n.14 (1984); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The cliché implicitly asserts that one can have competition without competitors, contains no definition of "competition," and is frequently used to deny the congressionally defined goals of antitrust policy in favor of the narrow goals assumed by the neoclassical model. See Flynn, *The "Is" and "Ought" of Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp.*, 71 *Cornell L. Rev.* 1095, 1144 n.234 (1986).

<sup>5</sup> See Baker & Blumenthal, *Ideological Cycles and Unstable Antitrust Rules*, 31 *Antitrust Bull.* 323, 323-24 (1986) (discussing ebb and flow of populist sentiment toward antitrust law). Presently pending before the Supreme Court is a case that may allow the Court to reflect more deeply upon the political and jurisprudential dimensions of vertical restraints. In *Business Elecs. v. Sharp Elecs.*, 780 F.2d 1212 (5th Cir. 1986), cert. granted, 107 S. Ct. 3182 (1987) (No. 85-1910), the Court may determine whether an agreement between a manufacturer and its retailers to prevent price discounting without any understanding regarding specific resale prices should be condemned under the per se rule. The Fifth Circuit held that the per se rule of illegality does not apply unless there is an agreement regarding a specific resale price.

<sup>6</sup> See Posner, *The Chicago School of Antitrust Analysis*, 127 *U. Pa. L. Rev.* 925 (1979) (describing evolution of "Chicago School" approach to antitrust analysis). It should be noted that underlying policy goals may also dictate which facts are relevant, what they mean, and how they apply in the circumstances. One of the authors of this Article has noted that Chicago School adherents urge that "antitrust laws should be applied only in a manner that in-

legal reasoning in disputes arising under the antitrust laws. A more accurate, multivalued background for antitrust policy is explored.<sup>7</sup> This Article finally proposes a method for analysis of vertical restraints that will allow antitrust law to implement the goals Congress has mandated, yet address constructively the commercial practices it must regulate.

## I

### LEGAL REASONING AND THE CURRENT STATE OF ANTITRUST ANALYSIS

#### *A. Background to Antitrust Reasoning*

Legal reasoning is variously described as reasoning by analogy, as not logic but experience, as a process of drawing inferences from premises, or, more generally, as an inductive and deductive process in which concepts are used to link facts and rules in light of the legislative goals of the law.<sup>8</sup> It is the experience of the common law process that the just, peaceful, and rational resolution of disputes must recognize community standards as expressed through the rules we call law and must account for the realities of the particular dispute presented for resolution. It is in

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creases economic efficiency. But, utilizing a creatively deceptive transformation, [they have] defined 'efficiency' in neoclassical economic terms to mean the maximization of aggregate social wealth without regard for the distribution of that wealth or its political consequences." Ponsoldt, *On the Docket: Robert Bork*, Wall St. J., Sept. 24, 1987, at 27 (letter); see also Ponsoldt, *The Ideological Shaping of the Federal Judiciary*, N.Y. Times, Sept. 6, 1984, at A22; Ponsoldt, *Judges' Ideology Must Be Checked, Balanced*, Nat'l L.J., Nov. 10, 1986, at 12 (letter).

<sup>7</sup> This process involves a series of "ought" propositions. Even when general consensus in support of the specific rules of a regime of law and the goals it is designed to achieve may obscure the normative nature of the analysis, the analysis is nonetheless the normative one of determining the relevance, meaning, and applicability of facts and rules in light of the moral goals underlying the law.

An ethics, like a metaphysics, is no more certain and no less dangerous because it is unconsciously held. There are few judges, psychologists, or economists today who do not begin a consideration of their typical problems with some formula designed to cause all moral ideals to disappear and to produce an issue purified for the procedure of positive empirical science. But the ideals have generally retired to hats from which later wonders will magically arise.

F. Cohen, *supra* note 2, at 3; see also Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. Legal Stud. 335, 336-39 (1980) (describing law as moral science).

<sup>8</sup> See B. Cardozo, *The Nature of The Judicial Process* (1921); F. Cohen, *supra* note 2; R. Dworkin, *Law's Empire* (1986); O. Holmes, *The Common Law* (1881); E. Levi, *An Introduction to Legal Reasoning* (1949); R. Pound, *An Introduction to the Philosophy of Law* (1922). For a review of current disputes over the nature of legal reasoning, see Stick, *Can Nihilism be Pragmatic?*, 100 Harv. L. Rev. 332, 336-38 (1986) (discussing influences of legal theorists on "nihilist" branch of critical legal studies theorists); Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. Colo. L. Rev. 45, 63-87 (1985) (comparing deductive and analogical theories of legal reasoning).

the interaction of law and fact that legal analysis plays its central and unique role of adjusting reality to society's values, and of adjusting society's values to reality.

Implementation of antitrust policy over the years has exhibited many attributes of the rigid form of legal reasoning roughly characterized as analytical positivism. Reliance on fixed definitions and rules has replaced inductive legal reasoning with rigid deductive reasoning. The rules themselves usually have been premised on narrow and questionable factual and normative assumptions about society and its economic institutions. Furthermore, this rigid reasoning process has precluded, through its definitional strategies, both alternative normative statements relevant to the dispute and alternative ways of understanding the facts.

In the early history of the Sherman Act, courts lost sight of the law's underlying policies when they applied literally the language barring "every" contract or conspiracy "in restraint of trade."<sup>9</sup> After adjusting interpretations to social and economic reality, as well as to Congress's original goals,<sup>10</sup> the pendulum swung to an amorphous "rule of reason," permitting judges to invoke their own unstated values in applying the antitrust laws.<sup>11</sup> The pendulum then swung back to rigid application of

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<sup>9</sup> See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

If such an agreement restrain trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if any agreement of such a nature does restrain it, the agreement is condemned by this act.

*Id.* at 312.

<sup>10</sup> This adjustment began with *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), in which the court read into § 1 of the Act that the statute banned only "unreasonable" restraints of trade. This interpretation was eventually adopted by the Supreme Court. See *United States v. American Tobacco Co.*, 221 U.S. 106, 180 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 406 (1911).

<sup>11</sup> Although the rule of reason was launched by *Standard Oil Co.*, see 221 U.S. at 60, that decision and its methodology were not unduly vague. The Court announced a balancing-process methodology and identified factors indicating the reasonableness of a restraint. Some ambiguity is unavoidable in such a process, but the process nonetheless is directed by sensitivity to the underlying values of the law invoked. However, later cases reflected a gradual drift from implementing congressional goals to implementing the general policy of laissez faire that characterized the period. See, e.g., *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925) (permitting sharing of industry cost and inventory data among manufacturers); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925) (same); *United States v. General Elec. Co.*, 272 U.S. 476 (1926) (permitting, as true agency, arrangement in which manufacturer denoted 26,000 retailers as its agents and sold to agents under scheme of preset retail prices). When coupled with the Great Depression, this judicial abandonment of congressional values in favor of undefined judicial values led to the general desuetude of antitrust until the end of the 1930s. See, e.g., *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) (finding that combination of coal producers to eliminate competition among themselves did not violate Sherman Act because competition in total marketplace not injuriously affected).

per se rules and defined categories of illegality.<sup>12</sup>

Today we are witnessing a similar swing of the pendulum within the executive and judicial branches, this time to the extreme of finding conduct per se lawful without regard for the values embodied in the antitrust laws or for the facts of particular disputes. Decisions regarding the validity of vertical restraints now apply neoclassical economic theory and libertarian politics to the exclusion of all other values and, moreover, apply an axiomatic methodology designed to give effect to that theory.<sup>13</sup>

This mechanical, deductive reasoning is well demonstrated by the Supreme Court's treatment of vertical distribution cases under section 1 of the Sherman Act. The Court has implied effective support for per se legality in all cases save vertical price fixing in order to avoid a rigid rule of per se illegality.<sup>14</sup> For example, in rejecting the per se illegality rule of *United States v. Arnold, Schwinn & Co.*,<sup>15</sup> the Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*<sup>16</sup> placed great weight on the assumed rationality of suppliers operating in perfectly competitive markets.

The *Schwinn* test precluded inquiry into the reasons for the restraint, and similarly precluded evaluation of the effects of the restraint upon suppliers and consumers. The *Continental T.V.* test, on the other hand, instead favors unrealistic assumptions of fact and value about the reason for the restraint and its effect in an idealized market of perfect competition.<sup>17</sup>

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<sup>12</sup> This shift was launched by *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); see also *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (finding that vertical restraints violated Sherman Act when they restrained alienation after title passed), overruled by *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Fortner Enters. v. United States Steel Corp.* (Fortner I), 394 U.S. 495 (1969) (holding that arrangement tying distribution of one product or service to another constituted violation of Sherman Act when such tying foreclosed competition from any substantial market).

<sup>13</sup> See, e.g., *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (group of manufacturers cannot be accused of predatory pricing when it has no rational possibility of recoupment); see also Flynn, *An Antitrust Allegory*, 38 Hastings L.J. 517 (1987); Ponsoldt, *Reagan Circuit Judges Assault the Rule of Law*, Nat'l L.J., Feb. 7, 1983 at 12 (letter), quoted in *Shafer v. Burk Petroleum Corp.*, 569 F. Supp. 621, 625 n.4 (E.D. Wis. 1983).

<sup>14</sup> The Court has also mitigated per se illegality by manipulating the definition of the "contract, combination or conspiracy" element of the offense. See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-74 (1984).

<sup>15</sup> 388 U.S. 365, 374-82 (1967).

<sup>16</sup> 433 U.S. 36 (1977).

<sup>17</sup> This approach is sought by proponents of a "law and economics" approach to analysis of vertical restraints.

Finally, we argued that substantially all distributional restraints have the same consequence, namely the attenuation of intrabrand pricing rivalry and the intensification of interbrand rivalry through nonprice means. Accordingly, the fact that a given restraint has among its consequences an upward affect [sic] on price is totally irrelevant to the question whether it should be characterized as a resale price maintenance type restraint. Baxter, *A Review of Antitrust Division Briefs*, 15 J. Reprints for Antitrust L. & Econ. i, xviii (1985). For a general assessment of the Chicago School's neglect of the values of antitrust law,

This shift from one rigid and mechanical test to another precludes in both instances a full inquiry, in light of the values Congress mandated and of the facts of individual cases, into whether vertical price and non-price restraints ought to be permitted or prohibited in all cases, or in some cases but not in others.

### *B. The Positivism of Neoclassical Economics in Antitrust: A Critique*

Current implementation of the antitrust laws, both by enforcement agencies and in many judicial decisions, exemplifies a breakdown in the common law analytical process. Judicial and executive reluctance to realistically evaluate vertical distribution restraints in light of governing legislation represents the subservience of law to ideology. Captured by a superficial methodology and by an erroneous moral premise claiming to be scientifically based,<sup>18</sup> antitrust analysis is becoming a sterile and irrelevant exercise in confirming inappropriate political goals or nonexistent facts—or both—by applying predetermined rules to predetermined facts to reach predetermined conclusions.

The rigid deductive reasoning of one brand of neoclassical economic theory has displaced the complex inductive and deductive reasoning

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see Ponsoldt, *The Enrichment of Sellers as a Justification for Vertical Restraints: A Response to Chicago's Swiftian Modest Proposal*, 62 N.Y.U. L. Rev. 1166 (1987).

<sup>18</sup> No small part of the attraction of economic theory is the assertion by some that economics is a science capable of producing "truth" like the supposed truths in physics, chemistry, or astronomy. Paradoxically, just as science was coming to realize that its models did not necessarily produce eternal and unchanging truths, and indeed were incapable of doing so, economics was becoming captive to an outmoded concept of the nature of scientific knowledge. For descriptions of the evolution in scientific reasoning see J. Conant, *Modern Science and Modern Man* (1953); T. Kuhn, *The Structure of Scientific Revolutions* (2d ed. 1970); A. Whitehead, *The Function of Reason* (1958); A. Whitehead, *Modes of Thought* (1938). For a critical analysis of the claim that economics is a science, see Rosenberg, *If Economics Isn't Science, What Is It?*, 14 Phil. F. 296, 311 (1983) ("[W]e should view [economics] as a branch of mathematics, one devoted to examining the formal properties of a set of assumptions about the transitivity of abstract relations: axioms that implicitly define a technical notion of 'rationality,' just as geometry examines the formal properties of abstract points and lines.").

Although many lawyers superficially familiar with economics, as well as some economists, appear to be captured by the neoclassical model, there is growing recognition that the discipline is in intellectual difficulty, if not disrepute, because of its divorce from the reality it claims to describe. See T. Balough, *The Irrelevance of Equilibrium Economics*, in *Further Essays on Economic Theory* 176 (1978); Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 Sw. U.L. Rev. 335 (1980-1981); Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. Rev. 1309 (1986); A. Kamarck, *Economics and the Real World* (1983); I. Kirzner, *Competition and Entrepreneurship* (1973); Kuttner, *The Poverty of Economics*, *Atlantic Monthly*, Feb. 1985, at 74; Leontief, *Why Economics Needs Input-Output Analysis* (Interview), *Challenge*, Mar.-Apr. 1985, at 27; Ponsoldt, *Antitrust Reform Isn't the Answer*, *Nat'l L.J.*, Apr. 7, 1986, at 13 (letter); Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 *Geo. L.J.* 1511 (1984); Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 *Phil. & Pub. Aff.* 317 (1977).

process of proper legal analysis of antitrust disputes. Not only are the normative assumptions underlying neoclassical theory<sup>19</sup> substituted for those Congress intended the antitrust laws to fulfill, but the facts assumed by the model are substituted for the facts of actual disputes.<sup>20</sup> The result is a process at war with the appropriate use of, and institutional constraints upon, legal reasoning: a process that ignores both the reality it must address and the values that Congress mandated that antitrust policy preserve.<sup>21</sup>

Closer attention to the concepts and premises of the architects of the neoclassical evolution in antitrust law reveals the hollowness of that theory. Judge Bork, for example, has claimed that the legislative history of the major antitrust statutes reveals that Congress had one goal in mind

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<sup>19</sup> The claim is often made that the neoclassical model is morally neutral and can be applied mechanically without invoking the decision maker's own moral values. However, by its assumptions the model chooses which facts and which values ought to be deemed relevant to analysis. This inescapable attribute of legal and other forms of reasoning was the central issue in a recent debate between Judge Easterbrook and Professor Tribe. Compare Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4 (1984) (arguing that Supreme Court Justices today are more sophisticated in economic reasoning and apply it more thoroughly than at any other time in history) with Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 Harv. L. Rev. 592 (1985) (calling Supreme Court's increasingly utilitarian approach to legal problems insufficiently attentive to distribution of wealth and power and to underlying social values and perspectives essential to constitutional decisions); see also Easterbrook, *Method, Result, and Authority: A Reply*, 98 Harv. L. Rev. 622 (1985) (arguing that judges must address scarcity and, hence, economics, in shaping values of concern to Professor Tribe).

<sup>20</sup> The neoclassical model is static, comparing the abstract extreme of a hypothetical purely competitive market with the abstract extreme of a hypothetical purely monopolized one. For a criticism of these assumptions, see Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213, 256-83 (1985) (arguing that neoclassical market efficiency model is not useful in identifying anticompetitive behavior because model is static, dwells too much on long-run effects, and fails to appreciate social costs of monopolistic behavior).

<sup>21</sup> For example, the Supreme Court essentially ignored the facts of an antitrust dispute, the goals of antitrust policy, the separate functions of judge and jury, and the role of summary judgment in *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Facts unique to individual industries are often ignored by advocates of the neoclassical model in their determination of whether to follow the dictates of the model in fashioning antitrust rules. Compare Posner, *supra* note 3, at 23 (advocating per se legality for vertical restrictions on intrabrand competition among distributors or dealers) with Gerla, *Discounters and the Antitrust Laws: Faces Sometimes Should Make Cases*, 12 J. Corp. L. 1, 21-24 (1986) (arguing that adverse effect of some vertical restraints, and competition that some discounters provide, should rule out possibility of treating all vertical restraints as per se legal) and Carstensen & Dahlson, *Vertical Restraints in Beer Distribution: A Study of the Business Justifications for and Legal Analysis of Restricting Competition*, 1986 Wis. L. Rev. 1, 80 (arguing that other interests, including public's, should be considered in assessing legality of vertical restraints). See generally Wright, *Some Pitfalls of Economic Theory as a Guide to the Law of Competition*, 37 Va. L. Rev. 1083, 1094 (1951) (arguing that because legal theories of competition and restraint of trade are far in advance of their economic counterparts, courts must avoid ritualistic antitrust enforcement and must strike balance between enough market control to provide incentives to small businesses and creation of a "cartelized ossified system even when that system has the effect of protecting a horde of 'little' businesses").



when it adopted each of the major antitrust laws—that the antitrust laws be used to promote consumer welfare by maximizing “efficiency.”<sup>22</sup> Judge Posner, in turn, defines efficiency as “exploiting economic resources in such a way that ‘value’—human satisfaction as measured by aggregate consumer willingness to pay for goods and services—is maximized.”<sup>23</sup>

The neoclassical concept of efficiency—which is at the heart of the libertarian political model—is further modified by a series of assumptions about an unreal world of perfect competition.<sup>24</sup> The neoclassical efficiency talisman, moreover, is measured by tautological definitions of rational individuals and collective conduct.<sup>25</sup> The model is based on a seemingly innocuous premise, but the premise is not empirically or politically verified and is asserted without reference to other disciplines that have studied human behavior.<sup>26</sup> That premise is that individuals are rational maximizers of their ends in life and that an observer can tell what people want and how much they want by noting how much they are willing to pay for it. Thus, the argument goes, the antitrust laws should not inhibit rational—that is, efficient—business behavior that is profit enhancing for buyer and seller. This argument, however, is merely an apology for enforcing the paternalism of the proponent of a restraint.<sup>27</sup>

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<sup>22</sup> See R. Bork, *supra* note 3, at 61-66.

<sup>23</sup> R. Posner, *Economic Analysis of Law* 4 (1972) (emphasis omitted).

<sup>24</sup> The late Joan Robinson commented on the significance of the steps taken in building neoclassical theory.

It is not legitimate to say: Let us first assume perfect competition, and bring in the complications later; for an economy in which textbook perfect competition was possible would be different from our own in important respects; we do not know what contradictions we may be letting ourselves in for by assuming it. Indeed, it usually has to be buttressed by a range of further assumptions, such as: that plant is perfectly durable, there is no interest on working capital, and so forth. Very drastic assumptions are useful to hack out a new path, but it hardly seems worthwhile making them in order to stroll up a well-trodden blind alley.

4 J. Robinson, *Collected Economic Papers* 132 (1980).

<sup>25</sup> See generally Green, *The Duty Problem in Negligence Cases*, 28 *Colum. L. Rev.* 1014, 1018-19 (1928) (“No natural or social science has found its secrets in words and phrases and neither will the science of law.”).

<sup>26</sup> In his review of Judge Posner’s *Economic Analysis of Law*, Arthur Leff asked, “Can one actually, now, write four hundred pages about human desire without adverting to Freud, his followers, or even his enemies?” Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 *Va. L. Rev.* 451, 474 (1974). Professor Leff made similar observations about the disciplines of sociology, anthropology, psychology, and law, finding them virtually ignored in establishing the first premises in neoclassical thought of the type Judges Bork, Easterbrook, and Posner advocate.

<sup>27</sup> For an exhaustive examination of the assumption of rationality in several disciplines and empirical studies, see Harrison, *supra* note 18. Professor Harrison concludes his analysis of the rationality assumption underlying the law and economics movement with the observation: “It has become a particularly virulent form of crabgrass that too many measure by the ground it covers rather than by any genuine nurturing it provides. Before we abandon the legal field to

Law and economics advocates further claim that economists have no concern for the wisdom or morality of the choices made by businessmen and consumers, that theirs is but an accounting function of totting up those choices. When businessmen agree on or are coerced into a distribution method that appears, on balance, rational because it maximizes profits,<sup>28</sup> the antitrust laws should not interfere. However, advocates of neoclassical theory fail to explain why the discipline of economics ought to adopt such a politically loaded definition of "rational." That the choices people make should be measured only by what they are willing to pay is a claim that would probably surprise many scholars.<sup>29</sup> Perhaps the neoclassicists' objective is to portray this method of analysis as a closed system like geometry, capable of always producing truth and beyond normative criticism.<sup>30</sup>

The weakness of the premises of rationality and efficiency ultimately lies in their underinclusiveness. First, the premises exclude from consideration everything that cannot be quantified materialistically by people's willingness to pay.<sup>31</sup> Second, the premises exclude from consideration

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economics, we had better measure more carefully the fertile thought of other disciplines." *Id.* at 1363.

The assumption of rationality is transferred to "institutions Adam Smith never dreamed of" so that corporations and other complex collectives in modern life are assumed to be acting rationally at all times or "as if" they were acting rationally. Errors in judgment as to how to maximize are presumably disciplined by the assumed existence of other rational maximizers operating in an assumed perfectly competitive market. Flynn, *supra* note 18, at 348-49.

<sup>28</sup> Commenting upon Judge Posner's unquestioning use of the neoclassical concept of "rational," Arthur Leff observed:

Thus what people do is good, and its goodness can be determined by looking at what it is they do. In place of the more arbitrary normative "goods" of Formalism, and in place of the complicated empirical "goods" of Realism, stands the simple definitionally circular "value" of Posner's book. If human desire itself becomes normative (in the sense that it cannot be criticized), and if human desire is made definitionally identical with certain human acts, then those human acts are also beyond criticism in normative or efficiency terms; everyone is doing as best he can exactly what he set out to do which, by definition, is "good" for him. In those terms, it is not at all surprising that economic analyses have a considerable power in predicting how people in fact behave.

Leff, *supra* note 26, at 458 (emphasis in original). This reasoning is the basis for the claim that neoclassical economic analysis is value free and does not include any subjective criticism of the choices made. It is also the basis of the claim that the model is scientific in the sense of being neutral and objective. Once the basic definitions are in place, the tautology makes criticism impossible.

<sup>29</sup> See, e.g., Harrison, *supra* note 18, at 1357-58 (questioning reliance on expression of value as indicator of preference); Leff, *supra* note 26, at 481 ("We all know that all value is not a sole function of willingness to pay . . .").

<sup>30</sup> See Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 *Am. U.L. Rev.* 939, 958-67 (1985).

<sup>31</sup> See Kelman, *Choice and Utility*, 1979 *Wis. L. Rev.* 769 (criticizing neoclassical approach to choice for its failure to consider unquantifiable factors such as regret and duress); see also Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 *J. Legal Stud.* 243, 243 (1980) (recognizing criticism of neoclassical theory for its exclusion of claims based

the inaction of those who are unable to express their choices because they lack things of value to exchange for the choices they wish to make.<sup>32</sup> Moreover, the theorists make an implicit normative assumption when they use willingness to pay as a measurement of rationality and efficiency, rather than drawing on the multiplicity of explanations for human behavior available from other disciplines.<sup>33</sup> This normative assumption creates a political bias that disfavors democratic intervention to protect the least wealthy and powerful.<sup>34</sup>

The political bias of neoclassical economics justifies relabeling as "pseudo-rational" the economic concept of rational. A major factor influencing any calculus of choice is the existing legal system governing the society in which the individual makes the choices being measured.<sup>35</sup> If a legal model is created to protect or further "rational behavior," the ensuing behavior necessarily will incorporate the commands and protections of the legal model. Thus, the concept of "rational" is self-fulfilling and utterly artificial.

Thus, for example, it may appear rational to commit certain crimes in a society that defines rational behavior artificially and does not impose any punishment for the crimes. When deductive logic is then used to avoid questioning normative assumptions, it is not difficult to understand how advocates of the neoclassical model can conclude that society ought to permit the selling of babies,<sup>36</sup> ought to permit individuals to sell themselves into slavery,<sup>37</sup> and ought to be concerned only with enforcing the property rights of suppliers in assessing the legality of vertical market restraints.

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on "pure desire").

<sup>32</sup> Leff, *supra* note 26, at 478-79; see also Dworkin, *Is Wealth a Value?*, 9 J. Legal Stud. 191, 191-92 (1980) (challenging neoclassicist definition of "wealth maximization"); Kronman, *Wealth Maximization as a Normative Principle*, 9 J. Legal Stud. 227, 228-29 (1980) (same).

<sup>33</sup> The meaning and implications of rationality have been issues in philosophy since the stoics and are currently the subject of extensive study in a number of disciplines. See, e.g., Harrison, *supra* note 18, at 1339 (recognizing contributions of philosophy, psychology, biology, and anthropology to explanation of altruism as motivating factor in individual choice).

<sup>34</sup> See Baker, *Starting Points in Economic Analysis of Law*, 8 Hofstra L. Rev. 939, 940 (1980); Kronman, *supra* note 32, at 242.

<sup>35</sup> See Mensch, *The History of Mainstream Legal Thought: A Progressive Critique*, in *The Politics of Law* 18, 37 (D. Kairys ed. 1982); see also Samuels, *Normative Premises in Regulatory Theory*, 1 J. Post-Keynesian Econ. 100, 106 (1978) ("With no unique optimal use of resources and opportunities independent of rights identification and assignment, the legal system must select the result to be pursued: *the definition of the efficient solution is both the object and the subject of the legal system.*" (emphasis in original)).

<sup>36</sup> See R. Posner, *Economic Analysis of Law* § 5.4 (3d ed. 1986); Landes & Posner, *The Economics of the Baby Shortage*, 7 J. Legal Stud. 323 (1978).

<sup>37</sup> See R. Posner, *The Economics of Justice* 86 (1981); R. Posner & A. Kronman, *The Economics of Contract Law* 256-60 (1979).

The neoclassical definition of efficiency<sup>38</sup> is derived from this circular definition of rationality. It is a definition premised on the unstated assumptions underlying its definition of rationality.

The neoclassicists subdivide efficiency into the concepts of allocative efficiency and productive efficiency. Judge Bork has defined these concepts as follows: "Allocative efficiency . . . refers to the placement of resources in the economy, the question of whether resources are employed in tasks where consumers value their output most. Productive efficiency refers to the effective use of resources by particular firms."<sup>39</sup> Judge Bork then asserts, "The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."<sup>40</sup>

This analysis is superficially attractive because it appeals to human freedom.<sup>41</sup> The analysis is also seductive because it uses language with laudable popular meanings, such as "rational," "efficiency," and "consumer welfare," to describe normatively loaded concepts that can be understood only in light of the tautological definitions and hidden assumptions underlying the model.

Furthermore, the analysis taps into a presently popular fear of discretion, particularly discretion exercised by governmental decision makers. The analytical positivists attempt to allay these fears by claiming that the neoclassical model ends the risk of the irrationality of discretion.<sup>42</sup> The positivists consider discretion irrational, rather than inescapable, because it does not provide a "scientific" method of control over the arbitrary exercise of judicial power to regulate capital or complement a "rule of law." However, the American political experiment has long been recognized as a compromise between the forces of economic liberty and laissez-faire capitalism on the one hand, and democratic regulation of capital on the other. "For the majority to support capitalism, it must have faith in the fairness and integrity of the market; the market must be sufficiently regulated for wealth distribution not to be too disproportionate; and the middle class must remain active and independent."<sup>43</sup>

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<sup>38</sup> For an examination of some of the complexities of the general concept of efficiency, see Symposium on Efficiency as a Legal Concern, 8 Hofstra L. Rev. 485 (1980).

<sup>39</sup> R. Bork, *supra* note 3, at 91.

<sup>40</sup> *Id.*

<sup>41</sup> See Leff, *supra* note 26, at 477 (recognizing that value of freedom "directs and informs" neoclassical approach).

<sup>42</sup> See, e.g., R. Bork, *supra* note 3, at 117 ("There is no body of knowledge other than conventional price theory that can serve as a guide to the effects of business behavior upon the consumer welfare [as defined by the model]. To abandon economic theory is to abandon the possibility of a rational antitrust law.").

<sup>43</sup> Ponsoldt, *Democracy and Capitalism Collide*, N.Y. Times, Jan. 9, 1987, at A26 (letter).

Any attempt to define the role of antitrust with respect to property and contract rights solely in terms of the neoclassical model would result in the abolition of the antitrust laws.<sup>44</sup> This rebirth of rigid positivism<sup>45</sup> is as startling as it is intellectually indefensible.<sup>46</sup> Moreover, it would result in the denial of the goals for antitrust mandated by Congress and result in the judicial repeal of the law. It is to the congressionally mandated goals of antitrust law and policy that we now turn.

## II

### THE GOALS OF ANTITRUST POLICY AND THEIR JUSTIFICATION

There is a curious and growing belief that Congress intended the antitrust laws to serve only the goal of allocative efficiency as defined by the "law and economics" wing of neoclassical economic theory or, notwithstanding congressional intent, that the antitrust laws ought to be interpreted this way. The principal proponent of the view that Congress intended the antitrust laws to serve only the goal of allocative efficiency is Judge Bork.<sup>47</sup> Judges Posner and Easterbrook are the principal proponents of the view that the antitrust laws ought to be interpreted with allocative efficiency as the primary goal of antitrust policy, regardless of what Congress intended.<sup>48</sup>

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<sup>44</sup> See, e.g., Dewey, *Antitrust and Economic Theory: An Uneasy Friendship* (Book Review), 87 Yale L.J. 1516, 1518 (1978) (reviewing R. Bork, *supra* note 3).

<sup>45</sup> See Posner, *Some Uses and Abuses of Economics in Law*, 46 U. Chi. L. Rev. 281, 285 (1979) (describing his form of economic analysis of law as methodology for describing what "is" as opposed to a normative approach attempting to define what law "ought" to be). In legal analysis, however, the "is" cannot be divorced from the "ought." See Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 Yale L.J. 1136, 1140 (1982); Flynn, *supra* note 4, at 1126.

<sup>46</sup> See Baker, *supra* note 34; Harrison, *supra* note 18; Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics,"* 33 J. Legal Educ. 274 (1983); Leff, *supra* note 26; Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. Chi. L. Rev. 307 (1979); Miller, *Economic Analysis of Legal Method and Law: The Danger In Valueless Values*, 21 Gonz. L. Rev. 425 (1986).

<sup>47</sup> See R. Bork, *supra* note 3, at 50-71 (1978) (discussing legislative intent of antitrust laws); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & Econ. 7 (1966) (same).

<sup>48</sup> See Posner, *supra* note 3; Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Doctrines*, 75 Colum. L. Rev. 282 (1975). Judge Easterbrook is perhaps the most extreme in applying a doctrinaire law and economics approach to antitrust analysis without regard for the legislative history of the statutes or the facts of individual cases. See Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1702 (1986) ("[The Sherman Act] does not contain a program; it is instead a blank check."); see also Easterbrook, *supra* note 3, at 1 ("[The] goal of antitrust is to perfect the operation of competitive markets."). In the latter article, Judge Easterbrook dismissed the plaintiff's predatory pricing in *In re Japanese Prods. Antitrust Litig.* 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), solely on the basis of the assumptions and predictions of the law and economics

The principal difficulty with Judge Bork's position, and the reason that the growing presumption in favor of his position is curious, is that he is wrong in his reading of the legislative history. The principal difficulty with the position Judges Posner and Easterbrook advocate is that their position is impossible to implement honestly in an adversarial system that relies upon common law legal reasoning and deference to the policies mandated by the lawgiver—in this case, Congress.

#### *A. The Historical Goals of Antitrust Policy*

Judge Bork's analysis of the legislative history of the antitrust laws is a case of "believing is seeing" rather than "seeing is believing." Neoclassical price theory and its concept of efficiency were unknown when the major federal antitrust laws were adopted.<sup>49</sup> Moreover, the leading economists of the day, largely of the classical school, either opposed or ignored the adoption of the antitrust laws.<sup>50</sup> It is difficult to believe that the legislators, adopting a statute over the objections or ignorance of the professional economists of the day, meant nonetheless to implement the values and goals of that group.<sup>51</sup>

If Judge Bork is claiming that the Congresses that adopted the antitrust laws meant to pursue the values that neoclassical economic theory later suggested ought to be the goals of the antitrust laws, that claim is simply false. Scholars who have made detailed studies of the legislative history of the antitrust laws reject such a reading and find that the legislative histories indicate that Congress had multiple goals in mind.<sup>52</sup> The

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model, without any reference to the record in the case. See Easterbrook, *supra* note 3, at 27. The Supreme Court followed Judge Easterbrook's analysis in its *Matsushita* decision, analyzing the predictions of the model in light of its assumptions rather than legislative goals for antitrust policy and the facts of the case.

<sup>49</sup> See Carstensen, *Antitrust Law and the Paradigm of Industrial Organization*, 16 U.C. Davis L. Rev. 487, 487 (1983); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 88 (1982).

<sup>50</sup> Lande, *supra* note 49, at 88-89. None of the schools of economics had much influence on Congress in general and on the "trust question" in particular. H. Thorelli, *The Federal Antitrust Policy* 120-21 (1954); see also W. Letwin, *Law and Economic Policy in America* 77 (1965).

<sup>51</sup> See Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213, 249 (1985) ("The legislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency.").

<sup>52</sup> See, e.g., R. Hofstadter, *What Happened to the Antitrust Movement?*, in *The Paranoid Style in American Politics, and Other Essays* 188 (1965).

The goals of antitrust were of three kinds. The first were economic; the classical model of competition confirmed the belief that the maximum of economic efficiency would be produced by competition, and at least some members of Congress must have been under the spell of this intellectually elegant model, insofar as they were able to formulate their economic intentions in abstract terms. The second class of goals was political; the antitrust principle was intended to block private accumulations of power and protect democratic government. The third was social and moral; the competitive process was

most succinct and accurate summary of those goals is that suggested by Professor Eleanor Fox. "There are four major historical goals of antitrust, and all should continue to be respected. These are: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor."<sup>53</sup> These are political goals, values, and "ought" propositions. They call for tools of analysis capable of implementing a more subtle concept of competition, competition as a process,<sup>54</sup> rather than the mechanically measured quantitative concept advocated by neoclassical theorists. It is clear that Congress intended to regulate commerce and to prohibit private commercial practices that interfered with the competitive process, regardless of the wealth-enhancing quality of those practices.

The question of the goals or values that Congress did intend the antitrust laws to fulfill remains a central and ambiguous issue in antitrust litigation. Although there is something to be said for maintaining a certain level of ambiguity in the interrelated values underlying a law in order to maintain judicial flexibility in the face of factual complexity, there should be little debate over the necessity for judicial deference to legislative judgment in economic policy making. There should be no debate over the necessity of at least identifying the legislative policy goals of a field of law, if judicial enforcement of the policy is to be coherent and predictable.

The inconsistencies of present antitrust enforcement merely manifest a deeper conflict over the goals of antitrust policy. Past attempts to make the sterile analytical systems of positivism work foundered because legal analysis became preoccupied with definitions divorced from reality,

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believed to be a kind of disciplinary machinery for the development of character, and the competitiveness of the people—the fundamental stimulus to national morale—was believed to need protection.

*Id.* at 199-200; see also H. Thorelli, *supra* note 50. The leading historical studies of the congressional goals for antitrust policy are surveyed in Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 *Cornell L. Rev.* 1140 (1981).

<sup>53</sup> Fox, *supra* note 52, at 1182.

<sup>54</sup> *Id.* at 1154.

One overarching idea has unified these three concerns (distrust of power, concern for consumers, and commitment to opportunity for entrepreneurs): *competition as process*. The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair. Some measure of productive and allocative efficiency is a byproduct, because competition tends to stimulate lowest-cost production and allocate resources more responsively than a visible public or private hand.

*Id.* (emphasis added and footnotes omitted). For a further elaboration of this concept of competition as a process, see note 87 *infra*.

the underlying political ends of the regime of law being applied, and the unavoidable inductive nature of legal reasoning.<sup>55</sup> Analytical positivism did not work in the nineteenth century and it will not work now. The interesting question is why it is argued that the law should travel down this well-trodden and dead-end methodological road once again. Possible explanations include a desire to impose disguised normative values for unstated political reasons,<sup>56</sup> protection of the status quo,<sup>57</sup> or fear that undue judicial discretion would lead to multivalued rules of decision.<sup>58</sup>

The last of these fears is based upon an erroneous assumption, of interest to the objectives of this Article, about the nature of legal reasoning. It is here that misuse of economic analysis in antitrust litigation occurs, due to an apparent belief that nothing short of a single-value, mechanical model for legal decision making can make the law "rational." To paraphrase Arthur Leff, what one sees by relying exclusively on the neoclassical model is the artificial light of the model, not the reality it is intended to illuminate.<sup>59</sup>

Judge Bork exemplifies the genre. He asserts that "[t]o abandon economic theory is to abandon the possibility of a rational antitrust law"<sup>60</sup> and that only by means of neoclassical price theory can antitrust

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<sup>55</sup> See, e.g., Green, *supra* note 25 (discussing legal positivism and formalism in context of law of negligence).

<sup>56</sup> See generally Flynn, "Reaganomics" and Antitrust Enforcement: A Jurisprudential Critique, 1983 Utah L. Rev. 269, 281, 312 (discussing Reagan Administration's "simplistic libertarianism"); Rowe, *supra* note 18, at 1559-62 (assessing political and normative goals of current antitrust policy).

<sup>57</sup> Chicago School reasoning assumes the existence of a legal system, an existing distribution of wealth entitled to legal protection, and the enforcement of the contract and property rights of those with power.

[M]odern economists assume that someone else, presumably the lawyers, has already taken care of the problem of "externalities"—whether costs or benefits—by providing for their assignment or appropriation by the state's enforcement of particular private property rules. Likewise, someone else has already taken care of the problem of excluding fraudulent transactions and/or transactions under duress from the universe of perfect competitors.

Kennedy, *supra* note 30, at 961.

<sup>58</sup> Extreme legal realism implies that there are no predictable rules to govern behavior, guide the decision maker, control discretion, or insure the goals of the lawgiver. See Lehman, *Rules in Law*, 72 Geo. L.J. 1571 (1984). The problem is to find a ground between rigid formalism and extreme realism. The law and economics movement tends in the direction of rigid formalism. See, e.g., Posner, *supra* note 45. The CLS movement tends to the opposite extreme. See Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 Stan. L. Rev. 413, 430-33 (1984); Stick, *supra* note 8; White, *The Inevitability of Critical Legal Studies*, 36 Stan. L. Rev. 649 (1984); Note, *Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law*, 95 Yale L.J. 969 (1986).

<sup>59</sup> See Leff, *supra* note 26, at 482.

<sup>60</sup> R. Bork, *supra* note 3, at 117. There are four rather generous assumptions inherent in this statement: (1) that a multiplicity of insights and values implies a total abandonment of



analysis avoid an irrational resort to vague economic, political, and social goals for antitrust policy—what Bork and others call “poetry.”<sup>61</sup>

Neoclassical price theory places any business practice under any circumstances into only one of three categories: (1) efficient (within the meaning of efficiency as defined by the model); (2) inefficient because it restricts output (measured by the concept of consumer welfare as defined by the model); or (3) neutral because the practice is unrelated to the only things that count—productive or allocative efficiency as measured by the model.<sup>62</sup> It is further asserted that “price theory enables us to identify, with an acceptable degree of accuracy, those activities whose primary effect is output restricting, leading to the inference that all other activity is either efficiency creating or neutral.”<sup>63</sup>

Finally, it is claimed that, in all cases where the model indicates that activity is neutral or does not provide a basis for predicting effects on “consumer welfare,” the law should not intervene.<sup>64</sup> This reasoning is backed by the unsubstantiated and startling assertion that “[t]here is no body of knowledge other than conventional price theory that can serve as a guide to the effects of business behavior upon consumer welfare.”<sup>65</sup> Why this is so and how it can be proved are never stated, although those who wander about in the epistemological quandaries of other intellectual

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economic analysis; (2) that other insights have no claim to truth; (3) that true knowledge can only be obtained through some process called “rational”; and (4) that the only rational knowledge is that produced by economic theory and, particularly, by neoclassical price theory. These assumptions often show up in bald statements suggesting that arguments relying on social or political goals rely on “poetry” and are, therefore, meaningless. See “No-Fault” Monopolization Proposal Debated by Presidential Commission on Antitrust Reform, *Antitrust & Trade Reg. Rep. (BNA) No. 880*, at A-22 (Sept. 14, 1978) (quoting Robert Bork); Panel Discussion on Economic Analysis, 12 *Sw. U.L. Rev.* 355 (1981) (statement of Prof. Clower) (referring to economists who criticize the Chicago School, stating “I am unable to see a role in the law or elsewhere for an ‘economics’ that starts from a base in poetry or metaphysics”). Poets, no doubt, will disagree that theirs is a meaningless effort incapable of providing insights into reality. An examination of the assumptions of neoclassical theory reveals that its practitioners are in the same boat as the rest of us—practicing “poetry.”

<sup>61</sup> See note 60 *supra*.

<sup>62</sup> R. Bork, *supra* note 3, at 122. This breakdown of conduct or structure into mutually exclusive categories may be called the “either-or” fallacy. Flynn, *An Antitrust Allegory*, 38 *Hastings L.J.* 517, 539 n.5 (1987). While such a division may hold true in closed systems of analysis like Euclidean geometry, complex facts and human conduct do not fall into such black and white categories—except perhaps questions of whether one is pregnant or not, or alive or not. Even in the latter instances it is not unknown for questions to arise that test the borders of the categories. To believe that all business practices fall into only one of the categories of efficient, inefficient, or neutral suggests an analysis of the abstract model rather than of the complex and messy reality of the real world.

<sup>63</sup> R. Bork, *supra* note 3, at 116.

<sup>64</sup> *Id.* at 117. It should be noted that the law has already intervened by creating and enforcing contract and property rights, and that there is an existing distribution of wealth by the legal system. See Baker, *supra* note 34; Kennedy, *supra* note 57.

<sup>65</sup> R. Bork, *supra* note 3, at 117.

pursuits may take some comfort from the claim that economics at least has arrived at knowable, eternal, and unchanging truth.

Unfortunately, reality, and the values Congress mandated that anti-trust policy fulfill, do not comport with the assumptions of the neoclassical model. The model and its definitions preclude a constructive analysis of reality in light of the values underlying the law. The model is crude and is similar to the per se rules criticized by law and economics advocates for their failure to consider possible explanations justifying the conduct condemned. Further, the neoclassical model rejects other sources of wisdom for antitrust, including other schools of economic thought<sup>66</sup> and subdivisions within the neoclassical school itself, in favor of a theory based on assumptions of how a perfectly competitive and perfectly monopolized world would look.

*B. Some Consequences of Substituting Positive Economics for Legal Reasoning and Congressional Goals*

The current success of the law and economics movement may be attributable, at least in part, to the inflexible per se rules of the past. Antitrust policy has long been preoccupied with certainty in its rules.<sup>67</sup> Courts adopted rigid per se rules and then a vague rule of reason in order to identify activity that ought to be condemned.

As with most inflexible legal rules, application of the rules took precedence over implementation of the law's objectives and a thorough evaluation of the facts unique to the dispute. For example, the issue in antitrust disputes often became whether the conduct under examination fell squarely within a category of per se illegal conduct,<sup>68</sup> without considering why the category of conduct had been declared per se illegal. The concepts of contract, combination, and conspiracy became playgrounds for the medieval metaphysician in the attempt to mitigate the rigidity of

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<sup>66</sup> See generally Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 Cornell L. Rev. 738 (1981) (discussing theories of predatory pricing); Schmalensee, *On the Use of Economic Models in Antitrust: The Realemon Case*, 127 U. Pa. L. Rev. 994 (1979) (discussing use of economic models in antitrust law, including tests for predatory pricing).

<sup>67</sup> See text accompanying notes 8-17 *supra*.

<sup>68</sup> See, e.g., *Fortner Enters. v. United States Steel Corp.* (Fortner I), 394 U.S. 495, 498-500 (1969) (holding tying arrangements per se illegal if certain prerequisites met); *Albrecht v. Herald Co.*, 390 U.S. 145, 151 (1968) (holding retail price fixing by agreements per se illegal); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967) (finding per se violation when product is sold to distributor subject to territorial restrictions on resale), overruled by *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). See generally Ponsoldt, *The Application of Sherman Act Anti-Boycott Law to Industry Self-Regulation: An Analysis Integrating Nonboycott Sherman Act Principles*, 55 S. Cal. L. Rev. 1 (1981) (arguing that courts should apply per se rules in evaluating industry self-regulation efforts undertaken without government approval).

per se rules. Distinctions not recognized elsewhere in the law were drawn between unilateral and bilateral conduct by litigants. Courts lost sight of the underlying reason for determining whether joint conduct violated the congressional goals underlying the prohibition upon "restraints of trade."<sup>69</sup>

With its pseudoscientific aura of producing the right answer, the law and economics approach may have appeared irresistible to the uninitiated. The model can be overwhelming to committed legal positivists, even though we have all been wisely warned that "our quest for certitude is so ardent that we pay an irrational reverence to a technique which uses symbols of certainty, even though experience again and again warns us they are delusive."<sup>70</sup>

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<sup>69</sup> See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984). The essence of a § 1 violation is whether there is joint action resulting in a restraint of trade. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939); *United States v. General Elec. Co.*, 272 U.S. 476, 485-86 (1926); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). The conduct that was alleged in the cited cases satisfies the legal requirements for a contract or conspiracy as those terms are used elsewhere in the law. The issue should be whether it is the type of contract or conspiracy that violates the values to be preserved and protected by outlawing "restraints of trade." Instead of analyzing the possible existence of a contract or conspiracy without considering the goals of the antitrust law, courts decide whether a contract or conspiracy ought to be treated as a contract or conspiracy. Coercive "unilateral refusals to deal" thereby escaped condemnation of the statute because there was no contract or conspiracy, see *Colgate*, 250 U.S. at 305, even though they resulted in compliance with the supplier's price fixing demands, interfered with the independence of traders, led to higher prices to consumers, and displaced the competitive process with power. Judicial inquiry should have proceeded further to determine whether the refusal to deal under the circumstances ought to be found an unlawful restraint of trade. See Andersen, *The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case for Presumptive Illegality*, 54 Wash. L. Rev. 763 (1979) (arguing that *Colgate* doctrine should be abandoned and identical standards should be used to evaluate vertical and horizontal price communications).

The different and subtle issue of sufficiency of the evidence so that a jury might determine the existence of joint action would still remain. However, it would be directed to the question of whether the facts were legally sufficient under the general definitions of contract or conspiracy to be deemed an illegal restraint of trade. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765-66 (1984) (finding sufficient evidence for jury to determine that conspiracy or agreement existed).

<sup>70</sup> *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 643 n.40 (1944) (Jackson, J., dissenting). Distinguished and creative economists have issued similar warnings. For example, Joseph Schumpeter warned:

Analytic work begins with material provided by our vision of things, and this vision is ideological almost by definition. . . . The more honest and naive our vision is, the more dangerous is it to the eventual emergence of anything for which general validity can be claimed.

J. Schumpeter, *History of Economic Analysis* 42-43 (1954). Frank H. Knight observed:

[A] fetish of "scientific method" in the study of society is one of the two most pernicious forms of romantic folly that are current among the educated. . . . [A] natural or positive science of human conduct . . . is not what we need; indeed, the idea is an absurdity.

F. Knight, *The Role of Principles in Economics and Politics*, in *On the History and Method of Economics* 250, 260-61 (1956).

With respect to vertical restraints, traditional per se analysis and neoclassical analysis are strikingly similar: both deductively apply definitions premised on hidden value choices to predetermined facts. For example, in *United States v. Arnold, Schwinn & Co.*,<sup>71</sup> a majority of the Court held that the common law rule against restraints on alienation dictated a per se rule against vertically imposed customer and territorial restraints.<sup>72</sup> Any attempt to interfere with the use or disposition of property once title had passed was apparently illegal without room for justifications.<sup>73</sup> This analysis considered only distributor freedom and disregarded the effect of distribution practices on the public or the supplier. By the same token, the only fact that mattered was the legal fact of whether title to the goods had been transferred.

The opposite position, advocated by neoclassical theorists and used by the Supreme Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*<sup>74</sup> to overrule *Arnold, Schwinn & Co.*, applied an undefined rule of reason to vertical customer and territorial restraints, effectively making them per se lawful.<sup>75</sup> This reversal was done in the name of bringing "market considerations" to bear in evaluating vertical restraints. Under this analysis, the sole objective is to maximize the wealth of the proponent of the restraint, without regard to the circumstances in which the restraint is imposed, the public interest, or the rights and interests of the victim. The restraint is assumed to benefit the public because the assumptions of the model so dictate.<sup>76</sup> The effect of the restraint on others in the system of

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<sup>71</sup> 388 U.S. 365 (1967), overruled by *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

<sup>72</sup> *Id.* at 379-80.

<sup>73</sup> Putting aside claimed economic justifications for vertical restraints, see, e.g., Goldberg, *The Free Rider Problem, Imperfect Pricing and the Economics of Retailing Services*, 79 Nw. U.L. Rev. 736 (1984) (arguing for presumption that manufacturer knows best when determining value of restrictions as long as no interbrand cartels exist), practical circumstances, such as the need to control distribution and use of dangerous products or to guarantee the quality of perishable products, arguably ought to justify the limited use of such restraints, see, e.g., *Tripoli Co. v. Wella Corp.*, 425 F.2d 932, 937-38 (3d Cir.) (finding restraints reasonable and in public interest to prevent public from harm), cert. denied, 400 U.S. 831 (1970); *Adolph Coors Co. v. Federal Trade Comm'n*, 497 F.2d 1178, 1187 (10th Cir. 1974) (allowing brewer to condition sales to distributors on requirement that distributors safeguard product quality but not to restrict territories or persons to whom product can be distributed once brewer parts with title), cert. denied, 419 U.S. 1105 (1975). However, deference to the assumed "rationality" of one side of the bargain does not account for the reality of modern marketing in the context of most antitrust litigation. Form distribution, franchise contracts, and coercive threats of termination have replaced the eighteenth-century model of farmers freely bargaining over their produce and wares on market day.

<sup>74</sup> 433 U.S. 36 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)).

<sup>75</sup> See *id.* at 57-59.

<sup>76</sup> See R. Bork, *supra* note 3, at 291-98 (discussing objections to thesis that all manufacturer-imposed vertical restraints should be deemed lawful); Posner, *supra* note 3, at 6 (arguing

distribution is ignored; the model either assumes that effect to be the product of free bargaining in a perfectly competitive market, or assumes that the actual impact of the restraint on a distributor and consumers is irrelevant to the analysis.

The market considerations that enforcement agencies and many courts have brought to bear since *Continental T.V.* have involved nothing more than the mechanical application of neoclassical theory. At its best, this approach singles out the value of maximizing the economic freedom of persons and private collectives proposing vertical restraints in the marketing process; at its worst, the theory protects without question the property and contract rights of those who have the power to impose the restraint. The "free rider"<sup>77</sup> argument assumes the rationality of the proponent of the restraint<sup>78</sup> in a perfectly competitive market.<sup>79</sup> By the

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that vertical restrictions on distributors should be per se legal). The argument is that distributors will impose vertical restraints only to achieve efficiency and increase output. Because it is efficient to impose restraints, consumer welfare will be enhanced and output increased even though the restraint may increase prices. This hypothesis has been persuasively challenged. See Comanor, *Vertical Arrangements and Antitrust Analysis*, 62 N.Y.U. L. Rev. 1153 (1987) (describing conditions, qualifications, and inconsistencies in efficiency analysis of antitrust restraints); Comanor, *Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 Harv. L. Rev. 983 (1985) [hereinafter Comanor, *Vertical Price Fixing*] (analyzing vertical restraints and taking view, contrary to Bork's, that these restraints might harm consumers); Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rival's Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986) (finding current policy toward exclusionary behavior not clear and suggesting alternative analysis); Scherer, *The Economics of Vertical Restraints*, 52 Antitrust L.J. 687 (1983) (analyzing arguments of Bork and Posner, suggesting rule-of-reason analysis for vertical restraints cases).

<sup>77</sup> The "free rider" problem has been explained as follows:

Sales are directed from the retailers who do provide the special services [jointly with the product] at the higher price to the retailers who do not provide the special services and offer to sell the product at the lower price . . . . A customer, because of the special services provided by the retailer, is persuaded to buy the product. But he purchases the product from another paying a lower price. In this way the retailers who do not provide the special services get a free ride at the expense of those who have convinced consumers to buy the product.

Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86 (1960).

<sup>78</sup> For analysis suggesting that reliance on the concept of the free rider produces inefficient results, see Barrett, *Restrictive Distribution and the Assault of the "Free Riders,"* 7 J. Corp. L. 467 (1982). The concept of the free rider is a rationalization for unlimited legal protection of the property and contract rights of the proponent of a restraint. Although recognition of the free rider purports to foster an efficient allocation of resources under the constraints of a perfectly competitive market, it actually deflects analysis from the circumstances in which the restraint is imposed, as well as from an evaluation of the contract and property rights of both the victim of the restraint and of the public. See Comanor, *Vertical Price Fixing*, supra note 76, at 999-1000; Scherer, supra note 76, at 694. As such, the free rider is another example of a cliché capturing and distorting analysis.

<sup>79</sup> See generally Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 Geo. L.J. 1487, 1495 (1983) (advocating per se rule against vertical price fixing as most efficient way to address free-rider problem, with limited exceptions to per se rule to preserve efficient enforcement).

same token, the argument makes the assumed rationality of the proponent of the restraint the only fact worthy of consideration. "Rationality" is used circularly, however, in that whatever the proponent desires is deemed rational if it is theoretically wealth enhancing, without regard to the rationality of other distributors or consumers.

The failure of current executive and judicial treatment of vertical restraints is evidenced by the fact that, instead of an antitrust policy moderating pressures for governmental interference in market processes, there is a vacuum of control. This vacuum is generating growing pressure at the federal and state level for interjection of complex and often anticompetitive franchising and other laws to regulate vertical market relationships.<sup>80</sup> Thus, if the goals underlying the antitrust laws are ignored or repudiated by the executive and judicial branches, the democratic process will seek to achieve those goals more intensively elsewhere.

### III

#### A MULTI-VALUED METHOD FOR ANALYZING VERTICAL RESTRAINT AGREEMENTS

In order to implement a more democratically responsive yet predictable use of antitrust policy to regulate vertical restraint agreements consistently with the requirements of legal reasoning, courts must employ a pragmatic and inductive method of analysis.<sup>81</sup> In addition, courts must provide an analytical framework within which conduct can sensibly be evaluated by lawyers advising their clients and by courts adjudicating antitrust claims. Without such guidelines, rejection of the undue and

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<sup>80</sup> Special federal and state franchising laws are multiplying; many of these laws are not in the public interest. The statutes are surveyed in L. Schwartz, J. Flynn & H. First, *Free Enterprise and Economic Organization: Antitrust 760-97* (6th ed. 1983). For an extensive empirical analysis of a pending proposal to legitimize restrictive vertical practices in the beer industry by special statute, which concludes that the empirical basis for the supposed efficiency of vertical restraints is much weaker than claimed by their supporters, see Carstensen & Dahlson, *Vertical Restraints in Beer Distribution: A Study of the Business Justifications for and Legal Analysis of Restricting Competition*, 1986 *Wis. L. Rev.* 1.

<sup>81</sup> See Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*, 49 *Antitrust L.J.* 1593, 1610-11 (1980). One method of analysis might be described as follows:

The spectrum from *per se* to rule of reason analysis is a single methodology presenting varying levels of evidentiary presumptions ordering the analysis of whether there has been an unreasonable displacement of the competitive process.

Conceptualizing *per se* doctrine as a separate category of rules and rule of reason analysis as necessarily requiring a significant quantitative effect on competition has engendered confusion in the cases.

*Id.*; see also Beschle, "What Never? Well Hardly Ever": Strict Antitrust Scrutiny as an Alternative to *Per Se* Antitrust Illegality, 38 *Hastings L.J.* 471 (1987); Ponsoldt, *supra* note 17.

misleading certainty offered by the neoclassical model will likely create undue uncertainty.

A central requirement of a counter methodology, one not met by exclusive use of the neoclassical model, is that it be compatible with the nature and requirements of legal reasoning. Legal reasoning is not a system in which rules  $\times$  facts = decision. Long ago, Dean Leon Green attacked such reasoning and the formalism that plagued the law of torts.<sup>82</sup> Dean Green observed that tort cases were being decided on the basis of meaningless notions of proximate cause (similar to standing analysis in antitrust) and shallow mechanical definitions (like the *per se* rules and neoclassical definitions used to determine the rules of antitrust) that divided conduct into particular named torts, each with its own "elements" or subdefinitions to be satisfied.<sup>83</sup> A similar battle must be fought against reliance on the formalism of neoclassical theory in the legal analysis of antitrust disputes.

Dean Green proposed that tort litigation could be broken into the following analytical format:

(1) Is there a factual connection between the plaintiff's injury and the defendant?

(2) Do the policies of the law and its system of protection extend to the interest that the plaintiff seeks to vindicate; and if some protection is afforded, what standard of care does the legal system impose upon the defendant?

(3) Was the standard of care breached by the defendant?

(4) What are the damages?<sup>84</sup>

The key elements of Dean Green's analytical method as applied to antitrust litigation are his second and third factors: Do the policies of the antitrust laws and their system of protection extend to the interest that the plaintiff seeks to vindicate, and, if some protection is afforded, what standard of care does the legal system impose on the defendant? This is the central policy question with which the courts must grapple in establishing the rules that ought to govern the litigation of vertical market restraints as well as other rules developed under the antitrust laws. Resolution of these questions requires constant recourse to the multivalued goals Congress intended antitrust enforcement to fulfill. Courts must then evaluate the facts of a given dispute in light of those values.

The congressional goals of antitrust policy are designed to guarantee to suppliers, distributors, consumers, and the public that a competitive

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<sup>82</sup> Many of Dean Green's writings are collected in L. Green, *The Litigation Process in Tort Law* (2d ed. 1977).

<sup>83</sup> See Green, *The Study and Teaching of Tort Law*, 34 *Tex. L. Rev.* 1, 18-19 (1955).

<sup>84</sup> See *id.* at 24.

process will govern the distribution of goods.<sup>85</sup> To the extent that private contract and property rights are used to displace that process, the anti-trust laws act to constrain the exercise of those rights.

Antitrust policy should therefore be viewed as part of the definition of the scope of property and contract rights, not as a rationalization for undermining the law's obligation to enforce those rights or to ignore the property and contract rights of others. Vertical customer, territory, and price restraints, on their face, limit the freedom of suppliers, distributors, and the public to choose from whom they may buy or sell. Vertical restraint agreements, by definition, reduce the commercial rivalry that is at the heart of the competitive process.

If, however, one begins with the neoclassical assumption that the contract and property rights of the proponent of a restraint are absolute, and that the market in which the restraint occurs is perfectly competitive, it is not difficult to see why the reality of the dispute is ignored and the values underlying antitrust policy are disregarded. The "rational," and therefore "efficient," and therefore "lawful," combination will always be that which has been privately bargained for, or coerced.

When vertical restraints on price, customers, and territories are imposed, the circumstances are not ordinarily those of a perfectly competitive market. In a perfectly competitive market, such a literal limitation on competition could not long be maintained. Rather, one or the other side of a transaction often attempts to displace competition in order to realize prices above a competitive level and to transfer wealth from the victim of the restraint and consumers to the perpetrator. It is at this point that the neoclassical model is fundamentally at odds with the intent of Congress. The neoclassical model assumes that such a wealth transfer enhances efficiency and therefore is beneficial. Congress has legislated, however, that wealth transfers resulting from displacement of competition are illegal.<sup>86</sup>

Consequently, the duties imposed on parties to a private transaction, and the rights of the public as beneficiary of a competitive process, should warrant a rebuttable presumption that vertical restraints violate section 1 of the Sherman Act. It is no answer to substitute the neoclassical model and its assumptions of rationality, efficiency, and perfect competition for implementation of the congressional goals for antitrust policy in the context of the reality of the dispute before the court. Belief that the "rationality" of the proponent of a restraint is a proxy for the rights of the victim of the restraint, the public, and the goals of antitrust policy mandated by Congress necessarily denies those rights, ignores the reality

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<sup>85</sup> See Fox, *supra* note 52, at 1182.

<sup>86</sup> See Lande, *supra* note 49.



of the dispute, and frustrates the congressional goals for antitrust policy.

There may be circumstances, however, in which the facts are not conclusive as to where the public interest, as defined by the multivalued goals of antitrust policy, resides. The courts therefore should view the distinction between the *per se* and rule of reason analyses as an evidentiary one establishing levels of presumptions of illegality and legality, and not as a distinction between hard and fast categories of lawful and unlawful conduct. Treating *per se* rules as evidentiary presumptions of varying levels of rebuttability would permit inductive reasoning to bridge the gap between the facts of individual cases and the policies underlying the antitrust laws.

This approach will provide the flexibility necessary for a sensible evaluation of fact and policy. Under this analysis, *per se* rules are treated as evidentiary presumptions of illegality, with rebuttability depending on the degree to which private agreements displace the competitive process in the reality of a particular dispute.<sup>87</sup>

For example, successfully maintained vertical price fixing is often the expression of economic power based on market imperfections, imbalances in bargaining power, or the presence of some level of oligopoly-like power due to trademarks or product differentiation. As such, vertical price fixing directly interferes with the freedom and opportunity of retail competitors to compete on the merits and usually results in higher prices to consumers. It enables the proponent of a restraint to assert an absolute property right and to suppress distributor competition on price, denying the right of independent distributors to succeed or fail on the competitive merits. Consequently, a relatively conclusive presumption of illegality is justified in cases of vertical price fixing.

Courts should work out over time the types of evidence that will overcome the presumption of illegality and determine when factual issues should be submitted to the jury. For example, the need to inform consumers through national advertising may justify advertising suggested retail prices, although coercion in enforcing the suggested price should remain presumptively unlawful. Thus, the scope of efficiency and other defenses can be defined in the context of the goals of antitrust policy and the realities of individual cases rather than be assumed in light of the abstract definitions and unreal normative and factual assumptions of the

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<sup>87</sup> The competitive process, not "competition," is the key concept in the analysis. Use of "competition" as the tool for analysis and as the definition of the scope of the duties imposed by the antitrust laws has confined the analysis to neoclassical theory's models of perfect competition and pure monopoly. This substitutes abstract definitions of "competition" for the values Congress mandated for antitrust policy, and substitutes facts assumed by the model for the reality of individual cases.

neoclassical model.<sup>88</sup>

In some circumstances—for example, vertical maximum price fixing—a more extended inquiry may be justified. However, this inquiry should still be conducted with a presumption of illegality because the impact of the restraint severely curtails the rights of distributors to succeed or fail through a competitive process. In cases where maximum price fixing takes place, be it horizontal<sup>89</sup> or vertical,<sup>90</sup> the markets involved are usually characterized by a virtually complete departure from the ideal of a perfectly competitive market.<sup>91</sup>

Assumption of power by a monopolistic supplier, or by a horizontal agreement among distributors to fix a maximum price, is a direct displacement of the competitive process of price determination. It is an assumption of power by the proponent of the restraint, denying rights of distributors and consumers to make their own judgments about pricing—a denial of rights guaranteed by the goals of antitrust policy. Congress did not leave to the proponents of such restraints the authority to determine unilaterally the scope of the contract rights of distributors. Similarly, Congress did not intend the proponents of maximum price fixing to determine what the best price should be for the benefit of the public.

Neoclassical theorists, preoccupied with giving the effect of an absolute right of freedom of contract to the proponent of vertical restraints, have been particularly harsh in their treatment of the *per se* prohibition on maximum price fixing.<sup>92</sup> Their critiques illustrate an analytical process based on unrealistic assumptions of fact used to dictate a policy designed to maximize an extreme view of private contract and property

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<sup>88</sup> See note 42 and accompanying text *supra*.

<sup>89</sup> See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

<sup>90</sup> See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

<sup>91</sup> As in *Albrecht*, for example, monopoly newspapers often use independent newspaper distributors to avoid the risks and burdens of retail distribution. See *id.* at 154-55 (Douglas, J., concurring). Distributors are usually treated as independent contractors fully responsible for tort and other liabilities incurred at their level of distribution, usually have little or no bargaining power, and are exempt from some labor regulations designed to curb an imbalance of bargaining power in certain labor relations. Giving monopoly newspapers the right to impose whatever contractual terms they wish on their "independent contractors" without incurring any of the risks of the distribution of the product reflects an extreme view of the rights and rationalities of the monopolist without any concern for the reality in which the legal right to contract is being implemented. This achieves the best of both worlds for the monopolist: total freedom of contract and the right to have the state enforce the contract imposed without the reality of the circumstances intruding into the analysis.

<sup>92</sup> See R. Bork, *supra* note 3, at 439; Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886 (1981); Liebler, *1984 Economic Review of Antitrust Developments: Horizontal Restrictions, Efficiency, and the Per Se Rule*, 33 UCLA L. Rev. 1019, 1034-49 (1986). As elsewhere, the neoclassical analysis here assumes perfectly competitive markets and maximization of output as the sole objective of the proponent of the restraint. It further assumes that enhancement of consumer welfare in terms of lower prices will be the necessary effect of permitting the imposition of maximum prices.

rights.

Because many disputes arising under the antitrust laws do not occur in perfectly competitive markets, and given the congressionally mandated goals of antitrust policy, there should be a presumption of illegality with regard to maximum price fixing, horizontal or vertical. Each case should be examined to determine whether the facts sufficiently rebut the presumption. Because courts are not normally thought competent to engage in rate regulation, the presumption of illegality should usually carry the day. The parties to such unusual arrangements should be forced to negotiate a less restrictive alternative consistent with the values of antitrust policy.<sup>93</sup>

A similar presumption of illegality is justified for vertically imposed divisions of territories and customers, particularly because the less restrictive alternative of unilaterally selecting and terminating dealers is available. Sheltering a product from interdealer price competition by customer or territorial divisions should be permitted only when there is a justifiable public interest in doing so, such as protecting the public in the distribution of dangerous products.<sup>94</sup>

The rule of reason should be viewed as a tool of analysis in those situations in which no presumption of illegality would apply. This might occur, for example, when there is no initial showing of anticompetitive purpose or effect. Courts should view a rule of reason case as an inquiry into whether there has been an unreasonable displacement of the competitive process in light of all the circumstances of the case. That inquiry, in turn, should be primarily a factual one similar to the long-established standards for a rule of reason inquiry set forth by *Chicago Board of Trade v. United States*.<sup>95</sup> This inquiry does not require definition of a relevant market and power in that market.

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the

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<sup>93</sup> Adjusting unusual factual circumstances to the values of antitrust policy through the use of evidentiary presumptions subject to justifications or excuse is not unique. Courts have been doing this in a number of cases without expressly admitting it. See, e.g., *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (finding no economic analysis necessary when horizontal agreement limited consumer choice and participants in horizontal agreements offered no competitive justification).

<sup>94</sup> See note 73 *supra*.

<sup>95</sup> 246 U.S. 231 (1918).

purpose or end sought to be attained, are all relevant facts.<sup>96</sup>

Finally, in a further effort to rectify the current analytical difficulties with antitrust enforcement, Congress should consider spelling out more explicitly the goals of antitrust policy. Legislation should be adopted amending the Sherman Act by inserting as a preamble to the statute the goals of antitrust policy as summarized by Professor Fox.<sup>97</sup> Such an amendment might read:

Preamble: Congress hereby finds and declares that the goals of antitrust policy are: 1. The dispersion of economic power; 2. Freedom and opportunity to compete on the merits; 3. Satisfaction of consumers; and 4. Protection of the competitive process as market governor.<sup>98</sup>

Together, these suggested changes in analysis of antitrust disputes may return the inquiry to the objectives from which it has strayed and to a sensible application of the law to the rich variety of facts tossed up by the legal process.

### CONCLUSION

Antitrust enforcement is trapped at a sterile intellectual crossroads by an analytical positivism that prevents it from addressing reality in light of the values Congress has mandated it to fulfill. Antitrust policy has been similarly trapped in the past. Part of the reason for the present problem is a reaction to past practice, which reflexively condemned any restraint fitting a predetermined definition as *per se* illegal. The problem is also attributable to fear of according discretion to the decision maker and to the undeserved certainty accorded to a model promising the right answer without regard to the facts of individual cases, the policies of the law, or the requirements of legal reasoning. Today, instead of economic analysis assisting antitrust analysis by illuminating some aspects of reality, a narrow brand of economic analysis is used to the exclusion of broader economic and other insights, the facts of individual cases, and the institutional responsibilities and logical method of the legal process.

In implementing the goals of antitrust through a method of legal reasoning that weighs these goals in light of the realities of the case, courts should change their approach to the *per se* rules and the rule of

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<sup>96</sup> *Id.* at 238.

<sup>97</sup> See text accompanying note 53 *supra*.

<sup>98</sup> The co-author of this article has advocated in testimony before the U.S. House Judiciary Committee that such a preamble to the Sherman Act be included in pending legislation, H.R. 585, designed to codify the *per se* rule for vertical price fixing. See Testimony of James F. Ponsoldt before the House Comm. on the Judiciary, Feb. 26, 1987 (on file at New York University Law Review); cf. Spivak, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, 52 *Antitrust L.J.* 651, 653 (1983) (proposing more lengthy list of Congress's intended goals that might be made preamble to Sherman Act).

reason. *Per se* rules should be considered evidentiary presumptions, of varying levels of rebuttability, for determining whether there has been an unreasonable displacement of the competitive process. The rule of reason should be used only where no presumption of illegality would apply.

Antitrust enforcement, like any other form of law enforcement, cannot avoid discretion. Courts must determine what rules and facts are relevant, what they mean, and how these rules and facts ought to interact to produce an informed and reasoned judgment on the legality of the conduct under consideration. The concepts it uses are tools, not rules, for bridging the gap between facts from the real world and values underlying the regime of law involved in the dispute. Antitrust policy cannot avoid confronting the intellectual reality that every legal decision is unavoidably a moral one. Like any other form of legal analysis, antitrust policy's primary tool is legal reasoning—a method of reasoning that is inductive and deductive, one that is constantly required to reexamine the values underlying the law within the constraints upon the judicial process. To some this may be “poetry”; to an experienced legal system it is the essence of legal reasoning and the rule of law.