Which past is prolog? the future of private antitrust enforcement

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I. Introduction

For the past four decades, and despite doubts voiced 100 years ago by the principal draftsmen of the Sherman Act,[1] the primary enforcement of the federal antitrust laws has occurred through private litigation.[2] Many of the leading cases carving out new

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1 Klingsburg, *Balancing the Benefits and Detriments of Private Antitrust Enforcement: Detrebling Antitrust Injury, Standing and Other Proposed Solutions*, 9 CARDOZO L. REV. 1215 (1988) (summarizing remarks of Senators Sherman and George expressing doubts about the ability of private plaintiffs to surmount the financial and legal obstacles to maintaining private suits).

2 Salop & White, *Private Antitrust Litigation: An Introduction and Framework*, in PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 3–4 (L. White, ed. 1988). Private suits have outnumbered public enforcement from a ratio of 6 to 1 to a ratio of 20 to 1 over the

standards of antitrust legality and illegality are ones that have resulted from private litigation. There is no doubt that the attraction of treble damages and attorneys' fees have provided a major incentive for the great increase in private antitrust actions over the past four decades. A generally receptive Supreme Court in the 1960's to the early 1970's gave considerable encouragement and the means to the bar to specialize in the bringing of antitrust suits through the expansion of favorable judge-made doctrine and procedures facilitating private enforcement.

Thereafter, judicial hostility to private antitrust enforcement began a noticeable rise. In the late 1970's and the 1980's, that hostility was manifested in the development of technical barriers to maintaining suits by doctrines such as "standing" and the intraenterprise conspiracy rule; by the increased use of summary judgment at a preliminary stage in private antitrust cases; and, by the shift in judicial and enforcement attitudes in favor of the legality of vertical market restraints. By the late 1980's, changes in several doctrines and the shift in attitudes in the enforcement agencies have led to outright proposals to abolish or severely limit private antitrust enforcement, while court-imposed barriers to private suits continued to mount. The trend has been running against private enforcement of antitrust policy, raising the possibility that the second century of antitrust enforcement might see the demise, in practice if not in the express repeal, of private enforcement or the creation of a hiatus in private actions much like that which prevailed from the 1920's through the 1940's. If the past is prolog, which past is the prolog to the future of private antitrust enforcement—the relative absence of private antitrust enforcement in the first six decades or the activism of the last four decades of antitrust law?

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period measured. While many private suits were actions following federal enforcement, the sheer number of private suits has consistently exceeded those filed by the federal government. The added deterrence of disgorging treble damages has added significantly to the deterrent effect of the antitrust laws through reliance upon rational self-interest to protect one's own interest without the necessity of direct government intervention.

Predicting the future of private antitrust, let alone the future of the economy or who will win the World Series next year, is a matter of weighing several variables—some known, and many more, not known. The task puts one in mind of the late Arthur Leff's reformulation of the economist's special theory of the second best into a general theory of the second best: "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 is going to happen when you vary 'your' variables, you're a booby."[3] To minimize the risk of violating Leff's general theory of the second best, this article reviews some of the key variables relevant to determining the future of private antitrust enforcement—passive or active, after listing variables one simply cannot make predictions about at this point in time.

II. Unknown variables

A. The ideology of enforcement officials and judges

One set of unknown variables of central significance to a prediction of the future of antitrust generally, is the approach to antitrust policy by the appointments President Bush will make to the enforcement agencies and the courts. It is not difficult to imagine that the appointment of moderates and realists to the enforcement agencies and the courts will have a significant impact on antitrust enforcement. Following 8 years of what many have seen as Reagan administration nonenforcement of the antitrust laws[4] and the appointment of judges with strong-minded, if

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[3] Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

[4] *See, e.g.*, Adams & Brock, *Reaganomics and the Transmogrification of Merger Policy*, 33 ANTITRUST BULL. 309 (1988); Krattenmaker & Pitofsky, *Antitrust Merger Policy and the Reagan Administration*, 33 ANTITRUST BULL. 211 (1988); Litvak, *The Appropriate Enforcement Role of the Government Antitrust Agency*, 9 CARDOZO L. REV. 1291 (1988); Pitofsky, *Does Antitrust Have a Future?* 76 GEO. L.J. 321 (1987); Shennefield, *Open Letter to the New President of the United States*, 9 CARDOZO L. REV. 1295 (1988).

not rigidly ideological, beliefs in the wisdom of a policy of extreme laissez faire, the appointment of experienced lawyers rather than theorists to the agencies and courts can have a profound effect on antitrust enforcement. If that were to occur, perhaps we will see the end to enforcement guidelines issued for advocating judicial nonenforcement of the laws Congress passed or for legislating the views of enforcement officials of what the law ought to be rather than leaving to Congress the primary law-making power. Government intervention in private litigation to prevent private enforcement might also subside. Court decisions dealing with the reality of cases and the practical procedural problems of litigation might even become the norm. We might even see the Justice Department stop trying to inflate its enforcement statistics by bringing the same case over and over in each federal district court in the Union! There are, after all, only so many road builders one can charge with bid rigging and soft drink bottlers one can charge with price fixing. And, judges might begin to analyze the reality of cases in light of the values underlying the law instead of deductively applying the conclusions of a theoretical model in light of its unrealistic assumptions to a reality not before the court.

There are a few aspects of the Reagan administration policies one can applaud and hope the Bush administration will continue. For example, the increased emphasis upon criminal sanctions for hard-core antitrust violations and support for a significant increase in criminal fines[5] should continue to be a major emphasis of the Bush administration's antitrust policy. The continuation of the Carter administration's more stringent examination of the regulated industries has also produced worthwhile results by questioning the on-going need for regulation in rapidly changing areas of the economy. Beyond that however, it is difficult to identify positive benefits of 8 years of Reaganomics on antitrust policy, let alone the economy generally, unless one simply assumes that nonaction, a decline in staff morale at the enforcement agencies, and the shrinking of enforcement budgets are, ipso facto, benefits.

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[5] *See* Starling, *Criminal Antitrust Enforcement*, 57 ANTITRUST L.J. 157 (1988).

B. The use and misuse of enforcement guidelines

One unpredictable variable of public enforcement in need of review by both Congress and the new administration is the expanded use made of enforcement "guidelines."[6] Many commentators are troubled by the expansive use of enforcement guidelines by the Antitrust Division beyond the merger area. The practice of an executive branch law enforcement agency issuing guidelines stating what the policy should be on a law adopted by Congress and committed to the courts for interpretation is inconsistent with the functions of a law enforcement agency, the Congress and the courts. While the FTC does have rule-making power subject to appropriate administrative law constraints, the Justice Department should confine its rule making to the only area where Congress has conferred a similar type of administrative authority—the administration of merger policy as a result of the Hart-Scott-Rodino Act.[7] Even in that instance, a serious reexamination of the practice should be undertaken since the Antitrust Division engages in a wide range of informal law making when issuing "guidelines" and negotiating settlements with Hart-Scott-Rodino applicants without sufficient legal constraints upon the process or independent review of the standards adopted or the procedures followed.

The Merger Guidelines of both the FTC and the Antitrust Division also should be reviewed in the name of complying with the law Congress enacted[8]—rather than some law the agency

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[6] For an interesting review of the use of enforcement guidelines in the merger area and the conversion of the Antitrust Division from a law enforcement agency to an administrative one, *see*, Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U.L.Q. 997 (1986).

[7] 15 U.S.C. § 18a.

[8] The underlying assumption of the Guidelines is to judge mergers by static neoclassical price theory rather than the dynamic structural standard implied by an incipiency standard and the legislative history of the Act. In effect, the Guidelines apply pre-1950 Sherman Act standards (1920's Sherman Act standards) to mergers. A major goal of the 1950's amendment was, of course, to overturn the application of Sherman Act

believes Congress should have enacted. If there is a problem with that law, appropriate legislation should be presented to Congress for its consideration[9]—a process mandated by the Constitution despite claims made for unilateral law-making powers implicit in some of the other executive branch practices of the Reagan administration. At a very minimum, considerable thought should be given to lowering the level of the Herfindahl index triggering merger challenges by the enforcement agencies. At a minimum, consideration should be given to enforcing the standards adopted, rather than an undisclosed set of standards adopted for in-house use.[10] Actions should be brought or inaction should be thoroughly explained where the agency's own standard for when a merger should be challenged is violated by a particular merger.

Other "guidelines" issued by the Antitrust Division do not appear to be for providing guidance—but are for advocacy. There are few who believe that the Antitrust Division's Vertical Guidelines were intended to be a fair summary of what the law is on vertical restraints, let alone what Congress intends the enforcement agencies should do about vertical restraints.[11] The

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standards to mergers. *See*, Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counselling or Propaganda for Revision of the Antitrust Laws*, 71 CALIF. L. REV. 575, 576 (1983): "[U]nder the guise of regularizing discretion, the antitrust laws are being amended without benefit of congressional action."

9 *See*, The Merger Modernization Act, H.R. 4247, 99th Cong., 2d Sess. (1986), the Reagan administration's proposal for a change in the Clayton Act § 7 standards to require that a merger's effect "will be" to increase the ability of one or more firms profitably to maintain prices above a competitive level for a significant period of time. The proposal would abandon the incipiency standard of the present law and rely solely on neoclassical price theory to determine the legality of a merger—a policy course it would appear the 1984 Guidelines and the current administration of them is adopting in fact if not in law. It is a policy course Congress never adopted.

10 *See* Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 453 (1988).

11 *See*, Note, *The 1980's Amendment to the Sherman Antitrust Act and the Revitalized Per Se Illegality of Resale Price Maintenance*, 9 CARDOZO L. REV. 1435 (1988).

Vertical "Guidelines" are an advocate's brief for a particular belief of what the law ought to be rather than what Congress intends. As such, they should be withdrawn by the Bush administration.[12] Similar claims are made about the Guidelines for International Operations and those too should be withdrawn since they read like draft judicial opinions instead of a fair summary of what the courts have decided the law is.[13] Antitrust Division authorities should be limited to advocating their beliefs through briefs in government cases in court where they can be challenged before an impartial judge and in independently refereed law review articles, unless we are willing to give the agency lawmaking powers heretofore left to the judiciary or Congress and law review footnote checkers.

C. Judicial appointments

Another unknown variable of great significance to the future of private antitrust enforcement concerns what types of judicial appointments the new administration will make. Judicial appointments are, of course, crucial to the future evolution of antitrust policy. Congress has entrusted wide discretion to the courts in defining the direction and meaning of antitrust policy. While the Warren Court era judges may have gone too far in their concern for populist values in cases like *Von's Grocery*[14] and

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12 The vertical restraint guidelines and the international operations guidelines are "nothing more than a large *amicus* brief" and should be withdrawn. 55 ANTITRUST & TRADE REG. REP. (BNA) 799 (Nov. 3, 1988) (Remarks of T. Kauper).

13 For a contrary view, *see* Hawk, *The Proposed Revisions of the Justice Department's Antitrust Guidelines for International Operations and Recent Developments in EEC Competition Law*, 57 ANTITRUST L.J. 299 (1988).

14 United States v. Von's Grocery Co., 384 U.S. 270 (1966). The problem with the Court's opinion is not necessarily the result, but the way the Court got there. The Court's opinion is primarily a factual one without establishing predictable standards by which a merger ought or

Schwinn,[15] it appears that the Burger and Rehnquist era of judicial activism is going too far in the direction of embracing a simplistic static version of neoclassical economic ideology without regard for reality or the goals of antitrust policy in cases like *Matsushita*[16] and *Business Electronics v. Sharp*.[17] The direction taken by the Bush administration in its judicial appointments and congressional reaction to them will have a great influence over the next decade in determining whether antitrust policy will remain a significant element in determining economic policy and the rights of consumers and competitors or whether it will become a curious backwater largely of historical interest like it was in the 1920's; of little interest until the next economic disaster such as the Great Depression of the 1930's undermines the economy.

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ought not to be judged pro- or anticompetitive. The subsequent adoption of premerger notification and the examination of a proposed merger by the enforcement agencies prior to its consummation, may have mitigated the dilemma of the courts in establishing workable guidelines for judging the legality of mergers under the broad incipiency standards of the Clayton Act by limiting the number of litigated cases. But it has not eliminated the problem of adopting and making known workable standards implementing the policies of Congress—it has simply shifted it to those administering premerger notification.

15 United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (drawing the line between lawful and unlawful dealer restrictions on resale between consignment and sales transactions on the basis of the common law doctrine of restraints on alienation; a knowable and predictable rule, but one easily circumvented and one that failed to grapple with all of the normative goals underlying the doctrine of restraints on alienation and the purposes of antitrust policy). *See* Flynn, *The Function and Dysfunction of* Per Se *Rules in Vertical Market Restraints*, 58 WASH. U.L.Q. 767 (1980).

16 Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). *See* Flynn, *An Antitrust Allegory*, 38 HASTINGS L.J. 517 (1987).

17 Business Electronics Corp. v. Sharp Electronics Corp., 108 S. Ct. 1515 (1988). *See*, Flynn, *The "Is" and "Ought" of Vertical Restraints After* Monsanto Co. v. Spray-Rite Service Corp., 71 CORNELL L. REV. 1095, 1114 (1986) (criticizing the Fifth Circuit's analysis in *Business Electronics* subsequently followed by the Supreme Court).

A key to the reflective development of antitrust policy through new appointments to the courts is that the Senate exert responsibly its coequal authority in the appointment of judges. Serious Senate evaluation will insure that we have judges who are reflective about the values they hold; open minded to challenges to those values and contrary statements of values; aware of the reality and facts of cases they must decide; skillful in the use of legal reasoning rather than the manipulation of definitions and deductive logic; experienced in the practical problems of litigation; and, sensitive to the congressionally mandated values underlying the laws they must enforce instead of the implementation of their own closed-minded and ideological beliefs.[18]

D. Overcoming barriers to entry in the private antitrust litigation market

Another unpredictable variable affecting the future of private antitrust enforcement concerns the willingness of the private bar and their clients to invest the resources necessary to bring credible private antitrust cases. From my conversations with members of both the plaintiffs' and defendants' bars around the country, it is apparent that many are cautiously gearing up for an increased level of federal antitrust enforcement—particularly in the merger area and in the area of horizontal restraints.

There is a growing chorus of concern about the merger movement claiming that it is driven primarily by promoters and deal makers interested in fees rather than the rational and efficient organization of the merging firms.[19] That perception is gaining the upper hand in Congress, among the public and even on Wall Street. There is more and more academic writing suggesting that the hypermerger movement is not in our national eco-

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18 *See* Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988).

19 *See* Krattenmaker & Pitofsky, *supra* note 4; Adams & Brock, *supra* note 4.

nomic interest, creates a debt-heavy corporate America posing fundamental economic risks in the event of a recession, detracts from economic efficiency and capital investment by draining off capital to nonproductive ends, and creates unmanageable firms that soon find themselves spinning off parts of the acquired firm.[20]

Another explanation for the belief that merger enforcement will increase may be the result of the past 8 years of merger mania with little or no stringent section 7 enforcement.[21] One wit commenting on the passing antitrust scene suggested that the relaxed triggering level of the Herfindahl index is reached in just about every merger that now takes place after 8 years of merger fever and the general nonenforcement of section 7. Art Buchwald's cynical column about the inconclusive debate in the Justice Department over whether to challenge the merger of the Sampson Securities Company owning the stock of all companies west of the Mississippi and the Delilah Corporation owning all companies east of it, attached as an appendix to Justice Douglas' concurring opinion in *United States v. Pabst Brewing Co.*,[22] no longer seems so far-fetched.

Eight years of lax enforcement, sanctioned and encouraged by some judges, also may explain why there appears to be a likelihood of an increase in both public and private enforcement in other areas of antitrust as well. The business community, like everyone exceeding the speed limit on the highway at 3:00 a.m. because no police are on the scene, can soon lose its fear of antitrust. Those subject to the law begin to engage in activities coming closer and closer to the line of illegality. For example, parties to a merger recently attempted to circumvent the ability of the FTC to have a court issue a preliminary injunction to stop the

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20 *See*, W. ADAMS & J. BROCK, THE BIGNESS COMPLEX (1986); D. DAVENPORT & F. SCHERER, MERGERS, SELL-OFFS AND ECONOMIC EFFICIENCY (1987); R. WILLS, J. CASWELL & J. CULBERTSON, ISSUES AFTER A CENTURY OF FEDERAL COMPETITION POLICY (1987).

21 *See* Adams & Brock, *supra* note 4.

22 384 U.S. 546, 553–55 (1966).

merger by moving up the date of acquisition after receiving notice the Commission intended to seek the injunction.[23] It is an example of increased antitrust activity because of the Reagan era of low visibility enforcement policy encouraging high-risk conduct by those subject to the law. Such conduct is encouraged by the tendency of the last administration to seek a justification for whatever someone wished to do in terms of the neoclassical model—save horizontal price fixing—without asking whether the competitive process might be damaged on a long- or short-term basis, whether other schools of economic and political thought ought to be heard from or even whether the reality of particular cases should be considered.

Perhaps the enforcement agencies have finally recognized the unduly permissive climate they have created. Startling things have begun to happen. The FTC staff has even filed a Robinson-Patman Act proceeding against major book publishers charging price discrimination in favor of large book store chains over their smaller competitors.[24] Most antitrust practitioners have come to believe that mentioning the Robinson-Patman Act within the confines of the Federal Triangle was at least a misdemeanor; suggesting that a case be filed to enforce the Act was a felony.

E. Confused congressional antitrust attitudes

Adding to the possibility that there may be more vigorous and wide-ranging antitrust enforcement by the federal agencies generating additional private enforcement, is the prospect that Congress will continue to exert pressure for such a course of conduct. It is doubtful that Senator Metzenbaum will be any more sympathetic to moves to relax antitrust standards than he has been in the past. It is likely that Congressman Brooks, chairperson of the House Judiciary Committee, will be similarly inclined. One

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[23] FTC v. Elders Grain, Inc., 1989-1 Trade Cases ¶ 68,411 (7th Cir. 1989).

[24] *In re* Harper & Row, Publishers, Inc., Dkt. Nos. 9317-9222 (FTC Dec. 22, 1988).

observer has classified Congressman Brooks as a cross between Congressman Celler and Congressman Rodino. Consequently, I expect we will see continued pressure for more active merger enforcement, the aggressive investigation of a broader range of horizontal restraints, continued calls to pursue vertical price-fixing cases[25] and concerns expressed about enforcement policy dealing with other questionable practices. For the Washington bar, there would appear to be plenty of Hill work ahead with the reintroduction of resale price maintenance legislation, moves to repeal the McCarran-Ferguson Act, battles over legislation modifying *Illinois Brick* and proposed legislation designed to eliminate the presumption of economic power with regard to intellectual property.[26]

It must be noted however, that Congress has not been a bastion of proantitrust fervor. Despite a general proantitrust reputation, a PAC-dominated Congress has not managed in the past decade to enact an activist antitrust agenda by passing bills such as those designed to overturn the *Illinois Brick* decision or come to grips with standards to govern vertical restraints. Instead, it has enacted such questionable legislation as the One House Veto of agency rule making later invalidated by the Supreme Court;[27] the reincarnation of the unused Webb-Pomerene Act through export trade cartels under the Export Trading Act of 1982;[28] legislation authorizing joint research

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25 *See, Brooks Offers Bill on Standards in Resale Price Maintenance Suits*, 56 ANTITRUST & TRADE REG. REP. (BNA) 363 (March 9, 1989).

26 *See, Few Surprises Expected as Congress Focuses on Competition, Deception Issues*, 56 ANTITRUST & TRADE REG. REP. (BNA) 86 (Jan. 19, 1989).

27 Pub. L. No. 96-252, 94 Stat. 374 (1980), held unconstitutional in Consumer's Union, Inc. v. F.T.C., 691 F.2d 575 (D.C. Cir. 1982), *aff'd sub nom.*, Process Gas Consumers Group v. Consumer Energy Council of America, 463 U.S. 1216 (1983). *See also*, I.N.S. v. Chada, 462 U.S. 919 (1983).

28 15 U.S.C. §§ 4001 *et seq.*

ventures and limiting private treble damage actions with respect to them;[29] legislation limiting treble damage remedies for peer review activities in the health care field;[30] legislation sanctioning exclusive territories in the soft drink bottling business;[31] and legislation eliminating damage actions, but not injunction actions, for anticompetitive activity by local governments.[32] When all is said and done, Congress has shown itself remarkably responsive to special interest legislation chipping away at antitrust policy generally and treble damage actions in particular. The hard truth is that Congress' antitrust record has been more anti-antitrust than proantitrust, making it another unpredictable variable in predicting the future of private antitrust activity.

A significant anti-antitrust bill that has materialized in the 101st Congress, is a move to permit production and commercialization joint ventures along lines similar to the immunity provided by the Export Trading Company Act of 1982 and the National Cooperative Research Act of 1984.[33] Playing on concerns about foreign competition, it is argued that U.S. firms need immunity to form production and distribution cartels for the purposes of coordinating production and marketing activities in competition with foreign firms or cartels. Although the Attorney General and Secretary of Commerce have voiced early support for such a measure,[34] the proposal has sparked widespread debate and oppo-

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29 15 U.S.C. §§ 4301-05.

30 The Health Care Quality Improvements Act of 1986, 42 U.S.C. §§ 11101, *et seq.*

31 Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501-03.

32 Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

33 The Joint Manufacturing Opportunities Act of 1989, H.R. 423, 101st Cong., 1st Sess. (1989); National Cooperative Innovation and Commercialization Act of 1989, H.R. 1024, 101st Cong., 1st Sess. (1989). *See generally, Witnesses Declare That Antitrust Law Discourages Formation of Joint Ventures*, 56 ANTITRUST & TRADE REG. REP. (BNA) 319 (March 2, 1989).

34 56 ANTITRUST & TRADE REG. REP. (BNA) 9 (Jan. 5, 1989).

sition from both the right and the left in academia. Hearings on the bill will find all the heavyweights of antitrust trooping to the Hill to debate what would be the most fundamental reorientation of antitrust policy since the NRA of the 1930's.

Giving rebirth to a form of the National Recovery Act of the 1930's[35] should provoke an interesting debate. Blaming America's competitive ills on the antitrust laws, after a sustained period of nonenforcement and the creation of significant judicial limitations on private enforcement, is a bit disingenuous if not hypocritical. Doing so through unnecessary legislation permitting joint production and commercialization ventures cuts out the heart of antitrust policy—preserving a competitive process as the best way to allocate resources, control undue accumulations of private economic power, insure innovation and insure equality of access to the market. United States trade policy should be seeking ways to break open Japan's domestic market to foreign competition, rather than gradually eliminating competition in our own in a vain attempt to emulate Japan's culture and system. As James Fallows recently observed, if we must imitate Japan to best Japan in the marketplace we also must be prepared to do the following if we expect to see it work:

> First, we rig politics so that one party is always in power and big-city votes don't count. Then we double the cost of everything else but hold incomes the same. Then we close the borders and start celebrating racial purity. Then we reduce the number of jobs for women by 70 to 80 percent. Then we set up a school system that teaches people not to ask questions. After a while, we can have a trade surplus too.[36]

In order to make such a system work like Japan's, we also must implement like Japan a system of economic and political feudal-

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35 Held unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

36 Fallows, *For Those Who Have a Yen for the Japanese Way: Think Twice*, Washington Post (weekly ed. Feb. 20–26, 1989), at 23, 24. *See also*, Fallows, *The Hard Life*, THE ATLANTIC MONTHLY, March 1989, at 16.

ism, markets closed to foreign competition, and manufacturing and distribution cartels designed to raise domestic consumer prices about 70% higher than those prevailing in the United States.

The time has come for Congress to stop chipping away at antitrust policy piecemeal by flirting with each competitive crisis—real or imagined—as it comes along. We need another T.N.E.C. study or exhaustive and fundamental hearings of the type that the late Senator Philip Hart endured to establish whether America's competitive ills in the world economy are due to the failure to enforce antitrust policy in our domestic and foreign trade, rather than the existence of antitrust laws that are too rigid for our national economic survival in a more competitive world economy. The price we pay in abandoning antitrust policy as the basic means for regulating our economy and relationships within it are of wide-ranging and long-term economic, political and social dimensions.[37] The present tendency of Congress to ad hoc antitrust policy to pieces, has left both the public's understanding and Congress' understanding of the broader social, political and economic purposes of competition policy confused and disorganized. It is time for Congress to go beyond the ad hoc and fad of the moment and take a much broader, deeper and long-term look at what our commitment to a competitive process means and what it ought to mean—politically, socially and economically for the immediate and long-term future. The future of private antitrust enforcement will remain impossible to predict without a clear mandate for its continuation or its demise from Congress.

F. A rebirth of state antitrust enforcement?

Another variable that is difficult to gauge concerns a little-noticed development in Washington, D.C. but not among law

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[37] For some idea of the implications *see* M. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM 1890–1916 (1988), a review of the economic, social and political issues involved in the process of institutionalizing antitrust policy at the turn of the last century.

firms elsewhere in the country. It is the continued growth and increased vitality of state antitrust enforcement.[38] State antitrust enforcement has become institutionalized with committed bureaucracies in many states devoted to its expansion. State antitrust officials do not fear to tread where federal enforcement officials believe the law should not tread. For example, states are becoming more active in merger enforcement[39] and favor more vigorous antitrust review of vertical restraints.[40] Both California and New York have been active in merger enforcement and state attorneys general in other states are interested as the result of significant mergers in their states such as the recent merger between Utah Power & Light Company and Pacific Corp.[41] creating a large regional electric utility and significant antitrust and regulatory issues in a basic public service for the local economies of several states.

In the vertical restraints area, state enforcement officials remain the major enforcers of traditional antitrust policy. For example, the state antitrust offices of New York and Maryland recently settled resale price maintenance cases for $16 million against Panasonic.[42] In addition, many states have been particularly active in franchise regulation, either under state antitrust

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38 A collection of recent significant articles reviewing state antitrust enforcement is reprinted in 28 J. REPRINTS FOR ANTITRUST L. & ECON. #2 (1989).

39 State attorneys general have found it necessary to become involved in the "guidelines" game in the merger field. *See*, *National Association of Attorneys General Merger Guidelines*, 50 ANTITRUST & TRADE REG. REP. 1306 (Spec. Supp., March 12, 1987).

40 With respect to vertical restraints, the National Association of State Attorneys General has also issued a set of "guidelines" in 1985. *See*, 5 Trade Reg. Rep. (CCH) ¶ 50,478.

41 *Re* Utah Power & Light Co., 45 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,095, 96 P.U.R.4th 325 (1988).

42 *See*, *Panasonic Will Refund $16 Million to Settle New York, Maryland RPM Cases*, 56 ANTITRUST & TRADE REG. REP. (BNA) 89 (Jan. 19, 1989).

and securities laws or under special state franchise statutes. In any current trade regulation index, state franchise cases consume pages of citations. In many instances, state franchise regulation is a response to the vacuum of sensible federal regulation of vertical market relationships under federal antitrust law. It should be noted also, that some of the state regulatory responses are anticompetitive and are not necessarily in the public interest. Rapidly multiplying state franchise regulations have been creating a confusing patchwork of regulation as well, which many national franchisors are finding increasingly difficult and expensive to comply with. Anticompetitive and unnecessary state regulations are a cost of the failure of federal enforcement officials to adopt a more realistic, flexible and less ideological approach to vertical restraints, leaving a vacuum where state and local officials are pressured to adopt regulatory approaches to fill in the gap; regulations that are not always in the public interest.

The consequences are that many law firms and courts around the country find themselves involved with a rapidly growing field of state antitrust enforcement—either states enforcing federal antitrust laws as consumers or in the enforcement of state antitrust and related laws in their own courts regulating vertical marketing and other practices. This is one of those variables one can predict will continue and that it probably will expand despite the recently announced effort of the FTC to adopt franchise rules designed to preempt state franchise regulation.[43] It is also reasonable to predict that such action by the FTC will be vigorously resisted and will be viewed as an attempt to get rid of significant state and *federal* regulation of the sale, enforcement and termination of franchises. It will not be viewed as the adoption of a responsible, effective and fair uniform federal standard to govern franchising and other vertical market abuses, but the further abandonment of federal responsibility to adopt a more realistic and pragmatic antitrust approach to vertical market restraints.

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43 *FTC's Advance Notice of Proposed Rulemaking on Amendment of Trade Regulation Rule Governing Franchises*, 56 ANTITRUST & TRADE REG. REP. (BNA) 307 (Feb. 23, 1989).

G. The deregulation movement

Another difficult to gauge variable of significance to private antitrust enforcement is the continued evolution of deregulation of presently or previously regulated industries. As a general proposition, one might expect to see antitrust policy involved in both generating pressure to deregulate and in "regulating" industries after they are "deregulated." For example, the natural gas transmission industry is now going through the confusion of ad hoc deregulation—deregulation imposed by the Federal Energy Regulatory Commission [FERC] converting pipelines from being brokers of natural gas to being common carriers of gas. It is a jurisdictionally questionable exercise of power by FERC[44] and an area that Congress should be addressing through legislation. Deregulation of gas purchases and sales by pipelines is nonetheless underway and it is a process that is generating private treble damage litigation by sellers and buyers of gas and is likely to cause more private litigation in the future.[45] Common carrier status for transmission pipelines and other developments in the industry are expected to lead to mergers in the industry—mergers likely to generate significant competitive questions about the activities of merged firms postmerger, and arrangements leading up to or entered into in conjunction with a particular merger.

In the electric power industry, FERC has begun to use its authority over mergers in the industry to impose common carrier obligations similar to those it is imposing in the gas transmission business on the merging parties where the merger has anticompetitive features. The leading case is *Utah Power & Light Co.*,[46]

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[44] *See, e.g.*, Watkiss, *Deregulatory Myopia: Sacrificing the Filed Rate Doctrine and Rule Against Retroactive Ratemaking to Promote Competition in Gas Markets*, 42 Sw. L.J. 711 (1988).

[45] *See, e.g.*, James River Corp. v. Northwest Pipeline Corp., Civ. No. 87-1141 RE (D. Ore. 1987); State v. Panhandle Eastern Pipeline Co., 852 F.2d 891 (7th Cir.), *cert. denied*, 109 S. Ct. 543 (1988).

[46] 45 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,095 (Oct. 26, 1988).

and the conditions imposed are already generating complex regulatory issues. The conditions also may spark antitrust disputes in the future because of the considerably more complex nature of the electric utility industry as compared with the natural gas industry.[47] It is generally agreed in the industry that it is on the edge of a large number of mergers seeking to rationalize the transmission system and competing sources of power generation. Such mergers are likely to raise substantial competitive issues and cause significant private antitrust litigation before the dust finally settles and the industry is more sensibly structured both horizontally and vertically. Once again, it is an area in urgent need of congressional action,[48] rather than an ad hoc regulatory response by conditions placed on mergers that happen to come along.

Another regulated industry likely to breed significant private antitrust work is the telephone industry. The breakup of A.T. & T. is only part of the problem. The more significant and longer term problem, one where the Justice Department, the operating companies and Judge Greene have a considerable difference of opinion, concerns the question of the scope of businesses the divested Bell operating companies will be allowed to enter. State regulatory schemes also have a considerable interest in the matter. State action or nonaction in response to operating company moves into related businesses is the source of complex antitrust issues of interest to the private bar as well.

The seven Bell operating companies have total assets of $151 billion plus and revenues of $69.7 billion in 1987; they are among the largest and most powerful entities in our society and hold monopoly control over a key segment to the future evolution of

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[47] *See* Russo, *Transmission Access—A Crucial Issue for an Industry*, 123 PUB. UTIL. FORT. 18 (Feb. 16, 1988).

[48] Among other things, Congress should consider adopting a law permitting private power companies access to low-cost public power if the private power companies agree to open up their transmission systems on a common carrier basis subject to FERC rate and service regulation. We can no longer afford the wasteful and environmentally harmful duplication of generation and transmission resources caused by the long-standing war between public and private power.

communications technology and policy in our society. They are seeking the end to restrictions in the A.T. & T. consent decree limiting the kinds of related businesses they may engage in, including the manufacture of telephone equipment, the providing of long distance service and the providing of information services, including cable TV and enhanced computer services. Judge Greene is resisting on the ground that the operating companies still have a bottleneck monopoly over switching and the local loop and that permitting the operating companies to engage in related lines of business will only be inviting the anticompetitive abuses that required the breakup of A.T. & T. in the first place. Former Assistant Attorney General Rule to the contrary notwithstanding,[49] Judge Greene obviously has the better of the debate. Moreover, the advent of fiber optic cable on the local loop is likely to strengthen and expand the bottleneck monopoly over switching and the local loop by taking over such fields as the delivery of cable television and computer services to the home. Many of the operating companies are also seeking the relaxation or abolition of local rate regulation under the banner of "incentive" or "revenue sharing" rate regulation; the conferring of

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[49] Rule, *Antitrust and Bottleneck Monopolies*, 5 TELEMATICS 16 (Dec. 1988). Former Assistant Attorney General Rule's basic objection is that antitrust courts are not capable of regulating pricing decisions by the bottleneck monopolist and that economic theory (based on unrealistic factual and normative assumptions) dictates that it is in the bottleneck monopolist's best interest to insure maximum use of the bottleneck at the lowest possible cost. Consequently, it is assumed that even where the bottleneck monopolist drives out competitors in related markets the consumer will be better off since there is no way to determine whether they will be worse off. Like other policy pronouncements of Mr. Rule, this one appears to be the product of abstract economic theorizing detached from reality and inconsistent with the congressionally mandated goals of antitrust policy. *See*, Flynn, *supra* note 18. The implication of Rule's analysis that bottleneck monopolies create no antitrust problems because the theoretical conclusions of a model deductively derived from its unrealistic assumptions says so, implies that the original A.T. & T. should be put back together again. Several of the operating companies seem to be bent upon that path with respect to their own operations and apparently with the academic support of former Assistant Attorney General Rule.

monopoly pricing discretion on the operating companies that will leave only antitrust policy as a control over the potential abuse of the otherwise unchecked bottleneck monopoly power and profits conferred.

These developments generate a classic circumstance inviting private antitrust actions if deregulation at the state or federal level comes to pass. There are already some possible suits in the wind as the result of attempts by the operating companies to obtain greater pricing discretion over local rates and permission to enter related businesses. One type of suit illustrating the connection between bottleneck pricing discretion and entry into related business activity is private antitrust litigation challenging the use of negative options for inside wiring.[50] Many local phone companies sent consumers a notice that their phone company would take care of any inside wiring problems they might have unless the consumer sent in a notice to the contrary. A monthly charge was to be assessed to all those not opting out of the so-called contract.[51] Using monopoly power over captured customers and potentially deceptive sales practices to entrap customers for a service they probably need once in a couple of generations is not an enhancement of consumer welfare.

Another deregulated industry ripe for antitrust concern is the airline business. The Department of Transportation has permitted a large number of mergers in the industry to go through—Herfindahl notwithstanding—without significant challenge. The results have been predictable and probably would not have happened if the initial review of mergers in the industry had been committed even to the Reagan antitrust enforcement agencies

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50 *See*, Sollenbarger v. Mountain States Telephone Co., 121 F.R.D. 417 (D.N.M. 1988).

51 This information is based upon a study of documents released by the FCC pursuant to a Freedom of Information Act request addressed to the Commission by the author. *See*, *In re* John Flynn, FOI Cont. No. 88-188 (FCC, March 10, 1989).

upon the phasing out of regulation rather than to the Department of Transportation.[52]

As a result of mergers taking place after deregulation, TWA has 83% of the market at St. Louis and fares have gone up 22% in the past 3 years; Delta has 77% of the Salt Lake hub and fares have gone up 26% in that market over the past 3 years; and, in Detroit, Northwest has 62% of the market and fares have gone up 27% in that market. During the same time period, the airline component of the consumer price index has gone up 11.1%. A private survey of 18 hubs where one carrier controls more than 50% of the market found that in 15 of those hubs consumers pay significantly higher fares than the industry norm.[53] It would appear that there is strong evidence of monopoly pricing going on—activity the Antitrust Division should be—but appears not to be—deeply concerned about, apparently in the belief that supposed perfect competition coupled with supposed free entry will take care of a supposed problem. Perhaps some imaginative private attorney can figure out an antitrust theory on behalf of an appropriate plaintiff for what appear to be monopoly overcharges as the result of several mergers that should not have been allowed to take place in the first instance in an industry characterized by significant entry barriers in reservations systems, airport landing rights and airport gate restrictions.

Several other industries, such as health care and emerging high tech industries developing difficult to classify intangible intellectual property values, present unique challenges to both antitrust and regulatory schemes seeking to curb practices suggesting abuses of economic power take place often in the industry

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52 Under the Civil Aeronautics Board Sunset Act, 49 U.S.C. App. §§ 1551, *et seq.*, DOT authority over airline mergers under the old Act ceased on January 1, 1989, thereby leaving them subject to regulation under the antitrust laws at the instance of the antitrust enforcement agencies and private parties.

53 The highlights of several recent studies are summarized in Hamilton, *The Hubbub Over Airline Hubbing*, Washington Post (national weekly ed., Feb. 13-19, 1989), at 21.

in a manner inconsistent with the normative goals underlying antitrust policy. Such industries are, and are likely to continue to be, a fruitful source of private antitrust challenges. Like those industries now undergoing deregulation, these emerging areas of complex economic activity continue to generate significant private antitrust litigation in both federal and state courts. As such, they are new frontiers challenging the imagination and creativity of the legal process to deal constructively with the issues they raise in the context unique to the activity involved and compatible with the underlying social, economic and political values we hold in common.

How a mixed system of private and public health care shall be regulated where third-party payment governs economic incentives and deep ethical issues and government financing effect access and availability, remains an unpredictable variable in estimating the future role of private antitrust in health care. Private and public efforts to protect emerging new technologies in high technology industries not neatly fitting traditional patent and copyright protections, also raise unpredictable variables that hold unknown implications for the future vitality of private antitrust enforcement in significant areas of newly emerging technological activity.

III. Predictable variables

If the Bush administration continues along the antitrust path chartered by the Reagan administration, there are several identifiable variables that must be changed if private antitrust enforcement is to have a significant future as the most important form of antitrust enforcement and a check upon public nonenforcement of the laws Congress has adopted. These are variables that largely reflect a current judicial hostility to private antitrust enforcement, despite section 4 of the Clayton Act vesting a cause of action in "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[54]

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[54] 15 U.S.C. § 15(a).

A. "Standing"

The first predictable variable influencing the future of private antitrust enforcement concerns access to the courts for private parties seeking to enforce the rights the law has given them. Over the past several years a particularly strange and pernicious doctrine called "standing" has been growing like a noxious weed. It is a confused and confusing doctrine, like "proximate cause" in torts and "privity" in contracts, limiting access to the courts in many areas of law without revealing the underlying reasons for doing so. It is an offshoot of the doctrine of justiciability; a doctrine more than one writer has pointed out is a myth. It is a myth because a finding that a particular dispute is not justiciable or that a party does not have "standing," outside the case or controversy doctrine, is to say something about the meaning or scope of the underlying law without saying so.[55] Masking or hiding what is being said about the underlying law behind a concept called "standing," obscures the substance of what is said about the underlying law and greatly confuses what the law is, how it should be pleaded considering the facts in a particular case and at what point in the litigation process it is appropriate to deal with the underlying substantive issues involved. Like the old doctrine of "substantive due process," standing doctrine allows courts to litigate the merits of disputes and the meaning of the law on abstract paper motions without saying so by pretending that a claimant lacks a right to bring the suit in the first instance.[56]

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[55] McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595 (1987). *See also*, Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988): "The essence of a true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty? This question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked."

[56] The analytical methodology of many standing cases resembles that followed in United States v. Butler, 297 U.S. 1 (1936), the classic substantive due process case. The majority repeatedly denied it was making any value choice when it set the Agricultural Adjustment Act down beside the Due Process clause to see if the former "squared" with the latter. The methodology is similar to that followed by economic

Use of the myth called "standing" is particularly pernicious since it is invoked at the preliminary stages of the dispute and involves a paper fninitrial on both the facts and law *via* motion practice without any of the constraints of a normal trial or a full record on which the court can make an informed judgment. Understanding the basis of the decision and its substantive implications for both the field of law involved and future disputes under that law is often impossible and contributes to further litigation to establish the boundaries of what is not being said. Moreover, the doctrine generates substantial confusion over the constitutionally mandated different roles of judge and jury in the litigation of a private suit—no matter what the field of law infected by the virus called "standing."

These realities are particularly apparent in the antitrust field, where standing holdings have served as a mask for hiding decisions on causation issues, damage issues and issues about the substantive meaning and scope of the law. Saying one thing while deciding another, is scarcely an informed and artful use of legal analysis and has generated considerable confusion over what one must allege and prove in the early stages of antitrust litigation to avoid being summarily dismissed from court.

Elsewhere, I have suggested that private antitrust litigation should adopt the following analytical framework to both escape the bog of standing and more clearly define the distinction between judge and jury functions in private antitrust litigation:

1. Is there a factual connection between the plaintiff's claimed injury and the defendant? (an issue not often contested);

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ideologues who measure the legality of a practice in a particular case by seeing if the deductively derived conclusions of the model square with the unrealistic assumptions of the model. Many standing cases also pretend not to be making a value judgment concerning the underlying law when they examine whether the plaintiff is the proper person to maintain the particular suit. How one can make that judgment without also making judgments concerning the scope of the protections offered by the underlying law, causation or damage issues and the normative values underlying these issues is difficult to discern.

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

3. Was the standard of care breached by the defendant? (a question of fact for the jury); and

4. What are the damages? (questions of fact for the jury).[57]

Such a system of analysis delineates the line between judge and jury functions and avoids the substantive confusion over duty, causation and damage issues generated by the courts' use of the shifting, changing and meaningless concept of antitrust standing. Confronting most "standing" issues as ones concerning the scope of the duties imposed by the antitrust laws, causation problems or damage questions, would also require that the factual, normative and legal basis for the decision be identified and confronted, that it be done at an appropriate time and place in the litigation, that it be done in light of the constitutional division of judge and jury functions and that it be done in light of all the congressionally defined goals for antitrust policy.[58]

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[57] Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*, 49 ANTITRUST L.J. 1593, 1610–11 (1980); Flynn, *supra* note 15; Flynn, *supra* note 17, at 1124; Flynn & Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125 (1987).

[58] Direct suits by shareholders, employees or suppliers of corporations injured by an antitrust violation, for example, should be treated as damage issues, not "standing" issues. Requiring the suit to be maintained by the corporation in most but not all cases avoids complex damage issues, the risk of multiple recoveries, prejudice to creditor rights and the undue consumption of court time by a multiplicity of lawsuits. While the end result of such an approach would often be similar to the end result in using "standing" doctrine, the process by which the determination would be made would differ significantly and the issue considered would be narrowed down to a damage issue and not be confused with or become the vehicle for determinations on the scope

The most recent antitrust pure "standing" case in the Supreme Court is *Associated General Contractors v. California State Council of Carpenters.*[59] In that case the Court upheld the dismissal before trial of an antitrust complaint charging that the defendant contractors had engaged in a conspiracy to cause third-party contractors to hire subcontractors not signatory to the collective bargaining contract between the plaintiff union and the defendant contractors. The Court held that the right to bring an antitrust treble damage action—so-called standing—was to be interpreted in light of common law limitations like foreseeability, proximate cause, privity, directness of injury, and certainty of damages and that the antitrust laws should not be held to extend a remedy to everyone injured by every ripple of an antitrust violation. The Court then sought to structure a test for determining whether the plaintiff union was within the class of persons the antitrust laws were designed to protect by an examination of a complex of factors such as the directness of the injury alleged, whether the plaintiff was in the area of the economy claimed to be damaged by a breakdown of competitive conditions, whether the plaintiff was within an identifiable class of persons with an incentive to bring the action and whether damages were speculative.

Issues of the substantive meaning of the law, causation and proof of damages are confusingly mixed by the Court's approach

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of the duties imposed under the antitrust laws without saying so. Treating the issue as a damage issue would also leave room for unusual cases where a right to maintain an action should be recognized and would permit a more understandable distinction to be drawn between the damage requirements for injunctive actions and damage actions. *See* Flynn, *Rethinking the Sherman Act Section 1 Analysis*, *supra* note 57, at 1593.

[59] 459 U.S. 519 (1983). The decision in Atlantic Richfield v. USA Petroleum Co., 110 S. Ct. 1884 (1990) might also be considered a standing decision. It is not a pure standing decision because the majority opinion, confused and confusing as it is, purported to be analyzing the case on the issue of what evidence is sufficient to prove "injury."

in the name of standing, and one required to be decided before a full record of the claim is presented to the Court without clearly identifying which issue is being decided, at what point in the litigation it must be decided or how the recipe of factors to decide it should be blended. If the Court wished to hold section 1 of the Sherman Act should not apply to a vertically induced boycott in labor markets where a competitive process is distorted by private contract (a substantive ruling on the scope of the duties imposed by the antitrust laws in the circumstances), it should have said so rather than decide the substantive duty issue behind a fog of standing doctrine leaving ambiguous the basis of the decision. The opinion reads like a common law judge's analysis of whether someone has stated a claim within the common law forms of action, rather than a lucid explication of the scope of the duties imposed on the defendant by the antitrust laws, the standards of proof for finding a breach of the duty, the factors necessary to prove the element of causation or the considerations underlying the issue of what damages are and are not recoverable.

The consequences are apparent. The opinion is a confused and confusing mishmash further hampering the intelligent pleading of a private treble damage action; our understanding of what violates the law and what does not; the meaning and scope of the constitutional right to jury trial in treble damage actions; what facts are relevant to the analysis of the issue and at what point in the trial they become relevant; and, the structuring of an orderly process for the motion stage and the trial stage of a private antitrust case. Apparently, in a certain class of cases where a conspiracy is claimed to deny a plaintiff access to a market governed by a competitive process, it will be necessary to hold a minitrial on the pleadings to determine whether the law is violated, whether the violation caused the plaintiff damage and whether a plaintiff has a right to recover for the damages claimed in the circumstances to satisfy something called standing. If a plaintiff survives that process at the motion stage of the case, then the plaintiff can have a trial to determine whether the defendant has violated duties owed the plaintiff under the antitrust laws, whether that violation has caused the plaintiff injury

and whether the injury claimed constitutes measurable damages under the antitrust laws. In philosophy, circular reasoning of this sort is called a tautology; in law it is called standing; and, in reality it should be called a form of unnecessary analytical chaos.[60]

The Court's opinion in *Associated Contractors* also relied upon the much debated and related rule of *Illinois Brick*,[61] denying recovery of damages by indirect purchasers. *Illinois Brick*, whatever its merits, was not a standing decision but one that drew the line around the duties imposed on an antitrust defendant at liability to the first in the chain of distribution in the name of avoiding undue complexity in damage calculations and the risk to defendants of multiple liability beyond that permitted by the statute. Instead of seeking a less drastic remedy for these legitimate concerns in indirect purchaser cases like mandatory joinder of all claimants, the Court simply barred indirect purchaser claims. Ever since the decision, confusion has reigned over issues like who are indirect purchasers and whether the concerns underlying *Illinois Brick* are present where overcharges caused by an antitrust violation are passed through to an indirect plaintiff down the line of distribution.

Two recent cases illustrate some of the confusion that now abounds: In *County of Oakland v. City of Detroit*,[62] the Sixth Circuit reversed dismissal of a claim on standing grounds and held that the plaintiffs who passed on alleged overcharges as the result of an upstream conspiracy should not be denied standing because they passed through the overcharges. In *In re Wyoming Tight Sands Antitrust Cases*,[63] the Tenth Circuit denied parens patriae standing, in direct conflict with a Seventh Circuit decision

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60 For more colorful descriptions of standing doctrine see the summary listed in Fletcher, *supra* note 55, at 221.

61 Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

62 866 F.2d 839 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 3236 (1990).

63 866 F.2d 1286 (10th Cir. 1989), *aff'd, sub nom.*, Kansas & Missouri v. Utilicorp United, Inc., 110 S. Ct. 2807 (1990).

upholding standing in similar circumstances. Standing was denied[64] to states suing on behalf of consumers allegedly the victims of a price-fixing conspiracy in the natural gas business even though the enhanced prices had been directly passed on to the state's consumers. The Tenth Circuit did so because it read *Hanover Shoe*[65] as requiring a preexisting cost plus contract in order to invoke the pass-through exception to the *Illinois Brick* rule barring indirect purchasers from maintaining an antitrust suit.

The Supreme Court affirmed[66] the Tenth Circuit's overly technical and narrow reading of the pass-through exception to *Illinois Brick*. The Supreme Court speculated that the utility passing on the overcharge may be injured independently of an injury to its customers and that timing problems caused by state rate regulation might raise complex issues of apportionment of the amount passed on.[67] The majority further speculated that

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64 State v. Panhandle Eastern Pipe Line Co., 852 F.2d 891 (7th Cir.), *cert. denied*, 109 S. Ct. 543 (1988).

65 Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

66 Kansas & Missouri v. Utilicorp United, Inc., 110 S. Ct. 2807 (1990).

67 The Court's hypotheticals can easily be changed to support the opposite result of permitting a recovery. More likely than not, overcharges for gas sold to the utilities for resale to consumers would have been included in utility rates as a recoverable expense for which consumers must pay. Regulatory lag in discovering the inflated charges for gas would mean the utilities would retain earnings reflecting the overcharge for a substantial time. In addition to the possibility of utilities keeping the float for overcharges because of regulatory lag, the "filed rate" doctrine might preclude a retroactive recovery of all of the excessive charges for a basic cost input to a utility like gas purchase costs. Ratemaking is generally said to be prospective. Past errors in rates may not generally be recovered in future rates. At the federal level, the filed rate doctrine precludes a regulated entity from charging rates other than those on file with the regulatory commission and has been held to

there remained a risk of double recoveries due to the complexity of apportioning the damages between the utility and its customers, even though the Court had held that state courts acting under state antitrust laws were free to adopt a policy of permitting indirect purchaser suits in *California v. Arc America Corp.*[68] State courts are apparently considered capable of sorting out the complexities of indirect purchaser suits while federal courts are not.

The twisting and turning of the federal courts on the right of indirect purchasers to maintain a damage action is an example of the undue confusion generated by both antitrust standing doctrine, other judicially created limitations on the right to maintain damage actions like the *Illinois Brick* decision and the detachment of antitrust rules from the underlying purposes of the law. It also bespeaks of a judicial hostility to private antitrust enforcement by the creation of abstract and hypothetical complications to avoid giving effect to the congressional grant of a right to "*any* person who shall be injured in his business or property by

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preclude a court or regulatory commission from altering a rate retroactively. The doctrine is said to be based on the need to preserve the stability of rates and protect the primary jurisdiction over ratemaking in the regulatory commission. *See*, Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986); L. SCHWARTZ, J. FLYNN & H. FIRST, FREE ENTERPRISE & ECONOMIC ORGANIZATION: GOVERNMENT REGULATION 355–57 (1985). The same day the Court decided the *Kansas* case, it decided a case where the filed rate doctrine was invoked to strike down a negotiated rate by truckers lower than the filed rate with the ICC. *See*, Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990). Consequently, if the utility is the only party able to recover for the overcharge, it is likely that the utility will be able to retain the overcharge and consumers would not recover anything for the higher prices they paid and state regulatory policy would preclude a regulatory commission from recouping the overcharge for consumers by retroactive ratemaking.

[68] 109 S. Ct. 1661 (1989).

reason of *anything* forbidden in the antitrust laws"[69] to bring a private damage action. It is also a warning to any antitrust plaintiff to hire a specialist in geometry or metaphysics before filing a treble damage action where potential standing or *Illinois Brick* problems may be lurking in the vicinity.

Standing type confusion has not stopped there. The states have stepped into the *Illinois Brick* controversy by passing state laws permitting indirect purchaser suits in some circumstances for a violation of their own state antitrust laws. In *California v. ARC America Corp*,[70] the Ninth Circuit held that state antitrust law provisions permitting suits by indirect purchasers found in the Alabama, California and Minnesota antitrust laws are preempted by federal antitrust policy because they stand "as an obstacle to the accomplishment of the full purposes and objectives of federal antitrust law." The Supreme Court granted certiorari and the Solicitor General—surprisingly—came into the case on the side of the states. In a unanimous opinion, the Court reversed the Ninth Circuit and held that federal law does not preempt state antitrust laws from granting indirect purchasers the right to maintain a state antitrust suit seeking damages for injuries they may claim.[71] Now, rather than confronting the complexity of sorting out damage proofs in a single federal action, defendants will be confronted with doing so in an array of state cases involving varying state laws authorizing indirect purchaser suits under state antitrust laws.

An analogous line of standing type cases has been evolving in the merger field as a result of the Supreme Court's standing decision in *Cargill, Inc. v. Monfort of Colorado*.[72] In *Cargill*, the Court required a plaintiff competitor seeking to enjoin a merger to prove an injury of the type the antitrust laws were designed to

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69 Clayton Act § 4, 15 U.S.C § 15 (emphasis added).

70 1987-1 Trade Cas. (CCH) ¶ 65,575 (9th Cir. 1987).

71 California v. Arc America, 109 S. Ct. 1661 (1989).

72 479 U.S. 104 (1986).

prevent. While rejecting an amicus argument by the Justice Department arguing that competitor suits to enjoin a merger should be denied standing as a matter of course because of the danger that the suit would be used to curb competition rather than foster it, the Court's opinion left confused and confusing just what a private plaintiff must prove to maintain a private action challenging a section 7 violation. The Court held that a private antitrust plaintiff seeking standing to maintain an injunction action is required to show threatened loss from an antitrust violation as opposed to loss due "merely to an increase in competition."

Where the injunction sought is a preliminary injunction, the issue becomes even more complex since the plaintiff is faced with having to prove a form of double incipiency—that the plaintiff is likely to prevail on the merits where the merits require a showing of a threatened—rather than actual—loss of competition or tendency to a monopoly. Treating the issue as a standing issue rather than a duty, damage or causation issue, once again forces a plaintiff to prove a case in chief at the preliminary stages of the litigation in order to be able to go on to prove the case in chief—a substantial barrier to private actions for injunctive relief and a result that significantly alters the express language of section 16 of the Clayton Act.[73]

Some lower courts have read *Cargill* as denying competitors standing to bring injunctive actions to enforce section 7 of the Clayton Act in just about any circumstances imaginable. For example, in *Phototron Corp. v. Eastman Kodak Co.*[74] the Fifth Circuit held that a competitor challenging a merger resulting in a

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73 Section 16 provides that any person "shall be entitled to sue" for injunctive relief for "threatened loss or damage. . . ." Requiring proof of actual loss or damage is inconsistent with this express language. Any fear of a misuse of the right to seek a private injunction for anticompetitive purposes should be more than remedied by the costs of filing such suits in the first place and the express requirement for posting a bond to cover the costs of an improvidently granted injunction.

74 842 F.2d 95 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988).

66%–85% market share in the wholesale photo-finishing market lacked standing to challenge the merger. In the course of effectively repealing section 16 of the Clayton Act, the court held that a competitor lacked standing to challenge a merger creating a monopolist as a result of the Supreme Court's *Monfort* decision. The *Phototron* court's standing holding appears to result in barring a private plaintiff from maintaining a suit where the merger results in a potential violation of section 2 of the Sherman Act and a clear violation of section 7 of the Clayton Act.

The Second Circuit parted company from the Fifth in the recent case of *R.C. Bigelow v. Unilever N.V.*,[75] a private suit challenging a merger that would have resulted in a single firm with 84% of the herbal tea market. *Bigelow* involved a merger that the FTC had studied for 6 months without action or an explanation for its nonaction. The Second Circuit upheld the plaintiff's standing, finding that an 84% market share not only justified a finding that the merger created a monopoly, but that it also raised a presumption of antitrust injury for purposes of a private injunction action under sections 7 and 16 of the Clayton Act. The *Bigelow* case raises another conflict in the circuits over antitrust standing and one demanding clarification of the doctrine by either the Court or Congress.

Cargill, *Illinois Brick*, *Associated Contractors* and their progeny, have generated an even more confused standing, injury and causation type of controversy in the context of a vertical price-fixing case. In *USA Petroleum Co. v. Atlantic Richfield Co.*,[76] a panel of the Ninth Circuit reversed dismissal on standing grounds of a competitor's claim that the defendant oil company had engaged in a conspiracy to set maximum prices with the purpose and effect of injuring the plaintiff independent gasoline marketer. The trial court held the plaintiff had no standing to complain without a showing that the maximum price fixed was a

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75 56 ANTITRUST & TRADE REG. REP. (BNA) 160 (2d Cir. 1989).

76 1988-2 Trade Cas. (CCH) ¶ 68,255 (9th Cir. 1988). *Contra*, Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698 (7th Cir. 1984).

predatory price—since by definition the plaintiff could not claim that it suffered the type of injury the antitrust laws prohibit absent proof of below-cost pricing; the plaintiff's injury was caused by "competition" not the displacement of it. The court of appeals rejected the simplistic cliche that the antitrust laws were enacted to protect competition, not competitors—how can you have competition without competitors—and held that the plaintiff was entitled to its day in court to determine whether it suffered antitrust damage. In effect, the court held that the plaintiff should not be thrown out of court at the preliminary stage of the litigation by a combination of cliches and economic theorizing inconsistent with the congressionally defined goals of antitrust policy and the procedural demands of a sensible litigation process.

On its face the complaint presented a clear claim that the law was violated, despite what some may think about the per se prohibition of maximum price fixing. Whether the alleged violation caused damages to the plaintiff and whether they were measurable damages were issues that could not be determined on a paper motion at preliminary stages of the litigation and must await further discovery and trial on the merits.

The Supreme Court reversed,[77] and held:

> Antitrust injury does not arise for purposes of § 4 of the Clayton Act . . . until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct; . . . in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect. . . . Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.[78]

The majority went on to observe that the "antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from an competition-*reducing* aspect or effect of a defen-

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[77] Atlantic Richfield Corp. v. USA Petroleum Co., 110 S. Ct. 1884 (1990).

[78] 110 S. Ct. at 1892 (emphasis in original).

dant's behavior."[79] Since the conduct involved a vertical maximum price-fixing agreement reducing prices, the Court held the conduct was not a "competition-reducing" form of behavior because consumers were benefited and not harmed by the practice.

The opinion further complicates a treble damage plaintiff's ability to bring a damage action since it is not clear whether the majority is changing the meaning of what it is that violates the law, holding that "causation" is not present, or defining as a matter of law what will constitute "injury" for purposes of section 4. Implicitly, the majority opinion appears to be suggesting that the only purpose of antitrust policy is the protection of "consumer welfare" as that concept is defined by neoclassical economic theory. A vertical maximum price-fixing agreement lowering prices to consumers "benefits" consumers under this line of thinking since the only purpose of antitrust policy is to insure the lowest possible price absent predatory pricing—which cannot happen or last long under the artificial assumptions of the model. Consequently, the opinion can be read as saying that nonpredatory vertical maximum price fixing is not a violation of the law, per se or otherwise, since by definition consumers are not injured by a reduction in price. Implicitly, and despite claims to the contrary in the majority opinion, the decision overrules the *Albrecht* decision[80] except where a maximum price-fixing conspiracy raises prices. If, of course, one takes the views that the goals of antitrust policy are broader than the neoclassical concept of "consumer welfare," that courts should take account of facts unique to the industry involved in the dispute before the court and that the law is designed to protect competition as a process rather than an abstract two-dimensional ideal based upon theoretical assumptions which seldom exist in reality,[81] the conduct could well be found to violate the law.[82]

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79 110 S. Ct. at 1894 (emphasis in original).

80 Albrecht v. The Herald Co., 390 U.S. 145 (1968).

81 The most succinct and accurate summary of the goals of antitrust policy mandated by Congress and enforced by the courts until recently,

Or the majority opinion can be read as saying that competitors have no standing to complain about a vertical maximum price-fixing conspiracy because the antitrust laws only protect consumers and not competitors. If this is the holding of the majority, then it is difficult to see who might maintain a suit since—in the absence of below cost predatory pricing—a vertical maximum price-fixing conspiracy setting prices below that which would pertain in the absence of the conspiracy, would benefit consumers (at least "benefit" under the assumptions of the model if not the law and in reality) and not harm them. Consequently, consumers could not maintain a suit since they are not injured.

A government suit, logically, should meet the same fate, if "consumer welfare" is the sole goal of antitrust policy. And, despite statements in the opinion to the contrary, it would appear that the logical upshot of the opinion is to reduce the per se status of vertical maximum price fixing where the maximum price is a nonpredatory reduction in price to a violation that no one could sue to redress since there would by definition be no antitrust injury. Indeed, the opinion might even be read as wiping out competitor suits generally unless it is first shown that the practice

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neoclassical theory notwithstanding, is that suggested by Professor Eleanor Fox: "There are four major historical goals of antitrust, and all should continue to be respected. These are: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor." Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1154 (1981). *See also*, Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 Sw. U.L. REV. 335 (1980); Flynn, *supra* note 18.

These are political goals, values, and "ought" propositions. They call for tools of analysis capable of implementing a more subtle concept of competition, competition as a process, rather than the mechanically measured quantitative concept advocated by neoclassical theorists. It is clear that Congress intended to regulate commerce and to prohibit private commercial practices that interfered with the competitive process, regardless of the wealth-enhancing quality of those practices. *See*, Flynn & Ponsoldt, *supra* note 57.

[82] *See*, Flynn & Ponsoldt, *supra* note 57.

in question raised prices to consumers. Then, of course, it will be argued that competitor suits are really derivative of consumer rights and are "indirect" actions that must be dismissed since they violate the policy of *Illinois Brick* by generating too much complexity for federal courts to handle.

The majority opinion may also be read as an interpretation of the causation requirement or of the injury requirement for maintaining a treble damage action. If read as a "causation" decision, one elaborating on the euphemistic requirement that for an injury to be an "antitrust injury" it must be one that "flows from" an antitrust violation, the opinion raises the endless metaphysical debates surrounding causation that can be spun out of the *Brunswick*[83] and *Cargill*[84] decisions and their progeny. And, if the opinion be viewed as an interpretation of the "injury" requirement, it generates great confusion over the scope of the function of a jury to determine both the fact and amount of damage only after a full trial, rather than by judicial speculation in the preliminary stages of litigation.

If private antitrust litigation is to play an important role in the future, this growing morass of standing decisions and the confusion between (1) what duties the antitrust laws create and what evidence is necessary to show a breach, (2) what evidence is sufficient to show a factual connection between the breach and injury to the plaintiff, and (3) what evidence is sufficient to prove injury, are in need of a substantial overhaul. These issues are also in need of considerable clarification in view of the significant issue of how they relate to who is constitutionally required or entitled to decide which question—on what standards and at what point in a trial—judge or jury. It is an area to which the private bar, the administration and Congress should all address their attention and find a solution to what has become a most significant barrier to private antitrust enforcement—the mythology

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[83] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (damage claimant in a § 7 merger case must show the "injury is casually linked to an illegal presence in the market").

[84] Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104 (1986).

of standing to sue and the procedural and substantive morass it has created.

Antitrust policy also would benefit by preventing the undermining of antitrust policy by substantive decisions made about the scope of duties created by the antitrust laws, causation issues and the meaning of and method for proof of damages behind the mask of standing, indirect injury and injury. Like the doctrines of proximate cause in torts and privity in contracts, the doctrine of standing should be relegated to the attic of legal history—there to gather dust as one of the curiosities of the past designed to provide certainty while only generating massive confusion and depriving litigants of their appropriate day in court on the merits of their claims.[85] If the doctrine of antitrust standing is not reigned in, then the future of private antitrust enforcement is indeed bleak.

B. The role of summary judgment

Another predictable variable of great significance to the future of private antitrust enforcement is the substantial change in the role of summary judgment in antitrust litigation and the startling decision of *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*[86] In *Matsushita* the Supreme Court held that the Third Circuit did not apply the proper standard in reversing a trial court's grant of summary judgment in a private suit alleging that several Japanese consumer electronics manufacturers had engaged in a predatory pricing scheme. The plaintiffs claimed the defendants had conspired to drive them from the market by a longstanding conspiracy to keep prices high in Japan and low in the United States—prices often so low that they were 20%–25% below cost.[87] Ever vigilant for protecting the geometric symmetry

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[85] *See generally*, Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. (1935).

[86] 106 S. Ct. 1348 (1986).

[87] *See*, Sussman, *Business Judgment vs. Antitrust Justice*, 76 GEO. L.J. 337, 341 (1987).

of neoclassical price theory even at the expense of the facts of actual cases, the Antitrust Division filed an amicus brief on the side of the defendants relying on an earlier law review article commenting on the case by a newly appointed federal judge who did not try the case, review the record or hear the appeal.[88]

The Court's opinion upholding the trial court's grant of summary judgment did several things of great significance for private antitrust litigation:

1. It substantially changed the standard by which summary judgment motions are to be weighed thereby altering the traditional test and the balance between a court's law making and a jury's fact finding functions in private antitrust litigation;

2. It looked only at the defendant's theory of the case to determine whether the plaintiff stated a claim, thereby making the defendant's "plausible" theoretical explanation of its conduct the test for summary judgment rather than the plausibility of plaintiff's facts and allegations of a violation of its rights the test for whether the motion should be granted;

3. It appeared to buy hook, line and sinker the application of abstract neoclassical price theory to judge the validity of an antitrust claim despite alternative economic and other frameworks for understanding the facts of the dispute and Congressional policy to the contrary;[89]

4. It ignored or tried to explain away the facts of the dispute and the plaintiff's interpretation of them in reaching its decision; and

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[88] Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 106 S. Ct. 1348, 1359 n.10 (1986), citing the "sensible assessment" of Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1 (1984). For a "sensible assessment" of the Court's majority opinion, *see*, Flynn, *supra* note 16.

[89] For a persuasive examination of the facts—as opposed to abstract theory detached from the reality of the dispute before the court—explaining what was occurring in the case, *see* Note, *Below Cost Sales and the Buying of Market Share*, 42 STAN. L. REV. 695 (1990).

5. It tipped the balance in judging summary judgment motions decidedly against—rather than in favor of—the party moved against.[90]

If the majority was seeking to straighten out the standards to govern summary judgment motions in antitrust cases, the opinion is a classic demonstration of G.K. Chesterton's cynical observation: "If a thing is worth doing, it is worth doing badly."

Perhaps the most significant parts of the Court's decision are those establishing a new standard for summary judgment motions and the implicit adoption of static neoclassical price theory as the sole guide to antitrust policy and the standard to be used for summary judgment motions in antitrust cases. Any attorney involved in private litigation will have no doubt encountered the new summary judgment standard in just about every case they bring or defend: "[I]f the factual context renders respondent's claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."[91]

"Economic sense" is apparently to be determined by neoclassical price theory and the defendant's version of it to determine whether the plaintiffs' case makes "economic sense." Since neoclassical price theory dictates that predatory pricing is seldom tried and rarely successful, reality to the contrary notwithstanding,[92] the Court's opinion requires a "respondent to a motion for

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90 *See*, Flynn, *supra* note 16; Ponsoldt & Lewyn, *Judicial Activism, Economic Theory and the Role of Summary Judgment in Sherman Act Conspiracy Cases: The Illogic of* Matsushita, 33 ANTITRUST BULL. 575 (1988).

91 106 S. Ct. at 1357.

92 One study of the data compiled by the Georgetown study of private antitrust litigation, PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING (L. White ed. 1988), suggests that 20% of all private cases with a settlement rate of over 90% were predatory pricing

summary judgment in an antitrust case to show that the predictions of The Model do not follow from the assumptions of The Model."[93] While tautologies may serve academics in the course of befuddling their students, they scarcely serve legal reasoning and the fair resolution of lawsuits in accord with the underlying purposes of the law and the practical requirements of a sensible procedural system. With all due respect, the majority opinion's method of analysis is logically absurd, inconsistent with the historical purposes of the Federal Rules of Civil Procedure, an impingement upon the constitutional right to jury trial, contrary to the goals of antitrust policy, and potentially devastating to all private antitrust litigation if it is to be rigidly followed in the future.

In recent years, summary judgment motions are granted in whole or in part in over 50% of private antitrust cases; a factor contributing heavily to the 47% decrease in private suits in the past 10 years.[94] The widespread and growing use of summary judgment in private antitrust suits is testimony to either the

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cases. *See, Forward: The Cases, the Judges, and Economic Research in U.S. Antitrust Policy*, 13 WAGE-PRICE L. & ECON. REV. 1, 17 (1989).

In Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104, 121 (1986), the Court observed: "While firms may engage in the practice [predatory pricing] only infrequently, there is ample evidence that the practice does occur." In this author's experience, predatory pricing does occur with more frequency than is generally believed or an abstract economic theory based on a world of perfect competition and rational maximization would suggest. The problem is one of proving the conduct has taken place. Determining cost information and the standard by which pricing is to be deemed "predatory" are often insuperable barriers to bringing a suit on this basis. Where a case is brought the battle can be long, complex and expensive. *See, e.g., Inglis Wins $13.3 Million Judgment in 17-Year-Old Predatory Pricing Case*, 56 ANTITRUST & TRADE REG. REP. (BNA) 369 (March 9, 1989). The problem becomes impossible where courts begin with an assumption the practice simply could not happen and, after *Matsushita*, utilize that assumption to measure a plaintiff's case on a motion for summary judgment.

93 Flynn, *supra* note 16.

94 55 ANTITRUST & TRADE REG. REP. (BNA) 797 (Nov. 3, 1988).

baseless nature of many such suits, to the growing use of summary judgment motions by trial judges to cut off lawsuits they do not like or to the increasing influence of ideology to resolve lawsuits detached from the reality of the lawsuit and the congressionally mandated goals of the law. While some of this increased use of summary judgment is no doubt due to baseless or poorly pleaded lawsuits, my review of the cases over the past 10 years suggests that a far greater share of it is attributable to judges getting rid of lawsuits they do not like or cases they mistakenly believe will consume too much time on a busy docket and increased reliance on the ideology of neoclassical theorizing dictating what the law ought to be rather than the policies of Congress and the facts of cases determining what the law ought to be.

Those cases that are baseless lawsuits can be readily dealt with by the use of rule 11 sanctions, rather than distorting the standards for summary judgment to deal with the imagined problem of countless baseless lawsuits filed by dishonest or incompetent lawyers or competitors seeking to misuse the antitrust laws. *Matsushita*'s standard for determining whether summary judgment should be granted can only accelerate the trend demonstrated by the standing and *Illinois Brick* doctrines of prematurely deciding antitrust cases on the pleadings and before trial. *Matsushita* establishes a bad process for legal decision making whatever one might think of private litigation to enforce antitrust policy. Moreover, as the important Georgetown study of private antitrust litigation shows, it is an unnecessary trend if one views the issue solely from the perspective of the light burden private antitrust litigation imposes on the courts.[95]

Procedural issues to one side, the substantive standards for weighing predatory pricing cases announced by *Matsushita*, that predatory pricing is seldom tried and rarely successful as determined by neoclassical theorizing, has come under increased scru-

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[95] PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING, *supra* note 92, at 8–10.

tiny and attack. For example, Oliver Williamson has argued that the neoclassical approach paints too simplistic a picture of predatory pricing and that the enforcement agencies and the courts should also evaluate the practice from the newly emerging economic perspective of offensive strategic behavior—or conduct aimed at actual or potential competitors to discipline or otherwise deter competitive behavior.[96] Although Williamson expressed reservations about the plaintiff's theory of the case in *Matsushita*, in part because of an economist's grave reservations about the efficacy of conspiracy doctrine, he found that the dissenting opinion in *Matsushita* adheres more closely to the standards that ought to be followed in summary judgment cases—a conclusion supported by an extensive study of the record in the case.[97]

In other words, the majority overturned decades of summary judgment law and cut off a full and fair analysis of the plaintiff's theory of the case and the record facts, a theory based on economic insights suggesting that a 15-year predatory pricing campaign by Japanese firms may well have been for strategic anticompetitive purposes. The Court did so because the ma-

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[96] Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271 (1987). *See also*, Krattenmaker, Lande & Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241 (1987). Among the difficulties critics of the neoclassical school of economic thought have had in arguing for alternative analytical methods for assessing conduct claimed to violate antitrust policy is the penchant lawyers and judges pretending to be economists have for models to define legal rules and dictate what the facts of specific cases are and mean. Such an approach to the legal analysis of disputes is a long discredited method of analytical positivism. *See* Flynn, *Legal Reasoning, Antitrust Policy and the Social "Science" of Economics*, 33 ANTITRUST BULL 713 (1988). Unfortunately, the methodology has become attractive to judges and requires critics of the current state of antitrust analysis to come up with alternative models, one hopes empirically based rather than abstract models, providing a scientific analytical framework for decision making that will always produce the right answer and eliminate discretion in decision making. Unfortunately, several hundred years of legal decision making have proven such a standard of certainty to be an illusion, and a dangerous one at that.

[97] Ponsoldt & Lewyn, *supra* note 90.

jority's view of the case and the realities of predatory pricing practices were captured by a belief in the religion of static neoclassical price theory—proof of Stendhal's observation that "all religions are founded on the fear of the many and the cleverness of the few."

Some lower courts, not overwhelmed by the superficial logic of the model and a temptation to clear their docket of cases by a freewheeling use of summary judgment and *Matsushita*'s invitation to do so, have found grounds for believing that predatory pricing is more often attempted, can be successful and requires a trial of the facts underlying predatory pricing claims where they are alleged—"economic" plausibility to the contrary notwithstanding. In *McGahee v. Northern Propane Gas Co.*,[98] the 11th Circuit reversed dismissal of a Sherman Act and Robinson-Patman Act claim of predatory pricing despite *Matsushita*. The court noted that the Areeda-Turner test for predatory pricing, drawing the line of illegality at average variable cost,[99] "is like the Venus DeMilo: it is much admired and often discussed, but rarely embraced." In conflict with decisions from other circuits and the abstract theoretical test for summary judgment the majority adopted in *Matsushita*, the court held: "when an antitrust defendant moves for judgement as a matter of law, the test for predatory pricing must consider subjective evidence and should use average total cost as the cost above which no inference of predatory intent can be made."

The *McGahee* case was a well prepared appeal; one pursued by lawyers intimately familiar with economic theorizing and the goals of antitrust policy. It is also a case decided by a judge concerned about the facts of the dispute before him; facts carefully and fully documented by the plaintiff's attorneys. It points up the importance of a private plaintiff's attorneys being fully conversant with the economic theory relevant and not

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98 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2110 (1989).

99 Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

relevant to the dispute and presenting their case in a compelling fashion. Great care should be taken by a plaintiff's attorneys before filing a case—care to think out carefully the theory of their case, to retain competent and thoughtful economic advice and to be prepared to confront judges who may place a heavy burden on a plaintiff to sustain his or her case at the preliminary stages of the litigation. Until the narrow and closed-minded ideological approach of *Matsushita* is overcome or ignored however, careful drafting of a well thought out complaint in much greater detail than normally required and with the assistance of an economist—not a lawyer pretending to be an economist—is the only hope for overcoming what is a bad and unwise Supreme Court standard for summary judgment motions in the antitrust field and a significant nail in the coffin of the future of private antitrust enforcement.

C. *Vertical market restraints and the meaning of per se and the rule of reason*

A final and significant variable that private antitrust enforcement must confront is the gradual destruction of private treble damage actions in the area of vertical restraints and the erosion of the distinction between per se rules and the rule of reason. In the past, a large percentage of private cases involved vertical market restraints, an area that neoclassical ideology suggests should be of little or no antitrust concern. Twenty years ago the *Schwinn* decision's rigid per se rule prohibiting any restraint on alienation after title had passed made vertical market restraints of great antitrust concern.[100] The private bar responded by attempting to overregulate vertical marketing restraints through a legion of private treble damage actions challenging many aspects of vertical marketing relationships and doing so pursuant to a wooden application of a rule of per se illegality. In response to these developments, the *Sylvania* decision[101] put a considerable

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100 United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

101 Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

damper on the use of private antitrust suits to regulate anything other than vertical price fixing.[102]

Elsewhere, I have written extensively about vertical restraints suggesting that the appropriate standard by which they should be governed lay somewhere between the two extremes of the legal formalism of *Schwinn* and the unrealistic ideological theorizing of neoclassical thought relied upon in part by the *Sylvania* Court to overturn *Schwinn*. I have been suggesting for the past 10 years that the per se rules in antitrust ought to be viewed as evidentiary presumptions of varying levels of rebutability,[103] in part to avoid the rigidity of the two extremes represented by *Schwinn* and by the neoclassical approach—extremes incapable of taking account of the facts unique to individual cases and all the policies underlying the antitrust laws. The Supreme Court, however, seems to be drifting further and further in the direction of relying upon a rigid version of neoclassical thought with its simplistic assumption that all vertical restraints save those masking a cartel or designed by a firm with monopoly power to exclude competition should be considered per se lawful. The irony that the rigidities of both the *Schwinn* and neoclassical approaches suffer from the same analytical faults, a failure to capture fully the values underlying antitrust policy and an inability to take account of facts unique to individual cases, seems to have escaped the Court.

A good illustration of the wisdom of treating per se rules as evidentiary presumptions subject to well defined defenses and justifications is demonstrated by the confused and confusing state of the tying doctrine in antitrust. In the not too distant past, tying arrangements were treated harshly by the courts—a seemingly absolute rule of per se illegality governed conduct once it was

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102 *See* Flynn, *supra* note 17, at 1095.

103 *See* Flynn, ANTITRUST L.J., *supra* note 57. The suggestion has subsequently been proposed by others. *See*, 7 P. AREEDA, ANTITRUST LAW, chap. 15 (1986).

defined as "tying" after cases like *Northern Pacific*[104] and *International Salt*.[105] There is reason for treating tying arrangements with suspicion, because Congress has singled out tying arrangements for special treatment under an incipiency standard in section 3 of the Clayton Act[106] and tying can impinge upon fundamental values underlying the Sherman Act if the congressional goals of that Act are respected by the courts. Sorting out those tying arrangements that impinge on antitrust goals from those that do not can be a challenge from one unique factual circumstance to another. The analytical method for doing so is, therefore, crucial to the development of a predictable tying doctrine—one that sensibly handles the facts of cases, respects the goals for antitrust established by Congress and provides a knowable and predictable standard for those subject to the law.

A rigid per se approach is incapable of doing these things where it subsumes all the issues to be determined under the initial analysis of whether a particular transaction is or is not a tying arrangement.[107] The per se approach traditionally followed in tying cases reached new heights of legal formalism in the first *Fortner* decision categorizing a financing arrangement for goods as a tying arrangement and suggesting it was per se unlawful if there is "power" in the tying product market.[108] On a second appeal of the same case, much backing and filling was required to explain why the particular financing arrangement was not an

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104 Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958).

105 International Salt Co. v. United States, 332 U.S. 392 (1947).

106 15 U.S.C. § 15.

107 Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 VAND. L. REV. 283, 284 (1980): "Notwithstanding . . . extensive Supreme Court attention, there is as much heat as light in this area. The doctrine which has developed is often unpredictable and frequently irrational, and the applicable rules make the analysis far more complicated than necessary. A simpler and more direct approach is long overdue."

108 Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

illegal tying arrangement[109]—an inference left by the first *Fortner* decision. Although the two decisions generated considerable confusion, is was thereafter widely believed that tying arrangements remained per se illegal where there were two separate products and "power" was shown in the tying product market. For tying cases, the translation of the Latin phrase "per se" must be amended from "in itself" to "in itself along with a few other mushy things."

In 1984, the Supreme Court once again stepped into what had become a growing morass of tying cases in the lower federal courts, and added to the morass, in *Jefferson Parish Hospital v. Hyde.*[110] In that case, the Court recognized tying arrangements were per se illegal, but only where it was shown that there were two separate products and there was power in the tying product. The Court then proceeded to hold what was labeled below a "tying arrangement," a lawful tying arrangement. The plaintiff, an anesthesiologist, claimed that a hospital had refused certification for him to practice in the hospital because it had a contract with a group of anesthesiologists to provide all necessary anesthesiology services at the hospital. The court of appeals held that the arrangement was a tying arrangement because consumers not wishing to have surgery "cold turkey" were forced to buy one product to get another—the tying product being the hospital operating room and the tied product being anesthesiology services. The lower court found power in the tying product and a not insubstantial amount of commerce involved, and therefore held the tie per se illegal.[111]

It is fair to suggest that the Supreme Court struggled unsuccessfully with the analysis of both the facts and the law on review; attempting to sort out what appeared to the Court at least as a square peg—the facts of the case and the reality of the

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109 United States Steel Corp. v. Fortner Enterprises, Inc., 495 U.S. 610 (1977).

110 466 U.S. 2 (1984).

111 Jefferson Parish Hosp. v. Hyde, 686 F.2d 286 (5th Cir. 1982).

hospital and medical businesses—that did not fit a round hole—the per se pigeonhole the record below labeled as the antitrust offense of "tying." Viewed from the defendant hospital and plaintiff doctor's point of view, the contract was an exclusive dealing arrangement with a competing supplier of the service; viewed from the patient's perspective, the arrangement was a per se illegal tying arrangement requiring the patient to purchase one product in order to have another.

Not surprisingly, the Court's analysis unraveled once the confines of the seemingly rigid per se rule of tying analysis captured the Court's thinking and method for analyzing the case. The opinion wanders back and forth between arguments that there were not two separate products to the issue of whether there was sufficient power in the tying product market to the issue of whether the power that did exist was the "kind" of market power necessary to prove the arrangement illegal. *Jefferson Parish* left tying analysis in further disarray, while also leaving the plaintiff doctor excluded from providing service in the defendant hospital. Patients in the hospital were left with little or no choice in the selection of the physician to provide them with anesthesiology services.

Think of how much simpler and more clear cut the analysis might have been if the Court had simply held that if the arrangement was to be labeled a tying arrangement, it was presumptively illegal subject to some affirmative defenses[112]—defenses proving a justification or excuse for the arrangement under the circumstances of the case. Instead of the analysis being

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112 The level of rebutability should vary from one category of per se illegality to another. For example, the presumption of per se illegality for horizontal price fixing should be nearly conclusive, although some circumstances might justify recognition of a narrow justification or excuse, particularly where other regulation is present. *See*, Broadcast Music, Inc. v. C.B.S. System, Inc., 441 U.S. 1 (1979); F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447 (1986). On the other hand, only a moderately presumptive level of illegality would be appropriate in the case of tying arrangements. *See*, Data General Corp. v. Digidyne Corp., 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 409 (1985).

deflected into arcane epistemological debates over the existence of one or two products and metaphysical distinctions between various types of market power, the analysis could have addressed in a straightforward way whether the displacement of a competitive process in anesthesiology services was justified in the circumstances unique to the case and by means within those permitted by the congressional goals of antitrust policy.

The majority of subsequent tying cases dismissed at some early stage of the proceeding, cite one or more of the inconsistent holdings one may read into the *Jefferson Parish* decision. This state of affairs may be pleasing to those who believe the tying doctrine should be done away with altogether—out of a naive belief that tying arrangements simply do not matter despite what Congress has said about them, the facts and circumstances of individual cases and the underlying goals of antitrust policy tying arrangements can impinge in many circumstances. Real judges deciding real cases brought by real lawyers and dealing with the messy world of real facts however, need something better than the rigid but unknowable standards of per se tying doctrine at the one extreme and the unrealistic approach of neoclassical theorizing, unconcerned about the facts and the law, at the other extreme.

Some tying cases continue to be brought, particularly in the area of intellectual property rights, where claims of tying still benefit from a presumption of power in the tying product. For example, in *Digidyne Corp. v. Data General Corp.*,[113] Chief Judge Browning of the Ninth Circuit held that a computer manufacturer's refusal to license its popular copyrighted computer operating system unless licensees of the program also purchase the computer system from it constituted a per se illegal tying arrangement. On petition for certiorari, Justices White and Blackmun dissented from the refusal to grant certiorari claiming that the decision was inconsistent with whatever the holding was in the *Jefferson Parish* case.[114] In another recent case, *William*

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113 734 F.2d 1336 (9th Cir. 1984).

114 Data General Corp. v. Digidyne Corp., 473 U.S. 908 (1985).

Cohen & Sons, Inc. v. All American Hero, Inc.,[115] a district court held that the requirement that trademark licensees for a fast food franchise purchase all their beef needs from the franchisor—licensor of the trademark—constituted a tying arrangement and that the existence of the trademark justified an inference of power in the tying product at least for purposes of a motion for summary judgment by the defendant to dismiss the case.

Aside from the particular results in these cases, it is apparent that the rigidity of the per se concept is creating at least two problems: (1) the creation of arcane and confused distinctions to mitigate the per se rule in certain cases where business reality requires without appearing to do so; and (2) the detachment of the legal analysis of the practice from the facts unique to each case and the underlying goals of antitrust policy—particularly the goal of protecting each person's right to succeed or fail in the market as the result of a competitive process.[116]

An understandable application of per se rules instead of a mechanical application of definitions, the avoidance of judicial gymnastics to sidestep a fixed rule in specific cases and the

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[115] 693 F. Supp. 201 (D.N.J. 1988).

[116] Professor Eleanor Fox has concisely summarized the unique meaning of the *competitive process* as intended by those who drafted the Sherman Act, as distinguished from competition, as follows: "One overarching idea has unified these three concerns (distrust of power, concern for consumers and commitment to opportunity for entrepreneurs): *competition as process*. The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair. Some measure of productive and allocative efficiency is a byproduct, because competition tends to stimulate lowest-cost production and allocate resources more responsively than a visible public or private power." Fox, *supra* note 81, at 1184. *See also*, Flynn, *Rethinking the Sherman Act*, *supra* note 57, at 1623–27; Flynn, *supra* note 15; Flynn, *supra* note 18, at 304–06.

muting of ideological criticism of the rules would all take place if the per se rules were understood as evidentiary and functional rules of varying levels of rebutability; an analytical process that avoids the tyranny of labels on the one extreme and the tyranny of the simple minded and lawless application of an abstract economic model not in conformity with the reality of the case and the policies of the law on the other. Both public and private antitrust enforcement suffer when the standards to be applied consist of either rigid definitions detached from modern reality or unrealistic conclusions derived from a model of a world that does not exist.

The most recent decision in the direction of a nonreflective application of neoclassical theorizing, and one that both obscures the law of conspiracy and the law of what constitutes vertical price fixing for purposes of antitrust analysis, is *Business Electronics Corp. v. Sharp Electronics Corp.*[117] In that case, the Supreme Court upheld the Fifth Circuit's reversal of a jury verdict for a plaintiff that complained that the defendant cut it off as a dealer in calculators at the behest of a competing distributor because the plaintiff was consistently cutting retail prices. The Supreme Court upheld the Fifth Circuit's ruling that for a vertical agreement between a manufacturer and a dealer to terminate a second dealer to be found unlawful, the first dealer must expressly or impliedly agree to set its prices at "some level," though not a specific one. The Court justified its affirmance of the reversal for a new trial, however, by holding that the prime vice of vertical price fixing is that it can be used to facilitate cartelization and no evidence of cartelization was present in the case—a conclusion derived from neoclassical price theory rather than the goals of antitrust policy. The Court further stated that any lesser standard would subject a manufacturer agreeing with a dealer to terminate another dealer to treble damage liability with no way for the manufacturer to justify its agreement or for a court to distinguish vertical price fixing from other vertical

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117 108 S. Ct. 1515 (1988).

restraints.[118] Other language in the opinion, particularly references to the imaginary horseman of the neoclassical theorist's artificial and apocalyptic world of vertical market regulation by antitrust enforcement—"free rider"[119]—suggests that if the per se

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118 The Court should have held that conduct impinging upon a basic goal of antitrust policy, in this case "promoting freedom and opportunity to compete on the merits," warrants a presumption of illegality subject to defenses like a good business justification under the circumstances of the case. *See* Flynn, *supra* note 17, at 1114–15, 1143–47.

119 The jargon "free rider" is used as a descriptive definition and a conclusion, not a functional legal concept, in neoclassical analysis. It is a form of reductionism that might suit theoretical speculation within the severe limits of its assumptions, but not a useful method for analyzing disputes not in conformity with the assumptions of the model or the normative ends of the law. Where used as a definition and a conclusion, the concept of "free rider" captures one's thinking by hypostatizing (thingifying) an abstract assumption—the meaning and scope of the property rights of the proponent of the restraint. By doing so, the resulting mental picture deflects the analysis from the normative and factual issues of concern by assuming the question antitrust analysis is required to explore in vertical market and other restraints analyzed under the antitrust laws—the scope of the property rights of the parties to the restraint and how the conflict in rights should be resolved. One of the underlying legislative objectives of the Sherman Act was to adopt a federal law giving federal courts the power to define the scope of private property and contract rights in order to guarantee the existence of a competitive process governing the determination of those rights. Describing distributors who do not follow the demands of suppliers with regard to price and other aspects of their distribution practices as "free riders" assumes the question to be asked: What ought to be the scope of the supplier's and distributor's contract and property rights in light of the goals of antitrust policy and the facts of the case? *See*, Sklar, *The Sherman Antitrust Act and the Corporate Reconstruction of American Capitalism, 1890–1914*, in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 65 (W. Samuels & A. Miller 1987).

Consequently, I have never met or seen "free rider," just as I have never met or seen "proximate cause" or "privity." The words are not used as concepts in law are used, to both connote the normative values underlying the concept and denote its application to the facts of the particular dispute, but are used solely to label whatever a distributor

prohibition on vertical price fixing is not dead, it is severely wounded.

From an economic point of view, the opinion is a strange one since it appears to justify the result and deny consumers the freedom to buy from discounters in the name of preserving the supplier's freedom to market its goods, in circumstances where the termination was not the product of the supplier's independent decision making.[120] The paternalism of suppliers agreeing with some distributors to impose restraints on other distributors for the best interests of consumers is apparently necessary to protect consumers from the scourge of "free riders"—"consumer welfare" Japan style.[121]

Instead of holding that the manufacturer's conduct was presumptively unlawful subject to proof of an economically justifiable reason within the goals of antitrust policy for the cutoff, the Court remanded for a retrial on the question of whether the

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does as taking something it is assumed belongs to a supplier—without stating why the legal system ought to assume the right should belong to the buyer in the first instance. The "free rider" explanation of vertical restraints is one of the more blatant misuses of a definition to displace the dynamic and functional use of legal concepts as devices for linking the underlying normative goals of the law to the facts of a dispute. *See*, F. COHEN, ETHICAL IDEALS AND LEGAL RULES: AN ESSAY IN THE FOUNDATIONS OF LEGAL CRITICISM 3–7 (1959). As such, it is a thingification and a definition displacing an empirical and normative analysis that should be banned from the legal analysis of vertical restraints and be relegated to Von Jehring's "Heaven" of other meaningless legalisms, there to join "proximate cause," "standing" and "privity"—concepts that obstruct, rather than advance, the legal analysis of disputes through the use of concepts to link facts and policy. *See* Flynn, *Reaganomics and Antitrust Enforcement, A Jurisprudential Critique*, 1983 UTAH L. REV. 269; Flynn, *supra* note 96.

120 *See*, 55 ANTITRUST TRADE REG. REP. (BNA) 803–04 (Nov. 3, 1988) (Remarks of E. Fox).

121 *See*, Fallows, *supra* note 36, reporting that in domestic markets dominated by cartels and vertical market restrictions, Japanese consumers pay retail prices approximately 70% higher on average than in the United States.

cutoff was for setting prices at "some level." Confusion will reign over whether *Business Electronics* is a decision about the meaning of agreement or conspiracy or a decision about the meaning of "price fixing"—epistemological debates similar to those in tying doctrine—since the evidence to prove the existence of a conspiracy or agreement will often be the same evidence as that relied upon to prove the agreement's objective. What lower courts will do with this decision remains a muddled question, since just about every vertical price-fixing case will be concerned with identification of the conduct, the existence of a conspiracy or agreement and the meaning of the Court's standard that the agreement need not be one to fix a specific price, but that prices be fixed at "some level."

When *Business Electronics* and *Atlantic Richfield* are coupled with *Matsushita*, every vertical price-fixing case is a summary judgment candidate since the combination is an invitation to find the plaintiff's claim that the defendant was motivated by a desire to fix prices is economically implausible since the model's assumptions will dictate what facts can be "facts" for purposes of the model. The dictates of the model presume that rational is whatever a supplier does and whatever a supplier does is rational save the implementation of a horizontal cartel. Cases will be analyzed in a nonexistent world populated by white-hatted rational maximizing distributors preoccupied by consumer welfare as a derivative of their own self interest, and black-hatted "free riders" laying waste to the range of perfect competition populated by ignorant consumers who need to be made to pay for services rational maximizers deem they need.

The only prohibition left by this clear path of analysis set by the Supreme Court is that horizontal price fixing is the only conduct of concern under section 1 of the Sherman Act; a conclusion that is difficult to defend if the only goal of antitrust policy is to protect the rationality and property rights of suppliers. After all, what could be more "rational" for profit maximizers than to conspire to fix prices?[122] The *Business Electronics*

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122 *See*, Flynn, *supra* note 16.

decision, a decision dissented from by only Justices Stevens and White, holds ominous implications for the future litigation of vertical price-fixing cases by private plaintiffs and by the enforcement agencies—particularly when coupled with the implications of *Matsushita* and the simplistic use of neoclassical price theory taught in too many 2-week law and economics courses for bench and bar.

IV. Conclusion

One could go on at great length with other Supreme Court decisions and the decisions of several lower courts and what they mean for the future of private antitrust enforcement. There are several circuit court decisions which, by their own standard of relying on economic analysis to decide the case, do so incorrectly from a mainstream economics point of view.[123] What this suggests for private antitrust enforcement is that the practitioner should be well schooled in the various schools of modern economics and have the expert assistance of an economist—not a lawyer pretending to be one as is often the case with too many lawyers and with too many judges—before filing an antitrust case of any significance. Lawyers gearing up for a new round of antitrust's "faustian pact with economists,"[124] would do well to include a professionally trained economist—preferably one with a legal education as well—on their new antitrust team.

The confusion generated by standing doctrine and the distortion in the use of summary judgment in antitrust cases also must be dealt with if private antitrust enforcement is to have a proper

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123 *See Antitrust in the U.S. Circuit Courts of Appeal: 11 Cases of 1987*, 20 ANTITRUST L. & ECON. REV. 21 (1988); *Forward: Antitrust Economics in the U.S. Circuit Court of Appeals* 1, 19 ANTITRUST L. & ECON. REV. 1 (1987); Shepherd, 14 *Recent Antitrust Cases and Mainstream Industrial-Organization Economics Criteria*, 19 ANTITRUST L. & ECON. REV. 35 (1987).

124 *See* Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511 (1984).

role in developing and implementing antitrust policy. In the early life of the Sherman Act, the use in private antitrust cases of restrictive commerce standards, high proof of damage requirements and extensive reliance on the rule of reason restricted access to the courts by private plaintiffs and ushered in a multidecade era of minimal private enforcement. The current reliance on the "efficiency only" test for proof of a violation, standing doctrine and summary judgment standards reversing the burden against the party moved against have all contributed to a dim future for private antitrust enforcement. If the past is a prolog to the future, the minimal use of private enforcement during the first six decades of antitrust enforcement is a more likely prediction of the future of private enforcement unless steps are taken by both the courts and Congress to rectify an imbalance now significantly tilted against the private antitrust plaintiff.

Those who believe antitrust enforcement should make a comeback in the private arena by dealing with reality and seeking to carry out the goals Congress has mandated for it, must pay greater attention to the overriding issue in antitrust policy today—one that has been around for almost 100 years. As Judge Bork put it: "What is the point of the law—what are its goals? Everything else follows from the answer we give. . . . Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."[125] Beneath all the controversy in Congress, academia and the courts over the rules of antitrust and the role of private enforcement, be it standing, the role of summary judgment or the implications of vertical price fixing, the overriding issue is: what are the goals of antitrust policy and what is the role of which theory of economics being followed at any one time in history in both defining those goals and the implications of the facts of a particular case? Judge Bork has argued that the only goal Congress intended for antitrust policy is the technical concept of "consumer welfare" or conduct that restricts output—output as defined by the restrictive assumptions of the neoclassical model.

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125 R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50 (1978).

Every other serious reviewer of the legislative history of the antitrust laws disagrees with Judge Bork's reading of that history. I do as well.[126] Those drafting the antitrust laws "were defining the limits upon the exercise of private contract and property rights in order to insure the integrity of the political process, the rights of individuals in their exercise of property and contract rights, and the right of competitors to succeed or fail pursuant to a competitive process."[127] For a host of economic, political and social reasons, antitrust policy in this day and age should continue to be viewed as having these goals as the central goals of antitrust policy.[128]

To insure that they are so construed and to restore the vitality of private antitrust enforcement in the future, Congress must clarify the point of the law. What is antitrust policy for and what values is it intended to protect and promote? Congress should hold extensive hearings on this question; hearings aimed at adopting a preamble to the Sherman Act explaining the goals of

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126 Flynn, *supra* note 18.

127 *Id.* at 303.

128 Obviously, an entire treatise could be written on what the appropriate balance between individualism and community in the economic sphere should be and how it ought to be expressed through law in the late 20th century. Defining that relationship solely in terms of a narrow libertarian economic model is a form of myopia that not only ignores history and experience, but ignores contemporary reality, political and other institutions and the necessary underlying normative beliefs that tie a society together. Efficiency in the use of common resources must be weighed along with other economic values such as innovation and the social and political beliefs that secure the consent of those subject to the law. That consent is defined and secured by a common commitment to a sense of justice and the institutions that implement that common belief. *See*, J. RAWLS, A THEORY OF JUSTICE chap. 5 (1971). Ignoring these broader constraints upon the choice of rules and normative goals governing economic rights and relationships by exclusive reliance upon a narrow utilitarian model divorced from reality and the society in which it functions is a prescription for economic, political and social disaster.

antitrust policy.[129] It would be a fitting thing to do as antitrust policy enters its second century; it is an essential thing to do if antitrust enforcement—public and private—is to be of any relevance at all to our next century or whether it is to continue down the sorry path toward becoming an irrelevant abstraction, wrapped in the theological shroud of a misused economic theory and encumbered with meaningless legalisms making it impossible to implement.

For those committed to the current fashion of defining antitrust policy solely in terms of static neoclassical price theory, one can only suggest that they remember Mencken's observation, which should be every lawyer's and every judge's motto: "Men become civilized not in proportion to their willingness to believe, but in proportion to their readiness to doubt." It is time to bring a lawyer's skepticism to the indiscriminate use of neoclassical theorizing dictating the goals of antitrust policy, the reality it is being asked to deal with and the methodology by which the goals of antitrust are implemented.[130] The reality of the litigation

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129 A tentative draft bill would look like the following:

> Preamble: The purposes of the antitrust laws are: 1. To insure the dispersion of economic power in order to protect the legal, social and political processes from undue economic power; 2. To promote freedom and opportunity to compete on the merits; 3. To foster the satisfaction of consumers and to protect them in the exercise of their contract and property rights; and 4. To protect the competition process as market governor.

This language is based on a distillation of studies of the legislative history of the antitrust laws found in Fox, *supra* note 81, at 1154; Flynn, *Rethinking the Sherman Act*, *supra* note 57, at 1623-27; Flynn, *supra* note 15.

130 There continues to be a considerable amount of scholarship concerning the historical and contemporary goals of antitrust policy rejecting the neoclassical interpretation of that history and the practical application of neoclassical theory to contemporary reality. *See*, Brietzke, *The Constitutionalization of Antitrust: Jefferson, Madison, Hamilton and Thomas C. Arthur*, 22 VAL. U.L. REV. 275 (1988); Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Wel-*

process demands it and the art of legal analysis requires the restoration of inductive legal reasoning in lieu of the discredited analytical positivism the presently popular methodology of "economic analysis" seeks to put in place of the legal analysis of antitrust disputes, our common consensus on the meaning of economic justice and the normative goals antitrust policy has served in the past century and should serve in the next.

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fare, and Technological Progress, 62 N.Y.U. L. Rev. 1020 (1987); Curran, *Beyond Economic Concepts and Categories: A Democratic Refiguration of Antitrust Law*, 31 St. Louis U.L. Rev. 349 (1987); Flynn, *supra* note 18; Fox, *The Battle for the Soul of Antitrust*, 75 Calif. L. Rev. 917 (1987); Fox & Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?* 62 N.Y.U. L. Rev. 936 (1987); Gerla, *A Micro-Economic Approach to Antitrust Law: Games Managers Play*, 86 Mich. L. Rev. 892 (1988); Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 Buffalo L. Rev. 871 (1986); Lande, *supra* note 10; Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213 (1985); Hovenkamp, *Rhetoric and Skepticism in Antitrust Argument*, 84 Mich. L. Rev. 1721 (1986); Hovenkamp, *Fact, Value and Theory in Antitrust Adjudication*, 1987 Duke L.J. 897; May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 Ohio St. L.J. 257 (1989); May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History*, 59 Antitrust L.J. 93 (1990); Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219 (1988); Peritz, *The "Rule of Reason" in Antitrust: Property Logic in Restraint of Competition*, 40 Hastings L.J. 285 (1989); Peritz, *A Counter History of Antitrust Law*, 1990 Duke L.J. 263.