

# An Antitrust Allegory

by

JOHN J. FLYNN\*

John Sherman Widget Co.

v.

Adam Smith Widgets, inc.,

— U.S. —, 110 S.Ct. 1410 (1990).

Justice SPENCER delivered the opinion of the Court.

This is a treble damage action under the Sherman Act, 15 U.S.C. § 1 *et seq.*, the only antitrust case of any kind filed in the federal courts in the past two years.<sup>1</sup> We take note of the fact that the Attorney General announced a year ago that ninety-five percent of the personnel in the Antitrust Division of the Department of Justice had been transferred to other duties in the Department following the successful completion of its criminal prosecutions against the only remaining road builders not then in jail for price-fixing. A “skeleton crew” staffs the Division to monitor labor union

activities, the most likely area for continuing antitrust concern. Since the Federal Trade Commission has closed all of its offices save those of the Commissioners, no reliable statistics are available with regard to its activities, if any, in enforcing the antitrust laws. Although the few staff members remaining at the Commission continue to issue occasional studies, demonstrating how a policy of *laissez-faire* promotes the most efficient use of resources (hereinafter “the neoclassical economic model” or “The Model”), it is apparent that neither the staff nor the members of the Commission have any intention of filing any new antitrust or unfair competition proceedings.

The plaintiff, John Sherman Widget Co., alleged that the defendants, a consortium of widget manufacturers and distributors,<sup>2</sup> have engaged in a wide variety of antitrust violations in-

\*Hugh B. Brown Professor of Law, College of Law, University of Utah. Concern for the well-being and reputation of several good friends who read and commented on drafts of this allegory requires the omission of their names from this, the normal place for printing such information. For names, send a self-addressed stamped envelope.

1. The Justice Department did file two civil antitrust cases back in 1987, but the economy has obviously been functioning efficiently since then, requiring no new litigation to force it to do so.
2. The defendants are in reality a single defendant since the Consortium has incorpo-

rated itself under Delaware Law as the Widget Manufacturers Cartel & Consortium, Inc. The plaintiff, however, sued the Consortium and each of its members individually. In the court below the defendants raised the issue of whether they could be sued individually, that is, whether the plaintiff was required to sue only the entity they created to carry out their agreement. The trial court did not consider it necessary to decide this issue, although the court did observe that under *Copperweld Corp. v. Independence Tube Corp.*, 474 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), there was “much merit to the defendants’

cluding a horizontal conspiracy at the manufacturing level to fix the price of widgets, a conspiracy to monopolize the widget manufacturing business, and a conspiracy to engage in predatory pricing in the distribution of widgets by charging high prices in geographic markets where they had no competition and "below cost" prices in those markets where the plaintiff sold widgets. Plaintiff also complained that each of the defendant manufacturers had imposed exclusive dealing contracts and geographical and customer restrictions on their distributors so as to prevent competition between those distributors and prevent competing suppliers from reaching them. The plaintiff also alleged that several of the defendants had entered into resale price maintenance agreements with their distributors and had actively policed the distributors to insure that they observed the prices established by each of the manufacturers.

Widgets are a fungible product with a wide variety of home and manufacturing applications. They are made in standard sizes by at least fifteen domestic manufacturers, fourteen of which belong to the defendant Widget Consortium of America. The Smith Company is the dominant manufacturer and distributor, with over 50% of the market. The plaintiff,

Sherman Company, is a relative newcomer to the market, having been established in 1980. Since that time, it has gained a 5% market share by aggressive marketing through discount outlets and mail-order catalogues. The Sherman Company has refused to join the Consortium despite the entreaties of the Consortium. Although there are several foreign manufacturers of widgets, imports have been negligible. The record indicates that it is relatively inexpensive to manufacture widgets and that the light weight and small size of widgets make national marketing from a central manufacturing facility the normal pattern.

On defendants' motion for summary judgment, the trial court granted defendants a directed verdict at the end of the plaintiff's case. The court did so after several evidentiary rulings excluding evidence offered by the plaintiff. The court ruled that tape recordings and minutes of the meetings of the defendant members of the Consortium were inadmissible. Those tapes and minutes indicated the defendants agreed on prices and directed certain Consortium members to cut prices in markets where the plaintiff was selling widgets in order to "drive that non-conformist Sherman out of business." The trial court also excluded two documents that plaintiff

---

argument." Since the lower court did not decide the issue and the parties have not argued it before this Court, we do not decide it. We note, however, that it is not a frivolous contention. A corporation is a single person and as such it cannot conspire with itself. Furthermore, *Copperweld* instructs us to look at form, not substance, in deciding who or what may be considered persons for purposes of contract and conspiracy doctrine under the Sherman Act. Ever since *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394, 6 S.Ct. 1132, 30 L.Ed. 118 (1886), we have held that a cor-

poration is a person for constitutional and other purposes. Just as a rose is a rose by whatever name, a person is a person by whatever name. And, since it takes two or more persons to conspire or have a "meeting of the minds" for the purpose of a contract, it is difficult to avoid the conclusion that the Consortium cannot contract or conspire with itself. *Q.E.D.* In any event, because of our decision on the merits in this case, we do not think the issue is likely to be a troublesome one in the future and therefore decline to reach it.

claimed conclusively proved a conspiracy in violation of §§ 1 and 2 of the Sherman Act. One document, a fifty page contract among the members of the Consortium, specifies in great detail the prices, customers, and markets allocated to each member. It is signed and notarized, and bears the corporate seal of each member of the Consortium.

The second document is an agreement between the Consortium, the Asian Widget Manufacturers Association, and the European Cartel of Widget Manufacturers dividing the world market and binding its signatories to abide by the terms of the agreement. This document is witnessed by the Assistant Attorney General for Antitrust and the Chairman of the Federal Trade Commission. The witnesses attached a joint statement to the document asserting that "efficiency demands that rational businessmen be permitted to implement freely their judgments, either by contract or through a partial integration of their functions, as to how best to set prices

and allocate resources." The statement went on to claim that both producers and consumers are rational maximizers of their own self-interest, that there is an inverse relationship between prices charged and quantity demanded, that sellers seek to maximize the difference between their costs and their sales revenues, and that scarce resources gravitate to their highest valued uses if free exchange is permitted.<sup>3</sup>

Based on these assumptions, the statement suggested that permitting the parties to the Consortium to engage in a rational act (maximizing their profits) would ultimately maximize the efficient use of society's resources as rational consumers responded to rational suppliers and the market process sorted out the optimal solution.<sup>4</sup> They added that "the rights of property and freedom of contract, sacred and inalienable rights in our system of capitalism, require that the Consortium be allowed to enter into and have the government enforce this agreement."<sup>5</sup>

The trial court was called upon at

3. Citing R. Posner, *Economic Analysis of Law* § 1.1 (3d ed. 1986). The document quoted the following statement from Posner: "The reader who understands the three fundamental concepts . . . the inverse relationship between price and output, alternative and opportunity cost, and the tendency of resources to gravitate from lower valued to higher valued uses if voluntary exchange is permitted—is prepared to deal with a surprising variety of economic questions." According to the statement, among the economic questions answered by The Model is that rational maximizers know their self-interest best and should be allowed freely to express it through voluntary agreements. In this way "efficiency" will be realized through the exploitation of resources in such a way that value—human satisfaction as measured by aggregate human willingness to pay for goods and services—is maximized. Any government intervention in this process is,

of course, logically counter-productive and necessarily generates inefficiency.

4. It is shocking to realize that just four short years ago a United States District Court rejected such a logical wealth-maximizing argument asserted by Coca-Cola in its attempt to acquire Dr. Pepper. See *FTC v. The Coca-Cola Co.*, 1986-2 Trade Cases Para. 67,208 (D.D.C. 1986).

5. It is interesting to note that this agreement has been the subject of constant criticism before the United Nations at the instance of the Soviet Union, the only major widget manufacturing country which has refused to join an international cartel. Three Soviet manufacturers of widgets openly compete on price with each other and with the defendants in world markets. But this irrational behavior is nothing new for the Soviet Union. Back in 1976 our Federal Maritime Commission had to force them to join our shipping cartels in the

the summary judgment stage to determine whether a material issue of fact existed. An issue of fact, the court quite rightly noted, exists only about propositions or events that are plausible or possible. Allegations that water ran uphill or that a man flew to the moon and back without mechanical assistance do not present issues of fact. Accordingly, the trial court reasoned that it must measure the allegations in plaintiff's complaint and the evidence offered in their support against the assumptions of The Model.

That Model or law, which inexorably governs us all and for which we are deeply grateful, states universal truths about the behavior of rational suppliers and consumers, and particularly declares that all persons will at all times and under all circumstances attempt to maximize their own benefits. Plaintiff's allegations regarding the meetings between the defendants and among the Consortia are obviously inconsistent with the law of perfect competition<sup>6</sup> which exists at all times and in all places, and with the assumption of single-minded price competition among firms in order to maximize profits. Thus, the trial court found that the meetings could not have happened and, therefore, did not happen.

The court also excluded the written documents relating to the international meeting of widget manufacturers. The Model indicates it would be counter-productive and impossible for all the world's widget manufacturers to engage in the conduct alleged with any hope of success. In reaching this conclusion, the court relied on the assumption that any deviation from the model of perfect competition would invite cheating by participants in the cartel, driven by the inexorable force of profit maximization, or that it would result in entry into the business by non-widget manufacturers in quest of the monopoly profits of the cartel.<sup>7</sup> Since The Model assumes the rationality of all members of the Consortium, written documents suggesting a contrary method of operation must refer to events that did not take place. Only two possible conclusions follow. One is that the documents themselves do not exist, and the other is that if the documents exist, they are false. The trial court concluded that it could not consider either non-existent or false documents to support the existence of a material issue of fact and that, therefore, the defendants' motion for summary judgment must be granted.

In the alternative, the court ruled that even if the meetings did occur, the

North Atlantic. See "Soviet is Moving to End Slashing of Ocean Rates," *New York Times*, Oct. 26, 1976, p. 1, col. 5.

6. "Perfect competition" has been described as follows:

"Perfect" competition . . . means an absolutely "frictionless" world. Everybody knows everything, everyone can be everywhere at once, coal heavers can become brain surgeons, and brain surgeons can become coal heavers, overnight. The capital embodied in a university can transform itself overnight into a battleship and so on.

Wright, *Some Pitfalls of Economic Theory as a Guide to the Law of Competition*, 37 *Va.L.Rev.* 1083, 1085-86 (1951).

7. The court cited Easterbrook, *The Limits of Antitrust*, 63 *Texas L.Rev.* 1 (1984). The trial court's reading of Easterbrook is an accurate exposition of the consequences of following his assumptions. The "limits" of antitrust as a device for regulating imperfections in the market, in Easterbrook's view, are somewhere between minimal and zero, with all doubts to be resolved in favor of zero.

matters that the tapes and minutes indicated were topics of discussion<sup>8</sup> could not be made the basis of a Sherman Act claim because they could not have caused the type of injury to the plaintiff the antitrust laws were designed to prevent. The court found that if the defendants did engage in the activity alleged, they would have conferred a benefit on the plaintiff rather than harmed it. According to The Model, the defendants would have been selling above marginal cost which would have allowed the plaintiff to undercut them in the marketplace, assuming the plaintiff was operating efficiently. If the defendants were cutting prices below marginal cost to drive the plaintiff out of the market, that conduct would confer the benefit of lower prices on consumers—the sole intended beneficiary of the antitrust laws. Since the plaintiff was a competitor and not a consumer, the court held the plaintiff lacked standing to

maintain a suit in these circumstances. Because reality can be viewed only in snapshots lest The Model itself be destroyed,<sup>9</sup> the court stated that any subsequent raising of prices after the plaintiff was driven from the market could be appraised only at the time it took place and only at the instance of a consumer claiming to be injured by reason of a conspiracy to raise prices.<sup>10</sup> The court concluded with the further observation that the plaintiff would lack standing to sue in any event because it would be impossible to prove that any of the alleged conduct was the proximate cause of any measurable antitrust injury to it.

## I

We think it important to set forth the trial court's skillful analysis of the law leading it to its conclusions. Citing *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 474 U.S. \_\_, 106 S.Ct. 1348 (1986),<sup>11</sup> the trial court

8. Among the topics of discussion the tapes and minutes recorded are: prices, "destroying the Sherman" firm, "wiping Sherman off the face of the Earth," "getting our returns back up to a decent 60% rate," "keeping distributors in line on customers, territories, and prices," cutting off "distributors who deal with that non-conformist Sherman and cut prices," price schedules, subsidizing those members of the Consortium who had to cut prices in Sherman's areas of operation, etc.

9. This is so because The Model would be unmanageable if too many variables were included in the analysis or if the variables were permitted to be dynamic and changing. Professor Leff's reformulation of the problem of the second-best sums up the difficulty: "If a state of affairs is the product of  $n$  variables, and you have knowledge of, or control over, less than  $n$  variables, if you think you know what's going to happen when you 'vary' your variables, you're a booby." Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va.L.Rev. 451, 476 (1974). "Boobiness" is

avoided by confining the analysis to a fixed set of quantifiable variables measured by snapshots of the static world placed under the analytical microscope, thereby avoiding destruction of The Model for analysis.

10. Such a claim would, of course, be subject to the indirect-purchaser standing decisions of this Court and the policy of letting the market correct the problem itself through cheating by members of the Consortium and the inevitable new entry that prices above marginal cost would attract. We would also expect any suit by a cheater disciplined by the other parties to the agreement, or a suit by a new entrant claiming the Consortium engaged in strategic behavior designed to raise entry barriers or exclude it, to be resolved by the well-established maxim that the antitrust laws are designed to protect competition, not competitors.

11. In that case, evidence tendered by the plaintiffs allegedly showed that Japan's consumer electronics manufacturers, their export trading companies, and their United

noted that this Court has instructed that motions for summary judgment in antitrust cases are to be judged by the predictions of the neoclassical economic model, not the facts. The court reasoned that *Matsushita* requires the

respondent to a motion for summary judgment in an antitrust case to show that the predictions of The Model do not follow from the assumptions of The Model.<sup>12</sup> The trial court pointed out that economic theory instructs us

States distributors had formed a cartel designed to raise prices for their products in Japan's protected domestic market to support lower fixed prices in the United States market. The same model television set manufactured in Japan was sold in the United States at up to 50% below the price charged for it in the Japan market. The agreement to price high in Japan and low in the United States was allegedly reached through and administered by the Television Export Council, a cartel of all of Japan's major consumer electronics manufacturers. Plaintiff alleged that the Japanese government encouraged the formation of the cartel and orchestrated its export activities. The agreement also divided customers and limited each manufacturer to distributing through five United States distributors. Over the fifteen plus years of its operation, Japan's manufacturers increased their U.S. market share from 5% to 50%. The plaintiffs' theory and expert witness testimony claimed all this took place by pricing well below United States manufacturers in the United States market while fencing United States manufacturers out of Japan's market where the cartel maintained high fixed prices.

We ignored this and additional evidence of a coordinated effort to price below cost and support low prices in the United States with high prices in the protected Japan market because The Model dictated that such conduct could not happen. 106 S.Ct., at 1359. We stated that no rational businessman, driven by the single-minded pursuit of profit, would conspire with competitors for twenty years to monopolize the United States market by predatory and below-cost pricing without hope of recouping the lost profits plus interest. In the course of our opinion, we ignored attempts to vary the number of variables to be accounted for by The Model for decision, see n. 9, *supra*, such as evidence that the defendants were motivated by a need for growth and market share rather than profit, that they had a need to dump their products because of excess capacity attributable to policies of the Japanese govern-

ment earmarking the industry for growth and export, and expert witness testimony indicating that the defendants were not operating pursuant to the assumptions of The Model. As is obvious, we held that for purposes of a motion for summary judgment in an antitrust case, a court is to determine whether the complaint states a claim by measuring it against the assumptions and predictions of The Model, rather than against the evidence produced by the parties. The Third Circuit finally got the message on remand of the case. See *In re Japanese Electronic Products Antitrust Litigation*, 807 F.2d 44 (CA3 1986) (dismissing both the antitrust and Antidumping Act claims; plaintiffs are foreclosed from arguing the predictions of The Model do not follow from the assumptions of The Model regardless of the facts in the record of the case).

While some may think statutes like the antitrust laws are intended to control irrational conduct, *Matsushita* establishes that the assumptions of The Model (all markets are perfectly competitive and driven by rational profit maximizers) determine what facts can sensibly be believed and that The Model dictates the goals the antitrust laws seek to achieve (to maximize consumer welfare). It would, therefore, be irrational to assume that competitors would behave in ways contrary to the behavior of rational maximizers; it would also—of course—bring chaos to the analysis to permit the antitrust laws to serve goals other than the maximization of "consumer welfare"—whatever that means.

12. The *Matsushita* opinion requires the non-moving party to come forward with "specific facts showing that there is a *genuine issue for trial*." 106 S.Ct., at 1356. If the claim is one "that simply makes no economic sense," according to The Model, the party moved against "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Ibid*. The balance of the opinion is devoted to showing how none of the explanations by the party moved

that efforts to cartelize a market are fruitless because "rational maximizers" know they can never in that way achieve success on a long-term basis nor recoup the losses incurred in cutting prices to drive out a competitor.<sup>13</sup>

We agree. Losses are certain to arise because The Model assumes that competitors cannot fence out new entrants or discipline effectively members of the cartel who cheat. The pro-

clivity of members of such a conspiracy to cheat and "free ride" is assumed and taken into account by rational maximizers in deciding whether to enter into such an agreement in the first place. Since, by definition, the defendants are rational maximizers, it is impossible for them to have contemplated or entered into the type of conspiracy plaintiff claims they entered. Even assuming the unlikely event that

against demonstrate that the predictions of The Model do not follow from the assumptions of The Model. Attempts to demonstrate that the assumptions of The Model did not equate with the facts of the dispute were either ignored or found to be based on speculative or inadmissible testimony. Some of the evidence plaintiff relied upon was found irrelevant and speculative because the assumptions and predictions of The Model made the evidence not plausible. The evidence that was ignored was evidence suggesting the assumptions of The Model were not operative in the circumstances in dispute. We think the Court's approach in that case is mandated by the logic of The Model which has, of course, become the logic of the legal process in these kinds of cases. See n. 19, *infra*.

As for any claim that The Model is based on unrealistic assumptions, we need not concern ourselves with such a non-scientific approach. In the science of economics, reality is compared with the predictions of The Model—not the assumptions underlying The Model. See M. Friedman, *The Methodology of Positive Economics*, in *Essays in Positive Economics* 3 (M. Friedman ed. 1953). This view of economic models has frequently been termed the "Ouija Board" theory—if it works, believe it.

13. Citing D. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure* (1982); Brozen, *Dialogue, Are Economists Taking Over?*, in *Changing Antitrust Standards* 31 (Conf. Bd. Research Bull. No. 144, 1983) (where collusive arrangements do not bar entrance, no need to be concerned about consumer welfare). The trial court also cited R. Bork, *The Antitrust Paradox* (1978) for the proposition that only those arrangements resulting in a reduction of output should be condemned as

"naked" restraints of trade. Since the agreement did not explicitly call for a reduction in or limitation of output, the agreement—if it did exist—was characterized by the trial court as "partially clothed" and "an ancillary agreement" restraining trade rather than a "naked" or non-ancillary restraint of trade. See *Rothery Storage & Van v. Atlas Van Lines*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J., distinguishing between the "naked" and the "partially clothed" and the "ancillary" and the "non-ancillary" on the grounds of whether the restraint is pursuant to a partial integration to make the main agreement more effective). Here, the parties have used the cartel to integrate partially their functions; the agreement on prices is clearly ancillary to the main agreement and designed to make the integration more effective. Hence, there is much merit to the trial court's classification of this restraint as "ancillary and not naked."

In any event, *Rothery* requires a showing of relevant product and geographic markets as well as a showing of monopoly power in the markets defined before a violation of § 1 may be found. In the instant case, plaintiff refused to introduce such evidence, arguing that it had filed a § 1 case not a § 2 monopolization case. We reject plaintiff's argument that proof of relevant markets and power in the market defined are irrelevant in a § 1 case. The Model assumes that economic efficiency as defined by The Model, see n. 3, *supra*, is the sole goal of antitrust policy. And there can be no showing of either a decrease in economic efficiency or a violation of the Act unless there is proof of a reduction in output through the exercise of monopoly power in a relevant market. Hence, §§ 1 and 2 of the Sherman Act are aimed at the same evil and mean the same thing.

the defendants stupidly engaged in the activity alleged, the trial court held that it should not intervene, for fear that it might make a mistake. As Judge Easterbrook has perceptively and humbly written: "judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not."<sup>14</sup>

Citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2459, 53 L.Ed.2d 568 (1977), the trial court rejected plaintiff's claims that the defendants' vertical restraints violated § 1 of the Sherman Act. The court reiterated its analysis of why it was irrational and impossible for the defendants to impose the vertical restraints through a horizontal agreement among themselves and why it would not be an antitrust injury to the plaintiff even if the defendants had in fact done so. The court further found that if each firm imposed the distributional restraints individually, each one must have done so to prevent "free

riders," the scourge of rational marketing.<sup>15</sup> Even though widgets are sold strictly on price, are fungible, and require no repair or warranty work, the court still held that it was completely within the prerogative of the rationality of each supplier to impose the vertical restraints—including price restraints—in order to prevent what each supplier perceived to be "free riding." Any distributional practice by a distributor objected to by its supplier and lessening the supplier's return on the item was defined as "free riding" and a threat to the right of the supplier to maximize profits.

The trial court also rejected the claim that *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), required a finding of *per se* illegality for vertical price fixing, noting that the Court in that case was not presented with the question of whether the *per se* rule should be abandoned.<sup>16</sup> The court opined that if this Court, "a Court

14. Easterbrook, n. 7, *supra*, at 3.

15. The trial court summarily rejected plaintiff's claim that "the free rider concept is a cliché indiscriminately used to make reprehensible the very competition the antitrust laws were designed to protect." Citing Pitofsky, *In Defense of Discounters: The No Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 *Geo.L.J.* 1487 (1983). The trial court stated:

Were this court to entertain such an argument it would plunge the court into an examination of the permissible scope of the property and contract rights of those imposing the restraint—moral questions completely irrelevant to this dispute. Such an inquiry would upset the symmetry of The Model by permitting a questioning of the rationality of the "rationality" assumption, and requiring an inquiry into the kind of legal system The Model assumes is in existence to give effect

to The Model's prediction. This courts cannot do, lest the closed nature of The Model be destroyed, discretion invade the analysis, and decision-makers relying upon The Model be deprived of the use of deductive logic in its application.

We agree with the trial court's assessment of the plaintiff's invidious and subversive argument. The internal coherence of The Model would be completely destroyed and its ability to predict outcomes with certainty would be eliminated if such an argument were to be entertained.

16. In *Monsanto*, we rejected the attempt of the Solicitor General and *amici* to raise the issue because it had not been argued below and not because the argument lacked merit. The trial court held that the logic used in *Sylvania* and by the advocates of The Model, when coupled with the policy assumptions of The Model, at least requires that vertical price fixing be measured on a rule of reason basis, if not be declared *per se* lawful.



which a few short years thereafter came down with the *Matsushita* decision," had been presented with the issue, it would have held that the *per se* prohibition on vertical price fixing should be abandoned. The court concluded this part of its opinion with the observation that it is the purpose of the legal system to protect the property and contract rights of suppliers or anyone else in a position to bargain for or impose such restraints. The court asserted that its role was to remain neutral towards the economic activity of free persons and not to condemn those imposing restraints for doing the "rational and efficient thing." The court observed: "That's what free enterprise is all about, and it behooves courts to be vigilant in protecting and promoting free enterprise by preventing governmental meddling with it and by bringing the full force and effect of the law to bear in protecting property and contract rights of the sort defendants have exercised here."

The court rejected the plaintiff's assertions that markets are not perfectly competitive, that the defendants' motives and incentives to engage in the cartel may encompass a much wider range of objectives than just obtaining long-term monopoly profits and supra-competitive prices, and that the evidence constitutes a "lay down" case of conspiracy in violation of the Sherman Act. The court did so on the grounds "that *Matsushita* establishes that the sole goal of the antitrust laws is to achieve economic efficiency as that concept is defined by the neoclas-

sical model of economic theorizing and that The Model indicates that reality cannot behave in the manner claimed by the plaintiff." The court further noted that the plaintiff is "a shining example of the validity of The Model since it has entered the market and gained a 5% share in the face of the alleged cartel."<sup>17</sup> Consequently, the court found the case was "one where summary judgment should be the rule and not the exception" and that the plaintiff's claim that the court was trampling on its jury trial rights was "unfounded because there were no facts that could be in controversy." The trial judge stated: "If you wish to be philosophical about it, The Model dictates not only what the law is but also what the facts are." In view of the "obviousness" of the dictates of The Model and the plaintiff's awareness thereof, the court granted the defendant's Rule 11 motion for sanctions. In light of this Court's holding in *Matsushita* and the clear dictates of The Model adopted in that decision for determining antitrust disputes, the court held that the plaintiff had filed a "frivolous lawsuit" that it knew or should have known was frivolous, and awarded defendants attorneys' fees and costs of \$650,000.

A panel of the Seventh Circuit affirmed the trial court's decision, *per curiam*. Citing various law review articles authored by members of the panel, that court found the plaintiff's appeal wholly without merit and an attempt "to undermine public and judicial confidence in the teachings of

17. The fact that plaintiff is in bankruptcy is irrelevant to our analysis. Plaintiff's difficulties could be caused by innumerable factors, including its failure to act rationally and maximize profits by joining the Consortium when the opportunity was

presented. In any event, plaintiff's entry into the market and securing of a 5% market share indicate that entry barriers were not insuperable and that they were entry barriers of the type which are inherent in this type of business.

Adam Smith and Herbert Spencer and the principles on which this great nation and our free enterprise system are based." The court agreed that the plaintiff's counsel had demonstrated "utter contempt for the truth by attempting to demonstrate a reality inconsistent with the assumptions of The Model" and entered further sanctions against plaintiff's counsel of \$500,000. That court concluded its brief opinion with the observation "that one would think any reasonably informed plaintiff's lawyer, regardless of the claim, would think more than twice about filing any antitrust lawsuits in the courts of this Circuit."

On appeal to this Court, plaintiff has attacked every finding below, reliance upon The Model to "dictate reality and the goals of antitrust policy," and the awards of sanctions under Rule 11. The plaintiff has also argued that the grant of the defendant's motion below violates "the spirit, letter, and common understanding of Rule 56 of the Federal Rules of Civil Procedure, makes a travesty of the division of judge and jury functions dictated by the Seventh Amendment, and repeals the Sherman Act." Defendants have urged us to affirm summarily the lower courts' findings and the entry of Rule 11 sanctions, and have included a demand that this Court award further sanctions for plaintiff's "temerity" in filing this appeal.

We affirm the holdings below, including the imposition of sanctions, but deny defendant's motion for further sanctions from this Court.

## II

This case is governed by the principles laid down in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,

474 U.S. —, 106 S.Ct. 1348 (1986). In that case we held that an antitrust plaintiff responding to a motion for summary judgment "must establish that there is a genuine issue of material fact as to whether [defendants] entered into an illegal conspiracy that caused . . . [plaintiff] 'antitrust injury.'" 106 S.Ct., at 1355-1356. We reject the plaintiff's assertion that the burden should fall the other way; that the movant must establish initially that there is no genuine issue of material fact by its motion and supporting documents and affidavits. Plaintiff claims that the movant should not be permitted to maintain there is no genuine issue of material fact by simply relying upon an "abstract model of a world which does not exist and nothing else to support its motion." Although subsection (e) of Rule 56 speaks in terms of the motion being "supported as provided in this Rule," we held in *Matsushita* that parties relying on The Model in support of a motion for summary judgment in an antitrust case automatically support and carry their burden of demonstrating there is no genuine issue of fact. The Model does it for them.

In that case, we relied upon The Model to establish the following propositions: that the sole motivation of firms in a perfectly competitive market is to maximize profit; that claims of predatory pricing (supporting below-cost prices in one market with high prices in another) are generally unlikely to occur in any circumstances; that defendants are not likely to regain losses from a predatory pricing campaign and thus have no motive to engage in such conduct; and, that "courts should not permit factfinders to infer conspiracies when such infer-

ences are implausible [implausibility as determined by the predictions of The Model], because the effect of such [judicial] practices is often to deter pro-competitive conduct." 106 S.Ct., at 1360. As the dissenters in *Matsushita* pointed out, we totally ignored the plaintiffs' evidence that the defendants had been selling goods in this country at a substantial loss for a long period of time. We knew that profit maximization—not growth or market share—was the only motive the defendants could be assumed to have

under The Model. 106 S.Ct., at 1365.<sup>18</sup> Consequently, requiring supporting affidavits and evidence from a summary judgment movant about facts admissible in evidence is unnecessary in antitrust cases since The Model itself demonstrates the only plausible set of facts. Under Rule 56, as presently written, the party moved against can still try to challenge the motion by filing counter-affidavits or other evidence questioning whether the predictions of The Model follow from the assumptions of The Model.<sup>19</sup>

18. Intent to exclude competitors should be held irrelevant even if it were possible that the defendants could have had such an irrational motive. Judge Posner has observed:

[I]f conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors ("these turkeys") is irrelevant. . . .

Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run.

*Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (CA7 1986).

Plaintiff has pointed out that Judge Posner's position is inconsistent with the binding precedent of *Poller v. CBS*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458, 464 (1962), where we said: "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles . . ." (emphasis supplied). Judge Posner regularly ignores binding precedent. On occasion, the practice produces worthwhile insights, even though a bit inconsistent with the usual role of lower court judges. By ignoring intent and relying on the fixed, meaningful, and knowable concepts of "consumer welfare," "ancillary restraints," and "reductions in output," we can make the law certain and predictable in cases like this one. To the extent that *Poller* holds

otherwise, it is distinguished. If it cannot be distinguished, it is overruled. See n. 20, *infra*.

19. This Court relied upon then-Professor Easterbrook's analysis of the *Matsushita* case to decide that case. 106 S.Ct., at 1359, n. 15. Easterbrook's analysis was not based on references to the record of the case. Indeed, it demonstrates that we do not need a record. His analysis posited the assumptions of The Model and its inexorable conclusion that predatory pricing could not take place over such a sustained period of time in light of the risks of new entry and cheating by the parties alleged to have conspired. From these uncontrovertible facts derived from the truths of The Model he could conclude that the defendants were "engaged in hard competition" rather than predatory pricing. Easterbrook, n. 7, *supra*, at 27.

We clearly adopted Easterbrook's method for deciding antitrust cases by determining whether the predictions of The Model followed from the policy and factual assumptions underlying The Model without reference to the purposes of Congress in adopting the antitrust laws or to the record of the case in order to determine whether the factual assumptions of The Model were in effect in the case before the court. Thus we overturned the Court of Appeals in *Matsushita* on the issue of whether there was a material question of fact regarding whether defendants had conspired because the Court of Appeals did not consider the dictates of The Model indicating that "it was as plausible to conclude petitioners' price-cutting behavior was independent and not conspiratorial."

Plaintiff would have us reverse *Matsushita* and hold that a court should consider facts which diverge from the reality assumed by and the consequences predicted by The Model. This we cannot permit. To do so would be to return to the now discredited view that antitrust cases are "complex" and require juries to weigh issues of motive and intent along with facts unique to the case.<sup>20</sup>

In this case, the defendants, as rational maximizers operating in markets where there is an inverse relationship between prices charged and quantity demanded, would have sought to maximize the difference between their costs and the prices charged. But if they obtained excessive profits, the assumed condition of free entry would mean that manufacturers of other

products would instantly enter the widget market to drive down prices to cost. On the other hand, if they were conspiring to cut prices below cost, they would not last long in the market for widgets. Consequently, their prices must have been neither too high nor too low—but just right. They proved this by showing no new entry took place and none of the members of the Consortium failed. Therefore, the burden shifted to the plaintiff to find a factual dispute The Model tells us is a genuine dispute—a burden the record indicates that the plaintiff has failed to even attempt to carry.

*Matsushita's* holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible,"<sup>21</sup> 106 S.Ct., at 1360, goes beyond the procedural technicali-

---

106 S.Ct., at 1353. In effect, we held that the court must grant the motion unless it appears that the predictions of The Model do not follow from the assumptions of The Model. A party challenging this logical holding certainly faces an uphill battle, perhaps an insuperable one. Short of repealing The Model and the reasoning process associated with it, we see no other conclusion in motions by defendants for summary judgment in antitrust cases after *Matsushita*.

20. It should be readily apparent that we have been creating different tests for summary judgment for different classes of litigation. In the antitrust arena, we have evolved from a posture of holding that summary judgment should be rarely granted in cases where motive and intent are often important issues, to the posture of granting summary judgment motions for defendants wherever The Model dictates that the facts alleged are not plausible. *Matsushita* is but a confirmation of that trend and not only authorizes a trial judge to ignore the general obligation of the proponent of a motion to carry the initial burden of supporting the motion with evidence, but also to ignore the obligation to draw the inferences from the facts in the light most favorable to the party opposing the motion as required by *Poller v. CBS*,

368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458, 464 (1962), and *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176, 177 (1962).

It should be clear that *Matsushita* also directs a trial judge to invade the traditional function of the jury, at least in antitrust cases, and decide whether the plausible inferences drawn favor one party over the other and enter judgment accordingly. The language in *Poller, supra*, "[w]e believe that summary procedures should be used sparingly in complex antitrust litigation," has been honored in its breach for at least the past ten years and that reality should be expressly recognized and approved by this Court. *Poller* has long been overruled in fact, if not in law. It is apparent that "trial by affidavit" has been, and is, a substitute for "trial by jury," the "hallmark of 'even handed' justice," *Poller, supra*, at 473, 82 S.Ct. at 491, 7 L.Ed.2d at 464, once we have the insights of economic analysis to help us determine what the facts are and guide us to the right answer—the record and other considerations to the contrary notwithstanding.

21. Implicit in this holding is the assumption that plausibility is a matter for the court to decide, not the jury. See n. 20, *supra*.

ties of which party has the burden of supporting a claim that there is no factual controversy in summary judgment motions. It establishes the substantive rule that where The Model determines that the conduct alleged as violating the antitrust laws is not plausible in light of the assumptions of The Model, no violation of the antitrust laws can in fact have taken place. We coupled our plausibility holding with the observation that "petitioners had no motive to enter into the alleged conspiracy" and that "as presumably rational businesses, petitioners had every incentive not to engage in the conduct with which they are charged,

for its likely effect would be to generate losses for petitioners with no corresponding gain." 106 S.Ct., at 1361. We found no plausible motive to engage in anticompetitive conduct in *Matsushita*, it will be remembered, by virtue of an examination of the dictates of The Model, according to Bork, McGee, Easterbrook, and others.<sup>22</sup> Their theorizing told us the defendants, firms from Japan selling electronics products in the United States, were acting pursuant to The Model and that they necessarily were acting "rationally" according to the standards of rationality posited by Bork, McGee, Easterbrook, and others.<sup>23</sup> We ac-

22. See R. Bork, *The Antitrust Paradox* 145 (1978); McGee, *Predatory Pricing Revisited*, 23 *J.Law & Econ.* 289 (1980); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 *U.Chi.L.Rev.* 263 (1981); see also Easterbrook, *The Limits of Antitrust*, 63 *Texas L.Rev.* 1 (1984).

23. Plaintiff's suggestion that this Court ended up analyzing the predictions and assumptions of The Model rather than the facts of the case in *Matsushita* borders on the contemptuous. In support of this wild allegation, plaintiff points out that the Court's basis for rejecting the plaintiff's expert witness testimony in that case was this Court's reliance upon the abstract theorizing of The Model rather than upon a review of the record and a finding that the expert testimony did not present an issue of fact. Be that as it may, we have held that The Model does determine both what the law is and what the facts are. See nn. 12 & 20, *supra*. To hold otherwise would undermine The Model; it would be like rejecting one of the basic postulates of Euclidian geometry—the entire system would fail and then where would we be?

Plaintiff also claims that subsequent actions by the Administration, which supported the defendants in *Matsushita* in entering into a trade pact limiting imports of semiconductors from Japan, indicate an Administration belief that Japan's industries engage in cartel activity orchestrated by MITI and engage in below-cost selling for sustained periods of time for reasons not accounted for by The Model. Plaintiff

points to a Reagan Administration official's defense of the trade agreement in the semiconductor industry limiting the import of semiconductors into the United States. The official suggested the low prices of imports from Japan were the product of long-term overcapacity supported by high fixed prices within Japan's protected domestic market. It was suggested that this was the product of official governmental policy targeting the industry for development and export trade. The policy was implemented by subsidies, trade barriers against imports into Japan's domestic market, and MITI coordinating Japan's exports at low prices on world markets. See C. Prestowitz, *In Defense of Semiconductor Pact*, *Wall St. J.*, p. 30, col. 4, (Sept. 26, 1986). Plaintiff claims that the same thing was happening in the markets at issue in *Matsushita*, but this Court refused to consider the facts of the case because we became "bewitched and enamored by the child-like simplicity of the neoclassical model and its compatibility with our unexamined ideological beliefs."

We refuse to reconsider *Matsushita* or plaintiff's intemperate observations about that decision. We are a court of law, not a political body like the Congress or some agency of the Executive branch. Our duty is to find the rules, apply them to the facts, and impose the conclusion wherever it may take us. The science of economics has given us our rules, The Model has given us our facts, and we need only multiply the

cordingly found the conduct alleged in that case, predatory pricing, to be speculative, rarely tried, never successful, and impossible to believe. Because of the rationality assumption, we also found the defendants in that case lacked a motive to engage in the allegedly illegal conduct because The Model indicated the conduct would generate losses for them—"losses" as defined by The Model. The claim that these are all issues of fact which a plaintiff is entitled to have a jury consider and determine, received no attention from the majority opinion—and justly so. For The Model, which is applicable at all times and in all circumstances, defines not only what is the law, but also *what is the reality that will be allowed to be considered fact relevant to the case.*

one times the other to reach the right conclusion.

24. Although Bork's reading of the legislative history of the Sherman Act suggesting Congress intended it to serve efficiency goals only, R. Bork, *The Antitrust Paradox* 50-71 (1978), has been persuasively challenged, Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *Hastings L.J.* 65 (1982); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 *Cornell L.Rev.* 1140, 1154, n. 76 (1981), we can only interpret the language Congress used. Determining the legislative history of any statute is a tricky business not to be engaged in unless the language of the statute is ambiguous. See *Caminetti v. United States*, 242 U.S. 470, 490, 37 S.Ct. 192, 196, 61 L.Ed. 442, 455 (1917) ("[W]hen words are free from doubt, they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source."). We do not see anything ambiguous about the Sherman Act. It clearly instructs us to hold joint activity "in restraint of trade" illegal. That language invokes a concept embracing economic analysis and is limited to determining whether a restraint has occurred in the

Thus it is that we have determined that the only purpose of the Sherman Act is to achieve economic efficiency as defined by The Model, the opinions of the members of the Congress that passed the Sherman Act to the contrary notwithstanding.<sup>24</sup> In *Matsushita* and in *Sylvania* we have also held that The Model dictates what will be permitted to be considered the facts for purposes of analyzing a case on appeal.<sup>25</sup> The frictionless functioning of The Model demands such an approach lest we be confronted with uncertainty and the interjection of our own personal values into the process of decision. To paraphrase Mr. Justice Roberts: When conduct of private corporations is challenged as not conforming to the mandate of the antitrust laws, the judi-

economic sense. Determining the economic meaning of the concept is all that we are doing here when we employ the objective model from the science of economics to fashion rules determining which restraints are lawful and which not.

25. It is not uncommon for there to be a difference in the version of the facts relied upon by trial and appellate courts in deciding a case, myths about due process to the contrary notwithstanding. See, e.g., *Telex Corp. v. IBM*, 367 F.Supp. 258 (N.D. Okla. 1973), *rev'd*, 510 F.2d 894 (CA10 1975), *cert. dismissed*, 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244 (1975) (trial court finding on cost of developing interfaces ignored by circuit court in defining relevant market). A comparison of the various court opinions in the *Matsushita* case illustrates that not only does the version of the facts considered by each court vary significantly, but that this Court need not become involved with the facts at all where a scientific and objective economic model can be relied upon to determine what the facts are which should be permitted to be considered in deciding the case. The error of the lower courts in both disputes was to ignore the assumptions of The Model in determining what would be permitted to be the facts for purposes of the analysis, reality to the contrary notwithstanding.

cial branch of the Government has only one duty—to lay the section of the antitrust laws (as defined by the predictions of The Model) which is invoked beside the conduct which The Model assumes has taken place, and to decide whether the latter squares with the former.<sup>26</sup> These are the substantive implications of our decision in *Matsushita* and they are the principles which that case and the dictates of

The Model require that we apply today.

Applying these principles to the facts of this case, it is obvious that the conduct plaintiff alleges took place could not have happened and that the alleged evidence suggesting otherwise is false; or, if it did happen, could not have worked in a way which caused plaintiff antitrust injury.<sup>27</sup> It would have been irrational for the defendants

26. *United States v. Butler*, 297 U.S. 1, 62 (1936). As a result of its squaring process in that case, the Court found the Agricultural Adjustment Act invaded the reserved power of the states, was beyond the power of the federal government, and was an inappropriate exercise of the federal spending power. In this case, our only function is to lay the predictions of The Model down beside the assumptions behind it and see if the former square with the latter. In the unlikely event that they failed to do so, it would be up to Congress to change the law or the facts, although Congress can no more change The Model and the assumptions upon which it is based than King Canute could hold back the tide. That is why we commonly refer to “economic laws” in the sense of immutable rules when speaking of The Model. It is beyond the power of this Court to legislate, just as it is beyond the power of Congress to tamper with, the assumptions underlying The Model. Our job is to apply, deductively, The Model to the facts as defined by The Model and not to engage in policy making, the consideration of irrelevant “facts” not accounted for by The Model, or the invocation of such vague and poetic concepts as fairness, justice, concentrated economic power, and competitive process. We prefer clear, precise, and rigorous concepts like “allocative efficiency,” “ancillary restraints,” “consumer welfare,” “Pareto optimality,” and “market power.”

27. Plaintiff argues that our antitrust “standing” decisions are irrational and impossible to reconcile. Plaintiff has also argued that the decisions are impossible to reconcile with the plain language of the statute and the congressional purpose behind the antitrust laws. Plaintiff has misunderstood our standing opinions. In antitrust litigation we have not used the

“standing” concept as we have used it elsewhere in the law to dispose of disputes not committed to the courts by Congress or suits not amenable to resolution by the judicial process. Rather, we have used it to dispose of cases where someone is admittedly injured in their business or property, but the chain of causation is interrupted by an intervening party. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

Furthermore, in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), we held that the scope of the duties created by the antitrust laws and the determination of who should be able to invoke the legal process to enforce those rights was dependent upon common law standards in effect at the time of the passage of the Sherman Act. *Id.*, at 531-534, 103 S.Ct., at 905-906, 74 L.Ed.2d at 733-736.

In one stroke we incorporated a wide range of judge-made limitations upon the right to invoke the private treble damage remedies like privity, foreseeability, proximate cause, certainty of damage proof, and so on. In this way the otherwise unlimited liability to the world that a literal reading of the damage provisions of the antitrust laws would seem to contemplate can be subjected to the informed discretion of the courts to dismiss claims they believe are “too remote,” “inconsequential,” outside the “target area” of the alleged violation, or conduct which ought not be found a violation of the antitrust laws in the first instance because The Model so dictates.

We further restricted access to the courts by antitrust plaintiffs in *Cargill, Inc. v. Monfort of Colorado*, 475 U.S. \_\_, 107 S.Ct. 484 (1986), by requiring private plaintiffs seeking injunctive relief against a

to have entered into the agreement and impossible for them to have carried it out if they did enter into it for the reasons stated by the court below. In the implausible event that the defendants did attempt to carry out the alleged agreement, courts should hesitate before intervening because the market will correct the situation rapidly through new entry or cheating by members of the cartel. Judicial interference with the free market is a form of government intervention and it should be presumed that any form of government intervention with the functioning of the market is likely to produce blunders interfering with the self-correcting and efficient solutions of the free market.<sup>28</sup>

In light of the dictates of The

Model, the courts below were eminently correct in dismissing the counts of the complaint alleging horizontal restraints of trade and in imposing sanctions for the temerity of the plaintiff's suggesting that reality could be otherwise and that a court should interfere with the self-correcting processes of the market if the defendants did indeed engage in the irrational and implausible conduct the plaintiff claims they engaged in.

### III

The plaintiff's vertical claims deserve a separate and more sympathetic treatment in light of the elliptical treatment of these issues in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d

merger allegedly violating § 7 of the Clayton Act to show threatened damage to them of the type the antitrust laws were designed to prevent and that the damage flowed from the merger. By imposing this standing burden on the private § 7 plaintiff, we were able to shut down such litigation unless it could be shown the merger violated the Sherman Act. This has proven to be the case because one only needs to show an incipient threat to competition to show a § 7 violation; by requiring proof of threatened damage of the sort prevented by the antitrust laws flowing from the violation in order to have standing, private plaintiffs are not able to bring incipency cases. They are forced to prove a Sherman Act violation in order to have standing.

In this case we could hold the plaintiff lacks standing to bring a treble damage action since the sole purpose of the antitrust laws is to maximize consumer welfare, not to protect competitor interests. Thus we have upheld the right of consumers claiming to be victimized by a price-fixing conspiracy to maintain a treble damage action. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). This reading of the statute implicitly means that a competitor trampled upon by a rival business that is injuring consumer interests lacks "standing" to sue.

Injury to the competitor is, at best, "indirect" and the result of a long-term injury—if any—"directly" suffered by consumers deprived of the competitor's presence in the market. The consumer, in turn, must be "directly" injured in his business or property in order to have standing. See *Illinois Brick, supra*.

If, of course, the plaintiff passes these "standing" tests, the issue still remains whether the assumptions behind The Model will permit one to draw the inference that the defendants operating in a perfectly competitive market would have any motive to conspire or rational expectancy that a contract or conspiracy to fix prices or divide markets would succeed in light of the assumptions and logic of The Model. If not, it would be impossible for a consumer claiming "direct" injury to be injured "by reason of" something prohibited by the antitrust laws. See *Matsushita, supra*. In light of our holding that it is logically impossible for a plaintiff to prove that the assumptions of The Model do not produce the outcomes The Model predicts, any further commentary on the issue of "standing" in such circumstances is unnecessary. As a practical matter no such suits can be maintained on the merits in light of what we hold today.

28. See Easterbrook, *ante*, at 524, and n.14.



775 (1984). In that case, tried on a *per se* theory of liability for vertical price fixing, this Court was confronted with a situation in which the defendant and others attempted to raise for the first time, on appeal, the question of whether or not vertical price fixing ought to be condemned on a *per se* basis. Applying well-settled principles of judicial review, we refused to consider an issue on appeal that was not litigated below. In view of the Court of Appeals opinion in that case,<sup>29</sup> this Court necessarily focused on the sufficiency of the evidence from which it might be inferred that a contract, combination, or conspiracy took place in the circumstances of that case for Sherman Act purposes. Whether this Court would have held that the conduct in question violated the Sherman Act and did so on a *per se* basis if the issue were properly before the Court, was left open to conjecture. Today, we settle that conjecture by holding that all vertical restraints should be presumed *per se* lawful—a conclusion we believe mandated by the economic model we have held dictates what the antitrust laws are meant to achieve as well as by the facts permitted to be considered by a court in analyzing whether the predictions of The Model are satisfied by the assumptions behind The Model in a particular case.

In view of the possibility that the plaintiff and others may have been reasonably misled by the true meaning of our opinion in *Monsanto*, it is understandable that the plaintiff may have filed this suit and pursued appeals from dismissal of these claims on the theory that we meant to reaffirm the outmoded *per se* prohibition of vertical price fixing. The plaintiff is to be pitied, not punished, for following this course of action.

It should be reasonably clear by now that rational maximizers operating in a perfectly competitive market will only impose vertical restraints, including resale price maintenance agreements, where it is efficient to do so—efficient as defined by The Model. In other words, suppliers will not impose vertical restraints where it will restrict output to do so.<sup>30</sup> The Model assumes defendants are rational maximizers operating in perfectly competitive markets. On this record and because of our reading of *Matsushita* as excluding evidence suggesting that defendants acted in fact contrary to the dictates of The Model, *ante*, at 526-527, the logic of holding vertical price and non-price restraints to be *per se* lawful is inescapable. Symmetry in the treatment of vertical price and non-price restraints demands such a result.<sup>31</sup> A system of restricted distribu-

29. 684 F.2d 1226 (CA7 1982) (asserting that proof of termination following competitor complaints was sufficient to send the issue of whether there was a conspiracy to terminate the plaintiff to a jury).

30. See Bork, *The Rule of Reason and the Per Se Concept: Price and Market Division II*, 75 Yale L.J. 373 (1966). Plaintiff's offer to prove that the restraints were imposed for other reasons was rightfully rejected.

31. See Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 45 U.Chi.L.Rev. 6, 9 (1981). While plaintiff has invoked the old

cliché that "consistency is the hobgoblin of small minds," plaintiff has not demonstrated any affirmative reason for disturbing the neatness of a symmetrical rule which is inherently consistent and easily understood. It is not persuasive to claim that the congressional repeal of the Fair Trade Exemption and the congressional prohibition on the Antitrust Division's arguing for declassifying vertical price fixing as a *per se* violation in *Monsanto* is evidence of an intent to apply a *per se* rule to such conduct. When Congress repealed the Fair Trade Exemption it did just that;

tion is designed to maximize rationally the efficient distribution of a supplier's product. Who are we to second-guess the rational judgment of a property owner in determining how to distribute its product, thus opening the door to "free riding" on the property rights of the distributor?<sup>32</sup>

#### IV

In view of the plaintiff's confusion over the status of vertical price fixing, we do not think sanctions are warranted for its having filed the petition for certiorari. Moreover, four members of this Court believe that the case presented sufficient grounds for review so as to vote in favor of granting the petition. Speaking for at least a few of that number, this case presented us with the opportunity to clear up some loose ends, carry *Matsushita* to its logical conclusion, and complete this Court's termination of its long and tortuous journey with antitrust litigation. For those reasons alone, we think it inappropriate to impose further sanctions on the plaintiff in view of the opportunity it has given this Court to clarify the meaning of the Sherman Act. We do so despite the rhetorical question at the end of

the plaintiff's brief asking what is left of the Sherman Act if this Court upholds dismissal of the plaintiff's claims. That question will, of course, be answered when and if the case arises and when, if ever, this Court deems it necessary to grant certiorari in another antitrust case. In view of the absence of any such litigation currently pending in the federal courts and the phalanx of lower court judges well-educated at corporate sponsored two-week courses in the right kind of law and economics, we do not believe it necessary to be worried about the possibility of significant antitrust litigation taking place in the future. The judgment of the Court of Appeals is

AFFIRMED.

Justice CATO, concurring.

I concur solely for the purpose of stressing the significance of the discovery of the neoclassical economic model and its use in law generally. We have been too reticent in our willingness to bring this insightful tool of the modern science of economics to bear on legal issues generally. The word should go forth, not just in antitrust cases where this Court has been gradually shifting the law to fit the predictions of The Model for at least twenty-five years,

---

it did not enact a *per se* prohibition. See Posner, *supra*. Moreover, we must apply the language that Congress used, not what it may have intended by that language. Since we have held that the Sherman Act is a short-hand expression of The Model and it is our duty only to compare the assumptions of The Model with its predictions, there is no utility in attempting to discern what Congress intended as opposed to what we have held Congress said—let alone compare what Congress intended or the assumptions underlying The Model to the reality of this case.

32. The fact that vertical price restraints are used primarily in the sale of goods like candy, blue jeans, and the like, where it is

questionable whether there is a need for warranty and repair work, does not exhaust the possible rationales for what constitutes free riding. For our purposes, and in light of the dictates of The Model, anything the distributor believes is a reason for imposing the restraint will, *ipso facto*, define what free riders are out to gain at the honest distributor's expense. Courts are duty-bound to enforce contracts imposed by suppliers restricting free riding of any sort by their distributors or third parties else freedom of contract becomes an empty right. See Goldberg, *The Free Rider Problem, Imperfect Pricing and the Economics of Retailing Services*, 79 Nw.U.L.Rev. 736 (1984).

but in all fields of law, that we now have a model to end judicial discretion. The light provided by The Model can serve to illuminate a vast range of vexing issues regularly brought before courts and legislatures and show the clear path to the right answer.<sup>1</sup>

For example, we have been instructed that from an economic perspective, the regulation of rape by criminal sanctions simply demonstrates a solution to a problem of market failure.<sup>2</sup> The implications of such an approach and whether and in what way such conduct should or should not be regulated by criminal law for

efficiency purposes are startling.<sup>3</sup> For example, if one sees the criminal law and the law of torts as ways of coercing rapists from engaging in involuntary exchanges that injure non-consenting parties, the economic sanctions imposed may be justified as a way of adjusting upward the costs of engaging in such activity in order to discourage the rapist from bypassing the market. It is, of course, "efficient to use different sanctions depending on an offender's wealth."<sup>4</sup> Consequently, we as a society should reserve criminal sanctions for rape for the non-affluent and apply tort remedies for rape for the affluent.

1. Posner has prophetically observed: "[M]y own view is that the proper domain of economics includes *all* of its fruitful applications—economics cannot be defined in accordance with some preconceived idea of what 'economic' institutions are." Posner, *Retribution and Related Concepts of Punishment*, 9 J. Legal St. 71, 73 (1980). It must be clear by now that the range of fruitful applications of the science includes all activities where human motivation plays any role at all. This is so because The Model's fixed assumption that whatever the individual chooses is rational and rational is whatever the individual chooses provides a fixed factual constraint upon judicial discretion to divine rules governing human behavior contrary to the assumption of rationality.
2. See Posner, *An Economic Theory of the Criminal Law*, 85 Colum.L.Rev. 1193, 1198-1199 (1985). Judge Posner instructs us that rape is a bad thing but that it is useful to think that "the prohibition against rape is to the marriage and sex 'market' as the prohibition against theft is to explicit markets in goods and services." Only "consensual relationships can create wealth, and therefore be efficient." *Id.*, at 1199.
3. *Ibid.* In the same article we are instructed that it is "hard for an economist to understand why the voluntary exchange of valuable goods should be criminal." *Id.*, at 1200. Among the examples cited as voluntary exchanges are unsuccessful conspiracies to commit murder, conduct like bribery of a judge which would thwart other

regulation, prostitution, deviant sexual behavior, pornography, and blackmail and certain other forms of "private law enforcement" made criminal. While Judge Posner would qualify the conclusion that such conduct is value-maximizing when serious effects on third parties are taken account of, I see no reason to take account of third-party interests in determining whether the law should permit such conduct.

The logic of The Model, and hence the logic of a legal system where The Model is made the major premise, focuses only on the bargain struck and enforces the rights and rationalities the parties have expressed in their agreement. To let the law interfere on the pretext of preserving or protecting some third party interest out of a wimpish concern for other values would interject uncertainty and unpredictability into the analysis and upset the functioning of the market. In the antitrust field, for example, we would return to the era of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 85 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), and *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), where the courts regularly frustrated the will of rational maximizers by concerning themselves with the "rights" of third-party intermediaries between the seller and the consumer.

4. Posner, n. 2, *supra*, at 1205.

The meaning and application of the First Amendment guarantee of a free press take on new and more realistic dimensions when one views its function as protectionism for a special-interest group which profits from publishing and broadcasting.<sup>5</sup> The sentimental view that attorneys should be appointed to represent prisoners in civil rights suits at public expense is shown to be inefficient when one sees that reliance on the contingent fee system would rationally and efficiently sort out the meritorious from the non-meritorious prisoner suits.<sup>6</sup> The unconstitutionality of state anti-takeover statutes designed to block profit maximizing multi-billion dollar merger deals promoted by the rational maximizers of the investment banking industry becomes clear when one realizes that such laws interfere with natural market processes by which investment bankers reorganize the efficient use of capital assets.<sup>7</sup> Even the vexing question of when to issue a preliminary injunction can be reduced to a formula, quantifying those factors which should be considered and seeing whether the costs exceed or do not ex-

ceed the benefits of granting the injunction, when The Model is brought to bear on the problem.<sup>8</sup>

I welcome the courage of the majority in restoring the appropriate role of this Court in implementing the verities of the science of economics. This Court should never have abandoned its important role of protecting property and contract rights from regulation by government. For too long we have been avoiding the inevitable dictates of The Model by defaulting in our responsibility to implement those dictates, and leaving to Congress, state governments, and juries the freedom to do as they choose. By placing the Sherman Act in its appropriate economic perspective, we can at last end a century of broad and far-ranging judicial tampering with the free economy and restore to its proper role the freedom and decision-making of corporate America operating in perfectly competitive markets.

Justice CLAYTON, with whom Justice ROBINSON and Justice PATMAN join, dissenting.

5. See "Influential Ideas, A Movement Called 'Law and Economics' Sways Legal Circles," Wall St. J., p. 1, col. 1 (August 4, 1986) (reporting Judge Posner's views on the economic approach to the First Amendment).

6. *Ibid.*

7. See *Dynamics Corp. v. CTS Corp.*, 794 F.2d 250 (CA7 1986) (Posner, J.).

8. See *American Hosp. Supply v. Hospital Products*, 780 F.2d 589 (CA7 1986) (Posner, J.). The formula is:  $P \times Hp > (1 - p) \times Hd$ . The beauty of the formula is, of course, that it guarantees certainty and predictability by suppressing the unruly horse of undue judicial discretion hiding behind such vague generalities as "balance of hardships" and the other poetry and rhetoric traditionally displayed in preliminary injunction decisions. The formula

also eliminates disputes over what the "facts" are since only those quantifiable facts the formula allows to be "facts" are facts for purposes of the analysis.

A similar exercise has shown that products liability rules are not the result of normative concerns, but rather reflect the inexorable drive of the common law system for efficient results—even though many of the courts framing the rules may have been completely oblivious of the insights of neo-classical economics. See Landes & Posner, *A Positive Economic Analysis of Products Liability*, 14 J. Legal St. 535 (1985). This is likewise true of the exclusionary rule for violations of the Fourth Amendment. See, Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 Wash.L.Rev. 635 (1982).

The majority opinion repeals the Sherman Act almost one hundred years to the day after its adoption, a power one thought was reserved only to Congress. The majority does so by following the dictates of the neo-classical model (hereinafter, the model) of economic theorizing, a supposedly "non-activist" and "neutral" tool of the "science" of economics much in vogue with self-described political "conservatives."<sup>1</sup> The model, in turn, is premised upon assumptions of a world which does not exist and invokes hidden value choices to delegate decision-making to private parties backed by state intervention to enforce the decisions made. Through a series of deft and seemingly "logical" moves, the model ends up with standards by which one can find any conduct either

consistent with the assumptions of the model, incapable of adversely affecting consumers as measured by the consequences of the model's analysis of its Alice-in-Wonderland world, or not happening in light of the assumptions of the model and the tautological and circular predictions which follow from the assumptions underlying the model.

It is claimed that the model is a value-free, neutral, and objective standard by which the judiciary may implement the inevitable dictates of the model. It does not require much imagination to see that the model ignores the existing distribution of wealth, time, the dynamic nature of reality, and the existence of the legal system and its enforcement of existing contract and property rights.<sup>2</sup> This is not all the model ignores. As the majority

1. It should be noted that most professional economists follow far more complex models than that advocated by the neo-classical school. Some economists even engage in empirical research in an effort to understand how the economy and markets actually operate. They do not make the ridiculous argument that one should not compare the assumptions of the model with reality, but only compare the predictions of the model with reality. See *ante*, at 522-523, n.12. As this case demonstrates, the model's assumptions determine what is the reality which will be allowed to be the only reality the model's predictions are compared with. See Flynn, "Reaganomics" and Antitrust Enforcement: A Jurisprudential Critique, 1983 Utah L.Rev. 269, 282; Mason, Some Negative Thoughts On Friedman's Positive Economics, 3 J. Post-Keynesian Econ. 235 (1980-81).

In some circles, for example Justice CATO's, the advent of what is called law and economics is considered a brilliant stroke of insight. Economic theorizing of many stripes has always informed the legal process and rightly so. The difference between an appropriate informing of the process and an inappropriate one is that the so-called law and economics movement substitutes the abstract theorizing of one school of economic thought for legal anal-

ysis, rather than just informing the process of legal analysis within the court's broader obligations, institutional limitations, and responsibilities for dealing with the messy facts of the real world while functioning as a court of law. The movement gains its reputation for brilliance because it simplifies (drastically and dangerously) the complex and because its basic predictions are counter-intuitive. The reason its basic predictions are often counter-intuitive is because they are derived from faulty and often false assumptions of fact about the real world. Decision-makers, therefore, should approach such brilliant insights with a good deal of skepticism and more than a grain of salt. See Farber, The Case Against Brilliance, 70 Minn.L.Rev. 917 (1987).

At a more fundamental level, it is apparent that the entire model is premised on a meaningless and tautological definition of "rational"; a definition which does not reflect reality and which ignores the insights of several disciplines which have made a considerable study of human motivation and behavior. See Harrison, Egoism, Altruism, and Market Illusions: The Limits of Law and Economics, 33 UCLA L.Rev. 1309 (1986).

2. It has been observed:

opinion makes patently clear, exclusive reliance on the model to determine the legality of conduct challenged under the antitrust laws causes the Court to ignore both the facts of the dispute and the purposes Congress intended the antitrust laws to accomplish.<sup>3</sup> Perhaps a psychiatrist or phi-

losopher may one day tell us why a majority of this Court would allow itself to be seduced by the childlike simplicity of a model of a world which does not exist, spinning about in its own closed world of tautological assumptions and conclusions,<sup>4</sup> to deal with the dynamic real-world issues

"[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 the perfect competitors.

....

The choice to develop conservative background rules was not one in favor of efficient markets and against egalitarian regulation; it was one for a particularly inegalitarian common law agenda and against a more egalitarian one.

....

[L]aw plays the same apparently minor and clear cut, but in reality major and obscure role in neoclassical as in classical economics. As before, it reinforces the status quo through an ideological/apologetic message. In classical economics, the role of law was to make it plausible that income shares were equivalent to labor inputs, and that unregulated exchange made all parties better off than they could otherwise be. In neoclassical economics the notion of a determinate background legal regime of property and contract makes it plausible that we can and have to choose between efficient market and egalitarian or equitable regulatory solutions. It doesn't wash in either case.

Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 *Am.U.L.Rev.* 939, 961, 966-967 (1985).

3. The majority's assertion that "boobiness"

is avoided by keeping the number of variables limited to a fixed number of quantifiable ones viewed by "snapshot," *ante*, at 521, n. 9, is logical but not defensible. It means that a good deal of the reality of the dispute is being ignored or coerced into a factor the model claims is quantifiable; factors defined and dictated by the ideology underlying the model and by the need for coherence of the model with its reliance upon deductive logic. The reality of the dispute, the policies of Congress in adopting the antitrust laws, and the logic of the legal process are all sacrificed by the mechanical methodology of the majority. While the "boobiness" of a mistake in deductive logic may be avoided, the "boobiness" of a failure to use artfully the inductive logic of legal analysis is not.

4. A few years ago, a chairperson of the FTC gave a speech illustrating well the simplistic and tautological nature of the reasoning followed by the ideological proponents of an exclusive reliance upon the neo-classical model to eviscerate antitrust policy. Chairperson Daniel Oliver likened interference with economic rights to interference with political rights. Chairperson Oliver defined economic freedoms as "freedom to contract" and "freedom to hold and dispose of property, without undue interference from the state." Not surprisingly, Mr. Oliver saw antitrust policy as a form of governmental interference with freedom to contract. See 51 *Antitrust & Trade Reg. Rep. (BNA) No. 1283* at 428-429 (Sept. 25, 1986).

The right to contract and the right to own and dispose of property have long been recognized as state-created rights. See Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8 (1928); Pound, *Liberty of Contract*, 18 *Yale L.J.* 454 (1909). If Mr. Oliver were to be completely consistent, he should oppose any state involvement with the creation or enforcement of contract and property rights, since it would amount to state interference with what he believes

Congress has mandated we resolve in light of certain goals under the anti-trust laws.<sup>5</sup> Regretfully, I cannot proceed past the obvious conclusion that

to be some kind of inherent natural right of the individual. Instead he wants to have his cake of state interference to create and enforce contracts, and the right to eat it without state interference.

Antitrust policy should be viewed as a part of the state's definition of the scope of state-created and protected contract and property rights, not as a form of state interference with some kind of mystical and preexisting rights standing in place free of and independent of the existence of a legal system. As such, the antitrust laws are the expression of a societal consensus integral to defining the scope of the rights the law creates and enforces for social, political, and economic goals of the society.

It should be apparent to even the most ardent ideologue that the viability of "freedom to contract" is dependent ultimately upon coercion; the expectancy that the state will use its coercive power to enforce the agreement made. The circumstances in which the state will and will not bring its coercive power to bear in enforcing the bargain made defines, in turn, the scope of the freedom which individuals and large political entities like the modern corporation have to contract. The tautological nature of the superficial reasoning followed by government officials like Mr. Oliver explains in large part the decline in antitrust enforcement by the government agencies charged with that responsibility. It also explains why much of what is passed off as "economic analysis" today is largely irrelevant, sterile, and nonsensical. See Kuttner, *The Poverty of Economics*, *The Atlantic Monthly*, p. 74 (Feb. 1985).

5. Just as the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," *Lochner v. New York*, 198 U.S. 45, 75, 25 S.Ct. 539, 546, 49 L.Ed. 937, 949 (1905) (Holmes, J., dissenting), the Sherman Act does not enact the neo-classical economic model. The most objective study of the congressional goals sought in adopting the Sherman Act found that the leading economists of the day were opposed to the adoption of the Act on the grounds that it constituted an interference with the functioning of the market—the classicist's concept of the market. Congress adopted the statute with a different set of objectives from those contemplated by classical economics: "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." Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 *Cornell L.Rev.* 1140, 1182 (1982).

The significance of defining the underlying congressional goals of antitrust policy for the scope and meaning of the statute is illustrated by *Fishman v. Estate of Arthur M. Wirtz*, 807 F.2d 520 (CA7 1986) (one of the rare Seventh Circuit cases upholding a lower court antitrust verdict for a plaintiff). Compare, *Illinois Corporate Travel v. American Airlines*, 806 F.2d 722 (CA7 1986) (Easterbrook, J., relying on the fiction of a principal-agent relationship to avoid applying the *per se* rule against vertical price fixing). The majority in *Fishman* emphasized the overall function of the antitrust laws as preserving and fostering a "competitive process" in upholding a finding of a violation of the Act in the context of competition for a professional basketball team franchise requiring access to a natural monopoly playing arena. Dissenting Judge Easterbrook, labeling the goal of antitrust policy as "consumer welfare" and its "cousin allocative efficiency" as defined by the neo-classical model, would have dismissed the antitrust claims absent some specific proof of injury to consumers as the result of one monopolist rather than another taking over a natural monopoly market. This result is the consequence of the error of positing "consumer welfare" as the sole goal of antitrust policy.

The Easterbrook approach also applied the either-or fallacy, *viz.*, that conduct is either wholly anticompetitive (anti-"consumer welfare") or wholly competitive (pro-"consumer welfare"), with no ground in between. The reality of complex and dynamic economic relationships does not often fall into this either-or simplistic method of analysis, usually applied to questionable pregnancies or whether it is raining out or not. The only time one might be justified in the either-or assumption is in those non-existent circumstances where the assumptions of the model exist in reality. Where they do not, humility ought to require a sophisticated and sensi-

the majority opinion is patently wrong and that the commentators on this Court's opinions may well label that opinion silly despite the traditional constraint upon lawyers and academics of respect for the institution of the judiciary.<sup>6</sup>

My explanation for the startling

majority opinion and the even more startling concurring opinion is that this Court has long been headed down a path of excessive reliance on ideologically based and reified rules detached from reality to decide controversies arising in complex factual settings in the antitrust field.<sup>7</sup> Antitrust policy

---

tive fact analysis rather than the mechanical application of a simpleminded model of a world which does not exist.

6. My brother-in-law, a philosopher, has reported to me that the recent meeting of the American Society of Philosophers was highlighted by a speech ridiculing this Court's analytical methodology. Surveying a wide range of decisions, with a particular emphasis on the *Matsushita* case, the main speaker at the meeting claimed that the Court's majority has returned to the use of a naive and simplistic analytical positivism. In philosophical circles, such a mode of reasoning has long been discredited. According to my brother-in-law, discussion of this Court's analytical skills provoked much hilarity at the meeting as well as comments like those suggested in my opinion. I suspect that the majority and concurring opinions in this case will generate a stunned disbelief at next year's meeting of the Society and among other commentators. Regretfully, the moral and intellectual credibility of this Court—the main sources of this Court's power as an independent branch of government—may well be undermined by what the majority does here today.

7. The factual complexity of antitrust claims has undoubtedly contributed to our development of arcane "standing" requirements for private treble damage claimants. See *ante*, at 531-532, n. 27. As the majority opinion makes clear, our so-called standing opinions may be used to bog down and block treble damage claims even where there has been a violation of the law and even where there is no question that the claimant has been injured by a violation. In *Cargill, Inc. v. Monfort of Colorado*, 475 U.S. —, 107 S.Ct. 484 (1986), this Court carried its confused standing analysis so far as to repeal § 16 of the Clayton Act as a practical matter and prevent any private enforcement of § 7 of the Clayton Act through injunctive actions. As the majority opinion makes clear in this case,

this Court's tortured standing doctrine in the antitrust field may also be used as a vehicle for implementing the otherwise unstated ideological views of a majority of this Court without appearing to do so.

What this Court calls a "standing" requirement in the antitrust field is usually confused with what are called "causation" or "proof of damage" issues elsewhere in the law. We should abandon these confused, bizarre, and unintelligible "standing" requirements described by the majority, *ante*, at 531-532, n. 27, and return to the standing test enunciated in *Radian Burners, Inc. v. People's Gas & Light Co.*, 364 U.S. 656, 660, 81 S.Ct. 365, 367, 5 L.Ed.2d 358, 361 (1961): "[T]o state a claim upon which relief can be granted under . . . [the Sherman Act] allegations adequate to show a violation and . . . that the plaintiff was injured thereby are all that the law requires."

Issues which are now treated as standing issues are usually questions concerning the scope of the duties imposed by the antitrust laws, the factual connection between the violation of the duties imposed and injury to the plaintiff, or the level of certainty in proof of the amount of damages suffered by the plaintiff. See Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*, 49 *Antitrust L.J.* 1593 (1980). Treating these kinds of questions as standing issues results in litigating causation and damage issues at preliminary stages of the litigation by motion, a judge deciding factual issues which should be decided only after a trial and only by a jury if the Seventh Amendment means anything in the antitrust field, and confusing what it is that violates the law with who it is that may maintain a suit and what kinds of evidence are necessary to prove causation and the amount of damage. See *Cargill, Inc. v. Monfort of Colorado*, *supra*, for a good example of these difficulties, as well as the use of standing analysis to render useless a right Congress



has been a natural target for ideologically based and seemingly objective rules promising certainty and predictability but divorced from any need to account for all the factual circumstances in which antitrust controversies appear or the underlying social, political, and economic objectives which Congress mandated the antitrust laws achieve. A part of the problem is caused by the broad generality of the Sherman Act, a feature noted early in judicial experience with the statute, and one causing, at first, a literal interpretation greatly expanding the meaning of the statute<sup>8</sup> and, later, the dilution of the scope and utility of the statute through interpretations injecting a meaningless rule of reason test to serve as a mask hiding the imposition of the personal political views of the judge writing the opinion.<sup>9</sup> As has been the case with the interpretation of broad language in the Constitution such as the Due Process Clause and "commercial" speech under the First Amendment, the rule of reason has become a vehicle for the imposition of a new form of substantive due process by the judiciary.

In recent years antitrust policy

has been buffeted by claims that the "science" of economics can bring certainty, predictability, and truth to the legal analysis of disputes arising under the antitrust laws. Paradoxically, the reasoning process being advocated is like that followed in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), where this Court relied upon the ancient and venerable rule against restraints on alienation where title to goods had passed to draw a bright line between permissible and impermissible vertical restraints. The logic used is the rigid deductive logic of analytical positivism. The *per se* rule of *Schwinn*, like the rigid and fixed assumptions of neo-classical speculation, is made the major premise of a syllogism; only those facts in the dispute comporting with the assumptions underlying the major premise are allowed to be the minor premise in the reasoning of the *Schwinn* and neo-classical approaches, and the Court then draws its inevitable conclusion. In both cases, the logic followed displaces the complex inductive and deductive logic required in legal analysis, where the facts determine what rules are relevant, what

granted private parties to bring equitable actions to enforce § 7 of the Clayton Act.

As this case makes clear, this Court's antitrust standing decisions are being used primarily to determine what it is that constitutes a violation of the statute. Instead of making a forthright declaration that the majority does not agree with the policy Congress has adopted, "standing" doctrine is used to mask implementation of the Court's hidden ideological agenda for dismantling antitrust enforcement behind the confused and confusing tests for "standing." The confusion is used to bar antitrust plaintiffs from pursuing the rights Congress has clearly given them and to defeat the policies Congress has instructed courts to implement without explicitly saying so.

8. See *Northern Securities Co. v. United States*, 193 U.S. 197, 331, 24 S.Ct. 436, 454, 48 L.Ed. 679, 698 (1904) (holding the Act is "not limited to restraints . . . that are unreasonable in their nature, but embraces all direct restraints imposed by any combination . . .").

9. See, e.g., *Appalachian Coals, Inc. v. United States*, 228 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1938); *Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918). Cf., *United States v. Columbia Steel*, 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948); *International Shoe v. FTC*, 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431 (1930); *United States v. United States Steel*, 251 U.S. 417, 40 S.Ct. 293, 64 L.Ed. 343 (1920).

they mean, and how they should apply, while the rules determine what facts are relevant, what they mean, and how they affect the result. Inductive logic plays a significant role in determining which rules are relevant and in pouring meaning into the rules. Inductive logic also plays a significant role in defining which facts are relevant to the major premise and what weight they have in the minor premise. This unbreakable analytical circle of legal reasoning is the common law method which has developed over the centuries as the best and most workable method for many of our tasks: for accommodating the reality of disputes committed to courts to the generality of laws adopted by the community; for implementing the policies behind the laws found relevant in light of the realities of the dispute; for recognizing the institutional constraints upon those charged with making the decision in the context of the dispute and the power of other institutions to determine the facts and the policies to be implemented; and, for importing the requirements for balancing common sense and principle and balancing certainty and flexibility in order to provide a basis in precedent for dealing with unforeseen future evolutions in reality.

In the *Schwinn* and neo-classical approaches the policies underlying the rule put forward as the sole path to truth, beauty, and wisdom contain values and insights worth considering in the analysis. In each case, however, exclusive reliance upon the deductive method of analysis followed and the underlying assumptions of the policy advocated produces an analytical meat

cleaver incapable of wisely analyzing the reality of the dispute in light of the objectives Congress mandated we account for in enforcing the antitrust laws. In each case the rigid deductive reasoning process causes the Court to ignore facts of the dispute not in conformity with the fixed assumptions of the major premise. And, in each case, the reasoning process distorts the appropriate balance between the courts and Congress and the judge and jury in the decision-making process.

Today's decision indicates how far the tunnel vision induced by an exclusive reliance upon the neo-classical economic model can drive a court to ignore reality, the goals of antitrust policy, the institutional limitations upon courts vis-à-vis those on Congress, and the function of the constitutional right to jury trials. This Court began its trip down the trail to its present state of unintended intellectual blindness and institutional arrogance in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). In that case, the Court found itself confronted with the unrealistic and wooden *per se* rule of *Schwinn* in a case challenging the vertical imposition of customer and territorial restrictions by a small television manufacturer seeking to shelter its dealer distribution system from intrabrand competition in order to succeed in interbrand competition with other manufacturers. Instead of moderating the rigid reasoning process of the *Schwinn* decision, the *Sylvania* decision asserted that "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Id.*, at 53 n. 21.<sup>10</sup> The

10. The implication of this assertion is, of course, that reliance upon notions of fair-

ness, the independence of business, the balance between inter- and intrabrand com-

opinion then turned to economic analysis to provide the "objective benchmarks" and held that vertically imposed customer and territorial agreements should not be found *per se* illegal.

The rejection of a rigid and mechanical *per se* rule in *Sylvania* was

not accompanied by the suggestion of a flexible, yet knowable and predictable, methodology for analyzing when such restraints ought to be found consistent with the congressional purposes for enforcing the antitrust laws and when they should be found inconsistent.<sup>11</sup> In its next major decision on

petitive effects, and the other goals Congress mandated we account for in antitrust enforcement are not reliable benchmarks for deciding cases. Courts and juries are always relying on "non-market" benchmarks for deciding issues like those arising in torts, contracts, and First Amendment and Fourteenth Amendment litigation. The further implication of the Court's remark is that "market considerations" (read "economic analysis") provide "objective benchmarks." It is readily apparent that this assertion is not only unsupported, but is insupportable. Economic analysis is not a value-free and objective science producing "objective benchmarks." It is a subjective field of human knowledge based upon ideological assumptions concerning wealth distribution, the oughts of government-private relationships, and the meaning and purpose of fields of law like contract and property. Neo-classical economic analysis, only one of many schools of economic thought, is widely recognized as a political ideology bordering on a religion and blinding its followers to a realistic evaluation of reality and an open-minded evaluation of the moral assumptions relevant to the dispute. See Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 Sw.U.L.Rev. 335 and Appendix, 12 Sw.U.L.Rev. 361 (1981); Flynn, "Reaganomics" and Antitrust Enforcement: A Jurisprudential Critique, 1983 Utah L.Rev. 269; Rowe, *The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics*, 72 Geo.L.J. 1511 (1984).

Some are blinded and misled by the way in which proponents of the model borrow words with a broad and general meaning that few would disagree with and then use them in a special, technical, and severely limited way when it comes to applying the model. Words like "efficiency" and "consumer welfare" have a praiseworthy connotation in popular speech which is often misunderstood as their connotation when

used in the model. The relation of the popular meaning of "efficiency" to its technical meaning under the severe assumptions and constraints of the model is about the same as the relationship of the concept "peacekeeper" to an intercontinental nuclear missile. The technical concept of "consumer welfare" has about as much relation to assured benefits for the average person in the real world as the Chicago Cubs do to a National League Pennant—pure chance.

11. The opinion does not suggest how the legality of such conduct should be measured under the rule of reason. For a suggested method of analysis, see Flynn, *The Function and Dysfunction of Per Se Rules In Vertical Market Restraints*, 58 Wash.U.L.Q. 767 (1983); Flynn, *The "Is" and "Ought" of Vertical Market Restraints After Monsanto Co. v. Spray-Rite Service Corp.*, 71 Cornell L. Rev. 1095 (1986). The suggestion is that the courts establish as the goals of antitrust policy the ones which Professor Fox's scholarship establishes were the goals Congress had in mind, see n. 5, *supra*, and the courts enforced until they became enamored of the neo-classical model. Under this method of analysis, the *per se* rules are treated as evidentiary presumptions of illegality of varying levels of rebuttability. The level of rebuttability would be determined by the degree to which the conduct actually taking place in the factual circumstances of the case impinged on the goals Congress mandated that courts implement through antitrust decisions. This is, of course, a qualitative and not a quantitative analysis. The same methodology would be followed in rule of reason cases, but no presumption of illegality would be entertained because the conduct in question does not suggest on its face an impingement on the goals of antitrust policy. It is the method of analysis this Court has followed implicitly in a long line of cases. See *FTC v. Indiana Federation of Dentists*, 106 S.Ct. 2009 (1986);

the issue, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), this Court did little to clarify the question. In upholding a jury verdict finding the defendant had engaged in a vertical price-fixing conspiracy, this Court was not asked to overrule the *per se* rule against vertical price fixing. Instead, the case focused on the sufficiency of the evidence to prove a conspiracy had taken place for purposes of § 1 of the Sherman Act. In the course of its opinion, however, this Court once again referred to "economic theory" as a legitimate basis for deciding antitrust cases in its drawing of a distinction between the treatment of price and non-price vertical restraints. The Court held that conduct which is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764, 104 S.Ct., at 1470.

That holding, one made with regard to the legal question of the sufficiency of the evidence to prove unlaw-

ful conspiracy, was picked up in *Matsushita* and made the basis for assuming that the neo-classical model of economic theorizing must be relied upon in motions for summary judgment to determine the fact question of whether there is a conspiracy and the policy question of whether it is one which ought to be declared illegal. 106 S.Ct., at 1357. *Matsushita* made the assumptions of the abstract model the vehicle for determining what the "facts" of a dispute could be, and made the predictions of the model the range of permissible policy goals the antitrust laws could aspire to achieve. It also made the rigid and deductive reasoning process followed by users of the model the reasoning process which must be followed in legal decision-making in the antitrust field and the process for determining what "facts" would be the facts for purposes of the analysis. Instead of using logic to investigate the assumptions underlying the premises of the rules for decision in light of the facts and vice-versa (legal reasoning), "logic" is being used to hide a process of abstaining from re-

---

*NCAA v. Board of Regents of the University of Oklahoma*, 463 U.S. 1311, 104 S.Ct. 1, 82 L.Ed.2d 1294 (1984); *Broadcast Music v. CBS*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978).

The question in both *per se* and rule of reason cases is whether there has been an unreasonable displacement of the competitive process (as defined by the congressional goals for antitrust), not whether there has been an elimination of "competition" in the sense that the term is defined by the neo-classical model. Requiring proof of an injury to competition generally results in the requirement of proof of a relevant market and power in the market defined, thereby ignoring the congressional purposes in adopting the statute and obliterating the distinction between §§ 1 and 2

of the Sherman Act. The majority's discussion of the *Rothery* decision, *ante*, at 523, n. 13, demonstrates how such an analytical process can wipe out both the legislative purpose behind the statute and the verbal and historical distinction between §§ 1 and 2 of the Act. The significance of *Rothery* is not the result in that case, a result I concur with, but the way in which the Court got there by importing § 2 structural considerations into the analysis of behavior in a § 1 case. The inquiry is a qualitative one into the effect of the behavior on the congressionally mandated goals of antitrust policy, not a quantitative inquiry into the impact of the restraint upon "competition" as defined by some abstract model. That is what footnote 59 of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n. 59, 60 S.Ct. 811, 845 n. 59, 84 L.Ed. 1129, 1168-1169 n. 59 (1940), is all about.

examining the assumptions underlying the premises relied upon and all the facts of the dispute (analytical positivism).

The consequences of such a reasoning process are easy to see. The defendants in *Matsushita* were permitted to carry the burden of supporting their summary judgment motion by relying upon the factual and policy assumptions of the model, while the plaintiff was required to carry its burden of rebutting the motion by making factual showings indicating the predictions of the model did not follow from the unchallengeable assumptions of the model. Rebutting a phantom made logically irrebuttable is not an easy thing to do and it should not be surprising that a court which reasons the way the majority did in *Matsushita* would be unwilling to even investigate the record or to accord any weight whatsoever to evidence suggesting the model's assumptions did not equate with reality. The net result is that any conduct alleged as violating the antitrust laws can never be found to do so, because the court hearing the defendant's inevitable motion for summary judgment will be off in a world which does not exist analyzing the internal logic of an abstract and irrelevant model instead of inductively analyzing the concrete reality before it in light of the policies Congress intended be implemented through the antitrust laws. The logic of *Matsushita* dictates today's decision.

There is a broader consequence of *Matsushita* evident in today's decision. Following the reasoning process of

*Matsushita*, with its incorporation of the deductive logic used by the model in lieu of legal reasoning,<sup>12</sup> enables the Court to administer the final *coup de grâce* to the antitrust laws. Exclusive reliance upon the model and its reasoning process not only determines what antitrust policy will be allowed to be, contrary to the intent of Congress, but is also used to determine what will be allowed to be the facts a court will consider in an antitrust case, without regard to the reality of the dispute before the court. From such a closed-minded and incredible misuse of the legal process, I can only enter the most vehement dissent and a lonely prayer that new appointments to this Court may restore some measure of common sense to our deliberations and some basic skill with legal reasoning to the writing of our opinions.

Justice ROBINSON, dissenting.

I concur in all that Justice CLAYTON has said and join in his lonely prayer with the slight amendment that any new judicial appointees not be cursed with a fetish for footnotes. Instead of judicial opinions, we appear to be writing law review articles with many things being hidden in footnotes for later use as precedent. See Mikva, *Goodbye To Footnotes*, 56 U.Colo.L.Rev. 647 (1985). I fear our prayer is not likely to be answered, however, until such time as the United States Senate begins to exercise responsibly and sensibly its advise and consent function in the appointment process for members of the Judiciary.

12. The majority needs to read some basic writings about the nature of legal reasoning. I would commend to them for start-

ers, despite the University of Chicago connection, E. Levi, *An Introduction to Legal Reasoning* (1962).