CHICAGO AND ITS ALTERNATIVES

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The *Duke Law Journal* has generously offered me space to respond to Professor Wiley's critique[1] of some of my opinions about antitrust policy.[2]

I. THE DIFFERENCE BETWEEN EXPLAINING AND DEFENDING

Professor Wiley provides explanations different from my own for two judicial decisions, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[3] and *Bonjorno v. Kaiser Aluminum & Chemical Corp.*[4] The gist of his argument is that one can easily explain the defendants' conduct in these decisions in a way that shows it to be competitive, or at least competitively harmless.

I have no quarrel with that observation, but find it generally irrelevant. My descriptions and explanations of the facts were drawn from the opinions. There may be other explanations, but at this stage they no longer count. A disturbing thing about Chicago School antitrust is that too often a Chicago School economist is required to explain to businessmen why what they have been doing for a long time is a good idea. For example, resale price maintenance was occurring and raising antitrust issues for a half century before Telser told us that it is efficient because it controls free riding.[5] It seems inconceivable that so many business persons engaged in resale price maintenance and exposed themselves to antitrust liability[6] without knowing why they were doing it.

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1. Wiley, *"After Chicago": An Exaggerated Demise?*, 1986 DUKE L.J. 1003.

2. These opinions may be found in Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985).

3. 105 S. Ct. 2847 (1985).

4. 752 F.2d 802 (3d Cir. 1984), *cert. denied*, 106 S. Ct. 3284 (1986).

5. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 93-94 (1960). The history of antitrust analysis of resale price maintenance goes back to Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 399 (1911), where it may have been used to facilitate collusion. *See also* Jayne v. Loder, 149 F. 21, 25 (3d Cir. 1906).

6. The Supreme Court cases alone that condemn resale price maintenance include United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920); United States v. Colgate & Co., 250 U.S. 300 (1919).

Antitrust defendants should sometimes be required to explain in litigation why their conduct is competitive or efficient. I have great difficulty believing Judge Easterbrook's theory that firms generally cannot explain purposive behavior, and that requiring them to explain themselves effectively throws the case to the plaintiff.[7] This is not the same thing as placing the burden of proof on defendants; nor is it the same as basing guilt on the defendant's subjective intent.[8] Indeed, evidence of efficiency can appropriately be objective as well as subjective. Both *Aspen Skiing* and *Bonjorno* involved fact findings produced in a jury trial in which the defendant presumably had as much chance as the plaintiff to explain its actions. After-the-fact explanations about why condemned conduct was really competitive must be taken with a bag or two of salt, particularly if the defendant never raised them itself.

A. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.

Professor Wiley attempts to give an efficiency explanation for the events that took place in *Aspen Skiing*. I find his explanation quite plausible but I am troubled that the defendant did not give the explanation at trial. The issue in *Aspen Skiing* was not whether some rational explanation for the events preceding the litigation would show Aspen to be blameless under the antitrust laws. Any number of explanations might do that.[9] The question was whether the defendant presented a sufficiently plausible and consistent explanation to entitle a jury to conclude that Aspen violated the antitrust laws. If I were asked whether the facts of *Aspen Skiing* as the Supreme Court described them were sufficient to warrant a directed verdict or summary judgment in favor of the plaintiff, I would have no difficulty in answering no. But that is not the issue the Supreme Court decided; the Court merely decided that the evidence was sufficiently in conflict to entitle the jury to choose among alternative explanations. Perhaps the jury found the plaintiff's explanation more plau-

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7. *See* Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 975 (1986). Also in substantial agreement is Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U.L. REV. 736 (1984).

8. Judge Easterbrook notes:

> The [Supreme] Court is not alone in thinking that the defendant should be asked to justify its conduct and pay the penalty if it fails. But why? This means that the plaintiff wins whenever the defendant does not know or cannot explain the true function of its conduct.

Id. Manifestly, however, it does not mean that. Rather, it means that once the plaintiff has presented evidence which prima facie strongly suggests illegal activity, the defendant has a chance to explain. *See* 7 P. AREEDA, ANTITRUST LAW ¶¶ 1504-1506 (1986).

9. Including, for example, the explanation that Aspen was attempting to avoid antitrust liability for engaging in cartel-like behavior. *See Aspen Skiing*, 105 S. Ct. at 2851 n.9. Judge Easterbrook found it incredible that the defendant "kicked away its strongest points one after another," as do I. Easterbrook, *supra* note 7, at 973 n.2.

sible because the defendant neglected to tell them that its output-expanding marketing strategy could not tolerate Highland's free riding,[10] or perhaps because the defendant did tell them, but the jury found the story incredible or found the plaintiff's version more plausible.

Aspen Skiing, I concede, stands for the premise that the Supreme Court has not entirely accepted the Chicago School approach to antitrust policy.[11] It stands equally for the premise that, notwithstanding the efforts of the Chicago School, there is still some room for jury fact finding in antitrust litigation. As a result it is never enough for someone to criticize a decision based on a jury verdict by raising plausible explanations that make the defendant's conduct look competitively harmless. Competent counsel should raise those explanations at trial.[12] Instead, one must show that his explanation is so good and so exhaustive of the possibilities that it makes the jury's view irrational. Professor Wiley's explanation fails to do this.

B. Bonjorno v. Kaiser Aluminum & Chemical Corp.

Professor Wiley also faults my theory about *Bonjorno v. Kaiser Aluminum & Chemical Corp.*[13] for somewhat similar reasons.[14] I argued that the traditional Chicago School analysis[15] of the price and supply "squeezes" in the *Alcoa*[16] case were simplistic because they neglected the problem of sunk costs.[17] My explanation recognizes that people sometimes make investment decisions that oblige them to others, creating relationships that can be inefficient.[18] I never argued, however, that *all* dealings between monopolists and vertically related firms are inefficient, nor even that a monopolist should feel obliged to charge a price that guarantees a vertically related firm full recovery of its total costs. I believe that the great majority of vertical relationships involving monopo-

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10. *See* Wiley, *supra* note 1, at 1005-06.

11. *See id.* at 1008; *see also* Kaplow, *Antitrust, Law & Economics, and the Courts,* LAW & CONTEMP. PROBS., Autumn 1987 (forthcoming) (Supreme Court has not adopted any discreet school of economic thought, including Chicago School "philosophy that economic efficiency is all").

12. Of course, not everyone has the best counsel, and Aspen may have been one of the unfortunate. Inexplicably, they failed to preserve an objection to a market definition that was almost certainly too narrow. *See* P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 518.1h (Supp. 1986).

13. 752 F.2d 802 (3d Cir. 1984), *cert. denied,* 106 S. Ct. 3284 (1986).

14. *See* Wiley, *supra* note 1, at 1009-11.

15. *See* R. POSNER & F. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 874-75 (2d ed. 1981).

16. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

17. *See* Hovenkamp, *supra* note 2, at 268-70.

18. *Id.* at 264-74.

lists are competitively harmless and raise no antitrust issues.[19] But I reserve the possibility—something that many Chicagoans appear to be unwilling to do—that some vertical relationships are not efficient, and have suggested that one place this is likely to occur is where sunk costs are high.[20]

Professor Wiley's characterization of the *Bonjorno* facts is very different from the account I read in the opinion. Kaiser was not condemned merely for refusing to sell to Columbia at a price too low to permit Columbia or other fabricators to make a profit. I heartily subscribe to the view that every firm, even the monopolist, may generally charge as little or as much as it pleases. Nor did I make up the story about tacit collusion. The court's opinion cited evidence sufficiently credible[21] that a jury was entitled to believe it, as they apparently did.[22] Once again, plausible harmless explanations for behavior that can be deduced after the fact do not suffice to impeach a circuit court's affirmance of a judgment based on a jury verdict. One must be convinced that the jury's verdict is irrational.[23]

II. On Redefining Consumer Welfare

Professor Wiley also suggests that perhaps there can be an "economic" principle for antitrust policy that both the Chicago School and its critics can live with, a principle that acknowledges that many critics would decide most cases the same way that the Chicago School decides them.[24] One might note that the same observation could be made about the Warren Era: most antitrust cases would be decided the same way.[25]

19. *See* H. Hovenkamp, Economics and Federal Antitrust Law § 7.2, at 196-202 (1985).

20. *See* Hovenkamp, *supra* note 2, at 266.

21. *Bonjorno,* 752 F.2d at 809-10 (noting testimony by Oliver Williamson).

22. *Id.*

23. Professor Wiley suggests that the collusion explanation for Kaiser's conduct is irrational because it is circular: "In essence, Professor Hovenkamp maintains that Kaiser sought exclusive-dealing contracts to facilitate horizontal collusion, but used horizontal collusion to compel exclusive dealing." Wiley, *supra* note 1, at 1010.

I see nothing circular about that explanation. Suppose that *X*, *Y*, and *Z*, who collectively dominate a market, fix prices and decide to use exclusive dealing as a mechanism to make the cartel more stable. Under the arrangement, a particular buyer, *A*, will be assigned to *X*; that way *A* will not be in a position to force *X*, *Y*, and *Z* to bid against one another. *A*, of course, would be better off in a competitive market, and would prefer that *X*, *Y*, and *Z* bid against one another, so it will attempt to avoid the exclusive-dealing arrangement. *Y* and *Z*, because they have agreed with *X* and have exclusive-dealing arrangements of their own, will refuse to sell to *A*. In that case *X* both seeks exclusive dealing to protect its collusion and relies on the collusion to enforce the exclusive dealing.

24. *Id.* at 1011-13.

25. For example, for all the criticism heaped by the Chicago School on Warren Court merger policy, many of the cases would have been decided the same way, at least if one accepts the market definitions relied upon in the Warren Court cases. *See* P. Areeda & H. Hovenkamp, *supra* note

Perhaps, Professor Wiley suggests, the economic goal of antitrust should be rewritten. The maximization of economic surplus, which is the sum of consumers' surplus and producers' surplus, is conventionally stated as the goal of Chicago School antitrust policy.[26] Professor Wiley and others suggest that the maximization of consumers' surplus alone, rather than the maximization of economic surplus, might be the preferred policy goal.[27]

I have three objections to such a policy. First, finding the policy that maximizes consumers' surplus is no easier than finding the solution that is efficient,[28] i.e., the solution that maximizes economic surplus. Only long-run solutions are relevant here. In the short run, for example, predatory pricing enlarges the consumers' surplus, for it produces lower prices during the predatory period, and consumers benefit from lower prices. In the long run, however, the difference between an efficient policy (one that maximizes the economic surplus) and a policy that seeks to maximize only the consumers' surplus tends to become blurred. In the long run, producers' surplus invites new competition and innovation into the market, and consumers benefit from those things. For that reason, Chicago School writers such as Judge Bork can argue plausibly that the "consumer welfare" principle requires maximization of the sum of producers' and consumers' surplus,[29] although they exaggerate the ease with which practices that further this maximization policy can be identified.

Second, Professor Wiley's proposed policy goes too far in hauling distributive concerns into antitrust policy. In his view, for example, a practice that increased consumers' surplus by one cent but had no effect on producers' surplus would be preferable to a policy that increased producers' surplus by one million dollars but did nothing for consumers. A merger or joint venture that produced tremendous efficiency gains but created enough market power to cause a barely perceptible price increase would therefore have to be condemned. More fundamentally, an antitrust policy goal of maximizing consumers' surplus without regard to the welfare of producers implicitly regards profits as a bad thing—or at least

12, ¶ 913.2, at 583 & n.14 (1986 Supp.); Baker & Blumenthal, *The 1982 Guidelines and Preexisting Law,* 71 CALIF. L. REV. 311, 334-35 (1983); Fox, *The New Merger Guidelines—A Blueprint for Microeconomic Analysis,* 27 ANTITRUST BULL. 519, 590-91 (1982).

26. *See, e.g.,* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 107-16 (1978).

27. On this point, see Wiley, *supra* note 1, at 1012; *see also* Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 HASTINGS L.J. 65, 151 (1982).

28. That is, efficient under the potential Pareto criterion, which maximizes the sum of consumers' and producers' surplus. *See* Hovenkamp, *supra* note 2, at 237-44.

29. R. BORK, *supra* note 26, at 107-16.

as of so little social utility that they can be excised from consideration in antitrust policy. I don't believe the framers of the antitrust laws had that policy goal in mind. For example, they appeared to agree that the "innocent" monopolist, who acquired his position by his own industry, skill or luck, had the right to his monopoly profits.[30] Cases ever since have held that it is not illegal for the monopolist to charge a monopoly price.[31] After all, profits encourage people to enter business.

Finally, carrying out a policy of maximizing consumers' surplus would turn every American market into a regulated industry. Many business practices fail to maximize economic surplus. Nevertheless, the practices are legal because in the long run they are self-deterring. For example, a dominant firm that fails to innovate in the optimal amount undoubtedly reduces the consumers' surplus. Failure to innovate is not an antitrust violation, however, for a number of good reasons. First, identifying the optimal amount of innovation is an inordinately difficult task. Second, the firm that fails to innovate effectively shoots itself in the foot; it will soon fall victim to the competitive advantages gained by firms that do innovate. Most importantly, within the confines of the market efficiency model we do not need to worry about economic surplus: competition naturally tends to maximize it. As a result, we do not punish firms for lack of adequate research or other forms of productive inefficiency.

However, the "invisible hand" tends to maximize the sum of producers' and consumers' surplus, not consumers' surplus alone. As a result, it is not clear that a policy of maximizing consumers' surplus can rely on the competitive market to achieve its goals. Firms would have to be regulated to ensure that they engaged in the optimal amount of innovation, or if they had monopoly power, that they charged competitive prices. Dominant firms would have to be monitored constantly to ensure that they did not innovate in a manner that enhanced their market power, regardless of what it did to their costs.

For these reasons I believe the theory that the antitrust laws should be used to prevent wealth transfers away from consumers ultimately "falls apart." There is no way to define its proper boundaries.

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30. 21 CONG. REC. 3151-52 (1890) (remarks of Mr. Edmunds); H. HOVENKAMP, *supra* note 19, § 5.3, at 141.

31. *See, e.g.*, Kartell v. Blue Shield, Inc., 749 F.2d 922, 927 (1st Cir. 1984) ("[M]ore than monopoly power is necessary to make the charging of a noncompetitive price unlawful." (quoting Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980))), *cert. denied*, 471 U.S. 1029 (1985).

III. When Does Criticizing the Chicago School Matter?

A. *Hypothetical Cases.*

Professor Wiley's most important critique of my *After Chicago* essay appears not to be some quibbles over the proper way to analyze cases, but rather that I would not decide very many cases differently from the way the Chicago School would decide them. I concede most of that. The Chicago School has done more for antitrust policy than any coherent economic theory since the New Deal. No one, including myself, can escape its influence on antitrust analysis. If I were forced to pick between Warren Era liberalism or the Chicago School on any number of issues, including horizontal and vertical mergers, vertical integration, the per se rule against tying arrangements, monopolization, predatory pricing, and the Robinson-Patman Act, I would unhesitatingly choose the Chicago approach.

But neither I nor anyone else is forced to that choice. The Chicago School has given us many good things, and—admit it—the Warren Era even gave us a few.[32] But we are entitled to pick what we want and to discard what we find unacceptable. I, for one, believe that the Chicago School answered many questions that were previously unanswered. But it did not answer every question, and some of the answers were wrong, or at least not complex enough to account for every situation in which the problem might occur.

For example, Chicagoans first observed that free riding explains many instances of resale price maintenance.[33] But by doing so they did not explain every instance of resale price maintenance, such as the kind that occurs with respect to fungible products or products that need absolutely no point-of-sale services. Consequently, it seems that, as a matter of economics alone,[34] rule of reason analysis is much more appropriate for resale price maintenance than is the commonly asserted proposal of per se legality.[35] Per se legality is appropriate only if we can be relatively

32. *See, e.g.*, United States v. Container Corp. of Am., 393 U.S. 333, 336-37 (1969) (adopting rule of reason for price information exchanges among competitors, and suggesting that market concentration is relevant); United States v. El Paso Natural Gas Co., 376 U.S. 651, 659 (1964) (establishing relevance of potential competition in merger cases); Silver v. New York Stock Exch., 373 U.S. 341, 364-65 (1963) (regulated enterprise engaged in legal rulemaking must give notice and opportunity for hearing to disciplined member).

33. *See* Telser, *supra* note 5, at 104-05.

34. I am persuaded, however, that Congress has sanctioned the per se rule for resale pricc maintenance, and that we should feel obliged to comply with it until Congress tells us otherwise. On that issue the Chicago School and I clearly differ. *See* Hovenkamp, *supra* note 2, at 250-54.

35. *See, e.g.*, Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 153-59 (1984); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 22-26 (1981).

sure that every instance of resale price maintenance is competitively harmless.[36] Here I observe only that retailing as well as manufacturing can be subject to economies of scale. As a result, a manufacturer may not have the option of integrating into retailing itself because the optimal scale retailer may be required to carry the brands of several different manufacturers. On the demand side, retail markets can be much smaller than supply markets, and scale economies may effectively constrain or delay new retailer entry. This combination of factors makes it plausible that some resale price maintenance practices are forced upon suppliers by large retailers, or groups of retailers acting collusively, and that the results are anticompetitive.

Second, I believe that members of the Chicago School are unrealistically sanguine about their side of the arguments concerning the "structure-conduct-performance paradigm" and antitrust policy.[37] Thanks to the unrelenting criticisms of the Chicago School,[38] today we know that economies of scale and propensities toward collusion must *both* be taken seriously in any decision affecting market structure. This means that higher concentration is not an unmitigated evil. It may often be very good, particularly if the likelihood of collusion increases only slightly and economies of scale in manufacturing or distribution are substantial.

But some Chicagoans make the mistake of regarding nearly all questions about the effects of concentration as settled, merely because in some instances higher concentration can lead to lower prices. Some even ignore scholarship that tends to show anticompetitive effects from increased concentration, while reading (and citing) scholarship that tends to show the contrary.[39] That seems to me a peculiar way to get at the truth, although it might be a perfectly appropriate way to support one's own political views.

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36. More precisely, per se legality is appropriate only if so few instances of the practice under consideration are competitively harmful, and the social cost of these so small, that legal enforcement is not worth its costs. *See* H. HOVENKAMP, FEDERAL ANTITRUST LAW § 15.2 (lawyer's ed. 1985).

37. *See* INDUSTRIAL CONCENTRATION: THE NEW LEARNING (H. Goldschmid, H. Mann & J. Weston eds. 1974); Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust,* 127 U. PA. L. REV. 1104 (1979).

38. *See* Easterbrook, *Workable Antitrust Policy,* 85 MICH. L. REV. 1696 (1986); Peltzman, *The Gains and Losses from Industrial Concentration,* 20 J.L. & ECON. 229 (1977); Ravenscraft, *Structure-Profit Relationships at the Line of Business and Industry Level,* 65 REV. ECON. & STATISTICS 22 (1983).

39. *See* Hovenkamp, *Rhetoric and Skepticism in Antitrust Argument,* 85 MICH. L. REV. 1721, 1722-23 (1986); Kaplow, *supra* note 11.

B. *Real Cases: Competition, Congressional Intent and "Antitrust Injury."*

My differences with the Chicago School described above generally extend to hypothetical cases, or to policy considerations that are expressed principally in academic literature rather than case law. This is because the Chicago School has not been sitting in the real driver's seat—the federal judiciary—long enough to make all that much difference. As others have argued with great skill, the influence of the Chicago School on the judiciary is greatly exaggerated.[40] Furthermore, judges have to take decisions as they come, and Judges Bork, Easterbrook, and Posner have not had the opportunity to rewrite the antitrust laws. Nevertheless, there are some real decisions that I find troublesome because they involve judicial attempts to undermine the political process by subordinating it to a particular economic view that has not itself attained sufficient support to be legislated into the antitrust laws.

Two decisions I find troubling are *Local Beauty Supply, Inc. v. Lamaur, Inc.*[41] and *Jack Walters & Sons Corp. v. Morton Building, Inc.*[42] Both raise essentially the same problem concerning the relationship between the "antitrust injury" doctrine developed by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[43] and the per se rule against resale price maintenance.

The problem is this: the concept of "antitrust injury" can have more than one meaning. It may mean nothing more than that the plaintiff must show some financial injury caused by an antitrust violation. Although several panels of the Ninth Circuit[44] and at least one panel of the Fifth Circuit[45] have accepted this interpretation, it is not what the Supreme Court had in mind in *Brunswick*.[46] The Supreme Court re-

40. Kaplow, *supra* note 11.

41. 787 F.2d 1197 (7th Cir. 1986). Although Judge Easterbrook sat on the panel, the opinion was written by Chief Judge Cummings.

42. 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

43. 429 U.S. 477 (1977). *See generally* P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 345 (1978); P. AREEDA & H. HOVENKAMP, *supra* note 12, ¶ 335.1; H. HOVENKAMP, *supra* note 19, § 14.5.

44. *See* Syufy Enter. v. American Multicinema, Inc., 793 F.2d 990, 990-1000 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 876 (1987); Catlin v. Washington Energy Co., 791 F.2d 1343, 1347 (9th Cir. 1986); Dolphin Tours, Inc. v. Pacifico Creative Serv., 773 F.2d 1506, 1509 (9th Cir. 1985); Northwest Publieations, Inc. v. Crumb, 752 F.2d 473, 476 (9th Cir. 1985); Royal Serv., Inc. v. Goody Prod., Inc., 1986-1 Trade Cas. (CCH) ¶ 66,907, at 61,636-37 (E.D. Cal. 1985).

45. Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 580 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982).

46. The court in *Brunswick* assumed that the plaintiff would suffer financial loss because of the merger, but that the loss would be caused by the merger's cost-reducing effects on competitors, not its price-raising effects on consumers. *Brunswick*, 429 U.S. at 487-89.

cently emphasized the point in *Cargill, Inc. v. Monfort, Inc.*[47] which made clear that the mere threat of financial injury to the plaintiff is not sufficient to satisfy the antitrust injury requirement.[48]

The antitrust injury doctrine may also mean that a private antitrust action for damages or an injunction[49] will lie only with respect to those kinds of injuries for which Congress intended to create a remedy. This view is much more plausible, and fully consistent with Supreme Court decisions. For example, both *Brunswick* and *Monfort* stand for the proposition that Congress intended the antimerger law to prevent mergers that tend to create monopolies and increase consumer prices, not mergers that give competitors more efficient rivals.

A third view, which dominates in Chicago School circles,[50] is that "antitrust injury" really means injury to competition, economically defined.[51] Under this interpretation a plaintiff must show not merely that the antitrust laws have been violated but also that some market is less competitive as a result, and that the plaintiff's injury results from this decrease in competition.

I find this view of the "antitrust injury" requirement attractive and generally plausible, but it creates an enormous problem with respect to certain antitrust violations that almost never involve injuries to economic competition. For example, how does one show an injury to competition, economically defined, in a secondary-line Robinson-Patman Act case[52] or in a case alleging resale price maintenance, particularly maximum resale price maintenance? I do not believe that *Brunswick* either repealed the Robinson-Patman Act, which of course the Supreme Court could not do, or overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[53] or *Albrecht v. Herald Co.*,[54] which it clearly could and may yet do.

In *Local Beauty* the plaintiff (Local) alleged that its dealership with the defendant was terminated because it refused to participate in the defendant's resale price maintenance scheme. The defendant's agreement

47. 107 S. Ct. 484 (1986).

48. *Id.* at 491-93.

49. On the antitrust injury requirement in cases seeking injunctions, see *Cargill,* 107 S. Ct. at 488-95, and P. AREEDA & H. HOVENKAMP, *supra* note 12, ¶ 335.1.

50. *See, e.g.,* Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury,* 47 U. CHI. L. REV. 467 (1980). Others also find the theory attractive. *See* H. HOVENKAMP, *supra* note 19, § 14.5.

51. That is, a state of affairs in which price is driven to marginal cost and costs are minimized.

52. This may explain the Fifth Circuit's problem with Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575 (5th Cir.), *cert. denied,* 459 U.S. 908 (1982), on remand.

53. 220 U.S. 373, 399-400, 405-06 (1911) (condemning resale price maintenance). *See also* United States v. Parke, Davis & Co., 362 U.S. 29, 47 (1960) (finding resale price maintenance illegal per se).

54. 390 U.S. 145, 151-53 (1968) (condemning maximum resale price fixing as illegal per se).

with Local and other distributors required them to engage in substantial advertising of the defendant's product, and to submit to periodic auditing. Local alleged that the auditing was the mechanism by which the defendant monitored its dealers' prices and detected forbidden price cutting. The evidence indicated that the defendant preferred to distribute its beauty products through full-service outlets, which charged relatively high prices and did their own advertising. Local was reselling the defendant's product to low-service "cash-and-carry" dealers, who did little or no advertising.[55]

The Seventh Circuit suggested that Local was free riding on the product advertising of other distributors.[56] The court assumed that illegal resale price maintenance existed, and that its purpose was to guarantee the distributors a cost-price margin sufficient to encourage them to advertise the product. But it held that summary judgment for the defendant was appropriate because Local could not show antitrust injury.[57] Because only the maintained prices permitted the other distributors to obtain the requisite revenue to advertise, the profitability of Local's free riding by selling to discounters depended on the existence of the resale price maintenance scheme. Thus, in this case Local claimed that

> damages do not reflect lessened competition, they represent Local's inability to continue to profit from the anticompetitive nature of the violation. Because Local's interests are disserved by enhanced competition (it loses its discounting market), its injury is not the type the antitrust laws were intended to prevent.[58]

The court concluded that "damages based on profits made by a plaintiff because of the existence of an antitrust violation are not recoverable,"[59] and that "lost profits from the inability to continue to take advantage of inflated prices due to antitrust conduct are not representative of antitrust injuries recoverable under § 4 of the Clayton Act."[60]

I cannot see in the Seventh Circuit's decision any attempt to harmonize *Brunswick* with the per se rule against resale price maintenance.[61] But a judge must feel obliged to do precisely that. In fact, *Local Beauty* appears to be inconsistent with the Supreme Court's recent decision in

55. *Local Beauty,* 787 F.2d at 1199.

56. *Id.* at 1202.

57. *Id.* at 1204.

58. *Id.* at 1202-03.

59. *Id.* at 1203 (citing W. Goebel Porzellanfabrik v. Action Indus., 589 F. Supp. 763 (S.D.N.Y. 1984), and Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978), *cert. denied,* 440 U.S. 930 (1979)).

60. *Id.*

61. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18 (1977) (indicating that by its repeal of the Fair Trade laws Congress "expressed its approval of a *per se* analysis of vertical price restrictions").

Monsanto Co. v. Spray-Rite Service Corp.,[62] which condemned a vertical price arrangement under the per se rule. To be sure, *Monsanto* did not deal with standing, but the evidence before the Court suggested that Monsanto, which was not a monopolist, terminated its relationship with the plaintiff because it was free riding on the services offered by other distributors.[63]

Nearly all private plaintiffs in cases alleging resale price maintenance are distributors or dealers allegedly terminated or disciplined in some other way for violating a supplier's resale price maintenance scheme.[64] In all such cases the dealer or distributor who violates the resale price maintenance scheme "profits" from the existence of the scheme itself. For example, the dealer who seeks to resell a product at $1.00 is better off if all dealers with whom he competes are forced by the mannfacturer to sell the product at $1.25. Further, he is better off whether or not he is engaged in free riding on the advertising or customer service efforts of other dealers. The mere fact that the resale price maintenance scheme, which he is violating, permits him to undercut the prices charged by other dealers means that, in the Seventh Circuit's words, he is earning "profits . . . because of the existence of an antitrust violation." Under that analysis the terminated dealer is ipso facto not a fit plaintiff to allege illegal resale price maintenance.

But such an interpretation goes far beyond any statement made by the Supreme Court, and seems quite inconsistent with the proposition, controversial or outrageous as it may be, that resale price maintenance is illegal per se. Under *Local Beauty,* about the only people who could enforce the law against resale price maintenance are consumers who allege that they paid higher prices as a result.

Even consumers would not be able to bring actions under the rule established in Judge Posner's opinion in *Jack Walters & Sons Corp. v. Morton Building.* There the plaintiff alleged that its relationship with the defendant was terminated due to the plaintiff's failure to abide by the defendant's *maximum* resale price maintenance scheme.[65] The per se rule against maximum resale price maintenance has been criticized on

62. 465 U.S. 752 (1984).

63. *See id.* at 765-68. The Seventh Circuit in *Local Beauty* cited *Monsanto* for the proposition that the "validity and legality of manufacturers' prevention of free riding by requiring payments or advertising and accounting of sales in territories has been settled by the Supreme Court." *Local Beauty,* 787 F.2d at 1202 n.2.

64. A tiny minority of plaintiffs are customers suing for overcharge injuries. *See, e.g.,* Arizona v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984), *cert. denied,* 469 U.S. 1197 (1985); Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980).

65. *Jack Walters,* 737 F.2d at 706.

economic grounds by a number of people,[66] including me.[67] Its effects on competition are less controversial than the effects of minimum resale price maintenance. In fact, almost no one has anything good to say about the current law. Nevertheless, the law is that maximum resale price maintenance is per se illegal.

In *Jack Walters,* however, Judge Posner held that one seeking to recover for maximum resale price maintenance must additionally show that *competition* has been injured as a result of the practice.[68] But any rule requiring a plaintiff to show that it has been injured by the anticompetitive consequences of maximum resale price maintenance is a rule of nonrecovery. I cannot escape the conclusion that Judge Posner—growing impatient with Congress's or the Supreme Court's refusal to overrule *Albrecht*—has decided to undertake that task on his own.[69]

Members of the Chicago School have visions, as do most of us, of the kinds of things that should obtain in a perfect world. The per se rule against resale price maintenance is definitely not among them. That fact justifies arguments, both theoretical and political. But it does not justify taking the matter into one's own hands, no matter how certain we may be that we are right.

C. *The Real Social Cost of Monopoly.*

An antitrust policy guided exclusively by economic efficiency would seek to minimize the social cost of monopoly in the American economy. But measuring social cost has proved to be an elusive task, and if we cannot measure something we may have difficulty minimizing it.

Some members of the Chicago School today have failed to consider the most important observations of one of their own high priests. In my

66. *See, e.g.,* Blair & Fesmire, *Maximum Price Fixing and the Goals of Antitrust,* 37 SYRACUSE L. REV. 43, 44-45, 68-77 (1986).

67. Hovenkamp, *Vertical Integration by the Newspaper Monopolist,* 69 IOWA L. REV. 451, 452-56 (1984).

68. *Jack Walters,* 737 F.2d at 708. Judge Posner noted a possible exception where the manufacturer forced dealers to sell at prices below their cost—presumably compelling them to participate in a predatory pricing scheme:

> [E]ven if Morton did violate the prohibition against fixing its dealers' [maximum] prices, the only harm to Walters came from the fact that competing dealers (or Morton itself) would lower their prices to consumers if Walters did not. There is no suggestion that the lower prices would have been below cost; they would have been lawful prices. . . . Walters will not be heard to complain about having to meet lawful price competition, which antitrust laws seeks to encourage, merely because the competition may have been enabled by an antitrust violation.

Id. at 709. I know of no case involving predatory pricing under such circumstances.

69. In fact, Judge Posner suggested that the Supreme Court's *Sylvania* decision overruled *Albrecht. See Jack Walters,* 737 F.2d at 706-07. Other courts disagree. *See, e.g.,* Northwest Publications, Inc. v. Crumb, 752 F.2d 473, 475 (9th Cir. 1985) ("No cases indicate an abandonment of *Albrecht* . . . .").

view the most important contribution to antitrust policy that Judge (then Professor) Posner ever made was his observation in 1975 that all of those who had been attempting to estimate the social cost of monopoly in the United States, and who had been generally coming up with quite small numbers, were missing the boat.[70] This was so, Posner argued, because only a small portion of the social cost of monopoly lies in the differential between price and marginal cost and the resulting "deadweight loss" caused by inefficient consumer substitution.[71] The real social cost of monopoly is the dollars inefficiently spent by firms and their representatives seeking to acquire a monopoly position so that they can earn monopoly profits. At the margin, firms "competing" against one another for the right to be monopolists might spend all the anticipated monopoly profits in inefficient monopoly-creating practices, and then what the static model deems to be a mere "wealth transfer" is not a wealth transfer at all but a social loss.

The problem for antitrust policy is what to make of Judge Posner's observation. We know, of course, that not all money spent in pursuit of monopoly is spent inefficiently. Research and innovation can create monopolies just as surely as predatory pricing or lobbying the government for entry restrictions. In all likelihood, a healthy percentage of the money spent by firms seeking monopoly is spent efficiently, but a healthy percentage is not. Today many Chicago School antitrust scholars, such as Judge Easterbrook, generally iguore Judge Posner's observation. Judge Easterbrook appears to assume that since in the long run monopolies correct themselves, antitrust policy ought not be concerned about the money that firms spend in acquiring or maintaining monopoly positions.[72]

I disagree. Business decisions are almost always motivated by short-run concerns. A monopoly that lasts for a short run of, say, ten years appears to be worth much more than no monopoly at all, and profit maximizers can be expected to expend considerable resources in the acquisition of such a monopoly. As a result I find unacceptable Judge Easterbrook's position that we should presume that any action by a business, no matter how anticompetitive it might appear on its face, be given every benefit of the doubt, for in the long run competition will prevail.[73]

70. Posner, *The Social Costs of Monopoly and Regulation,* 83 J. POL. ECON. 807, 821 (1975). For a summary of the earlier research and its findings, see Hovenkamp, *Distributive Justice and the Antitrust Laws,* 51 GEO. WASH. L. REV. 1, 13 n.51 (1982).

71. Posner, *supra* note 70, at 815-21. For a brief description of how the social cost of monopoly is measured, see H. HOVENKAMP, *supra* note 19, § 1.3.

72. Easterbrook, *The Limits of Antitrust,* 63 TEX. L. REV. 1, 15-16 (1984).

73. *Id.* at 15.

In the long run we're all dead, but that doesn't mean that murder should be legal.

More importantly, Judge Posner's observation about the social cost of monopoly applies *only* to short-run concerns, for precisely the reason that in the long run all monopolies correct themselves. Firms make predictions about the likely extent or duration of a monopoly, and then decide how much they are willing to spend—whether efficiently or inefficiently—in pursuing it. This constant chasing after monopolies, some of which will come into existence and all of which will eventually disappear, almost certainly represents the greatest social cost of monopoly, and is the one with which antitrust policy ought to be most concerned.

In fact, a good case can be made that the pursuit of this particular aspect of the social cost of monopoly is within the intent of the framers of the Sherman Act. Although they knew nothing of Pareto efficiency or demand curves, they were clear that mere monopoly pricing by the innocent monopolist should not be an antitrust violation.[74] The immediate concern of Congress was not with the deadweight loss caused by monopoly, about which it knew nothing, but rather with the means by which the dominant firm seeks to gain or retain a monopoly position—i.e., monopoly conduct rather than monopoly pricing.

IV. Conclusion: Politics Counts

Finally, unlike most members of the Chicago School, I believe that antitrust policymakers must be much more explicit about how politics counts in antitrust policy.[75] In a country that respects both the right to free speech and the democratic process this entails two things. First, academics can make any criticism they please about current policy, from any perspective. We are entitled to argue that economic efficiency should be the only goal of the antitrust laws, and that it would be a good idea if Congress and the enforcement agencies would recognize that fact. For that matter, we are entitled to argue that economics ought to have nothing to do with antitrust policy. We are even entitled to be Marxists and argue for the elimination of capitalism and, presumably, of the antitrust laws.

Second, however, the fact that politics counts entails that writing law review articles and making judicial decisions are not the same thing. The judge or the enforcement agency is bound to follow the law, not

74. *See supra* note 30 and accompanying text.

75. *See* Hovenkamp, *supra* note 2, at 231-33. Kaplow argues quite convincingly that the Chicago School is quite political but refuses to admit it. Kaplow, *supra* note 11.

merely to criticize it, although he may certainly do that as well. I argued in *After Chicago* that political concerns become more prominent when models for efficiency become more complex and ambiguous, as they are in the writing of some of the Chicago School's critics.[76] The making of economic models is nothing more than a rather sophisticated form of consensus building. When a consensus becomes broad enough, the democratic process, inefficient as it may be, can be trusted to recognize it. That explains, for example, why electric utilities are regulated monopolies and grocery stores are competitive.[77] Many Chicago School models, such as the explanation model for resale price maintenance or the critique of the structure-conduct-performance paradigm, have failed to achieve such a degree of consensus. That means, at least for the time being, that they are not part of our antitrust policy.

76. Hovenkamp, *supra* note 2, at 224-26, 241-43, 284.

77. *See* Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1280 (1984).