

ESSAY IN LAW

“Reaganomics” and Antitrust Enforcement: A Jurisprudential Critique

*John J. Flynn**

*There are few judges, psychoanalysts or economists today who do not begin a consideration of their typical problems with some formula designed to cause all moral problems to disappear and to produce an issue purified for the procedure of positive empirical science. But the ideals have generally retired to hats from which later wonders will magically arise.***

I. INTRODUCTION

One cannot fully comprehend the current enforcement stance of the Department of Justice and the Federal Trade Commission without some introductory comments about the underlying philosophies of Assistant Attorney General Baxter and Chairman Miller. Both are strong proponents and devoted followers of the so-called “Chicago school of economics.” This relatively recent school of thought emphasizes one form of economic analysis, the neoclassical approach, and advocates that this approach be made the exclusive premise of antitrust enforcement.¹ It is a school of thought whose basic assumptions are under substantial attack and whose methodology for analyzing the facts of real cases is open to serious question. To paraphrase the late Fred Rodell, there are only two things wrong with the Chicago school’s philosophy: one is form, the other

* Professor of Law, University of Utah, Salt Lake City, Utah.

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** F. COHEN, *THE ETHICAL BASIS OF LEGAL CRITICISM* 3 (1959).

1. In the academic world, the leading proponents of the Chicago school’s analysis of antitrust issues have been Professor Posner, now a judge on the United States Court of Appeals for the Seventh Circuit, Professor Bork, now a judge on the United States Court of Appeals for the District of Columbia, Professor Baxter, now Assistant Attorney General of the Antitrust Division and apparently Mr. Miller, now Chairman of the Federal Trade Commission.

is substance.²

I will not rehearse all the elements of that school of thought here, nor the considerable debate and discussion which it has provoked in academic circles.³ Its major implication for antitrust is that it would limit antitrust intervention in the market to actions aimed at removing private arrangements restricting output—"output" as defined by the Chicago school's economic model. All other structure and conduct would be presumed to be efficient or subject to the self-correcting forces of competition. The discussion and the debate provoked by this theory have usefully challenged old assumptions and called attention to the potential costs of government intervention in the market. Where translated into enforcement policy, however, the philosophy generally has been a disaster for the effective and fair administration of the antitrust laws. I say disaster because the artificial and abstract conclusions of the theoretical academic debate have been translated into enforcement policy without regard for the serious and devastating questions raised about the Chicago school's approach to antitrust enforcement and its impact on the purposes of law. Furthermore, this enforcement policy has been implemented without the approval of Congress and, in many instances, without the approval of the courts. Similarly, the new philosophy (I prefer to call it a theology) has been implemented without much regard for reality, the broader goals of the law and the methodology and function of the legal process.

II. CURRENT POLICY

A. *Schools of Thought*

The Reagan Administration's economic philosophy includes three complementary dogmas. One dogma is the belief that all of our inflationary problems can be cured simply by controlling the money supply. This is the "monetarist" theology, whose followers are fond of attacking whatever the Federal Reserve Board does as

2. Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1937).

3. See A. LOWE, AN ECONOMIC KNOWLEDGE: TOWARD A SCIENCE OF POLITICAL ECONOMICS (2d ed. 1983); *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965); *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); *Antitrust Law and Economics*, 127 U. PA. L. REV. 918 (1979); *Antitrust Jurisprudence: A Symposium on the Economic, Political, and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977).

never being the right response, at the right time or with the right intensity. A second dogma is that simply by cutting taxes, without regard to other factors influencing the economy, we can achieve Nirvana because the increase of the supply of discretionary income to the consumer will fuel a massive recovery of the economy. This is the "supply-side" theology, whose proponents are fond of drawing curves on napkins. The third dogma, supported by the Antitrust Division's leadership and the Chairman of the Federal Trade Commission, asserts that a variant of the neoclassical economic model should be rigorously followed in antitrust enforcement to the exclusion of all other considerations.

These three theories represent the theology of the Chicago school, whose priesthood is fond of drawing supply and demand curves and coining slogans such as "consumer welfare" and "economic efficiency." According to the Chicago school, we should pretend that the economy is governed by consumers equal in all respects, that consumers behave rationally in all circumstances, that power and wealth distribution are equal, that large institutions either do not exist or behave like individuals and that the task of the law is to rid rational economic man of government interference in the free competitive economy. It follows from this series of assumptions that the bounty of the private economy will be maximized for the benefit of us all.

These three simplistic policies have common elements. Each is rigidly applied, each is put forth as the path of truth and each claims that other considerations are irrelevant. The monetarists seek to choke what they see as the main taproot of inflation by restricting the output of money into the economy. The supply-siders seek to restrict the income of government and the output of government services on the theory that the government is the source of all evil, and that private waste and economic power are irrelevant. The neoclassical antitrust position seeks to restrict the influence of government as a counterweight to private aggregations of power in the economy. Neoclassicists see government intervention in the market system which is designed to rectify market malfunctions, anticompetitive structure or behavior that distorts the competitive process, as an evil or as counterproductive unless it is aimed at clearly proven restrictions of output. Private intervention in the market is otherwise presumed to be "efficient" or as promoting "consumer welfare" because the economic model employed by the neoclassicists has a built-in series of assumptions and constraints which admit of no other hypothesis.

These policies have been implemented for the past three years by the Reagan Administration through its monetary, fiscal and antitrust policies. In monetary affairs, the Administration consistently has fostered a very rigid policy of tight money. In fiscal affairs, the supply-siders have been carrying the day by securing massive tax cuts with little concern for deficits, high interest rates, unemployment and lagging demand. In monetary and fiscal affairs, however, recent reversals of policy have occurred because the theology of the monetarists and the supply-siders collided with reality. That reality suggested that we were rapidly advancing into a depression as the result of high interest rates and bulging deficits. Reality also indicated that simplistic solutions vigorously followed to the exclusion of other relevant considerations simply did not work and were often counterproductive.

The Federal Reserve Board's experience with relaxing the policy of tight money exemplifies such a reversal of policy. Faced with ballooning defense and entitlement expenditures, Congress and the President executed a "midcourse correction" as well and altered the fanaticism with which supply-side economics was applied by enacting modest tax increases. Thus, while the Chicago school's theology may have some grains of truth in its view of the solution to our economic problems, the insistence that its theology be followed rigorously and excessively to the exclusion of all other insights has helped lead us to a disastrous economic situation that the Administration's "midcourse corrections" now are trying to alleviate. For the ten million unemployed and the victims of excessively high real interest rates, however, the pain still persists.

Unfortunately, a similar course reversal has not followed with regard to the dogma being applied in the area of antitrust. Instead, the leaders of the enforcement agencies have bluntly stated that they intend to apply the Chicago school theology of microeconomics to all aspects of antitrust enforcement.⁴ They apparently intend to do so despite the broader purposes of Congress in adopting the antitrust statutes, despite adverse consequences for the competitive process and despite the well-established and judicially supported precedent to the contrary. Furthermore, the antitrust enforcement agencies continue to apply their philosophy despite mounting criticism of the assumptions of their theology, the values that theology represents, the methodology by which it is implemented and the consequences for our long term economic

4. Washington Post, Aug. 13, 1982, at A1, col. 1.

vitality.

B. Criticisms of the Neoclassical Approach

Not only are the assumptions and value judgments of neoclassical antitrust theory under serious attack by several commentators⁵ and inconsistent with the values Congress intended to implement when it adopted the antitrust laws, its methodology also is suspect.⁶ The Baxter-Miller approach to antitrust issues, an approach based on views honestly held, brilliantly articulated and rigorously applied, fully embraces the abstract theoretical speculation of the neoclassical school. Mr. Baxter's views are the

result of the current intellectual imperialism of high-powered economists who (1) believe that economics can be used to uncover nearly all knowledge worth having about our social and political institutions; and (2) profess that there is little worth knowing about those institutions that cannot be expressed in quantitative terms. In this imperialist war, economics is their strategy and regression their preferred weapon.⁷

The rigid use of deductive logic, while employing the "intellectual imperialism" associated with this form of economic analysis, produces the arrogance of true believers—an arrogance that is intolerant of the views of others, disdainful of historical insights and oblivious to the broader function of law to implement the moral values of society. Its claims to be a "science" are beyond belief, and the belief that its methodology produces truth and the "correct" result in formulating antitrust policy should be ranked with similar claims made for ouija boards and astrology.

Mature science recognizes its models as working hypotheses limited by the assumptions underlying the model and by the unvarnished consequences of applying the model to brute reality. The hypothesis is only a starting point to aid in our understanding of reality. It is always subject to rejection where the assumptions and reality do not equate, and it should never be held up as a "totem," immutable and free of change.⁸ These limitations upon "scientific"

5. See authorities cited *supra* note 3.

6. See Brodley, *Limiting Conglomerate Mergers: The Need for Legislation*, 40 OHIO ST. L.J. 867 (1979); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1982); Schwartz, *On The Uses of Economics: A Review of the Antitrust Treatises*, 128 U. PA. L. REV. 244 (1979); Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1 (1980).

7. R.O. TOLLISON, *THE POLITICAL ECONOMY OF ANTITRUST* 71 (1980).

8. See J. CONANT, *MODERN SCIENCE AND MODERN MAN* (1952); T. KUHN, *THE STRUC-*

reasoning are widely accepted in the physical sciences, where there may be some justification for believing that there are fixed, ultimate, and universal rules governing the behavior of matter and celestial bodies. In economics, however, we have yet to discover similar rules, if, in fact, they do exist. Indeed, the involvement of unpredictable human behavior in matters economic makes reasonable the assumption that immutable rules are both unlikely and undesirable. I am confident that many scientists would be startled to learn that some economists claim their discipline to be a "science" that has discovered fixed and immutable rules capable of governing and quantifying the human and institutional actions that dictate what society's law should and must be. The fact that their model is constructed out of thin air with no reference to such other sources of human knowledge as psychology, history, sociology and law, seems not to matter to the true believers. It does, however, serve to demonstrate the fact that this form of economic analysis is not a "science," but instead is a religion premised upon a well-hidden series of value choices and ideological preferences that are seldom discussed and which dictate how our economic affairs *ought* to be ordered. Joan Robinson described the consequences of this state of affairs in the "science" of economics as follows:

Mathematical operations are performed upon entities that cannot be defined; calculations are made in terms of units that cannot be measured; accounting identities are mistaken for functional relationships; correlations are mistaken for causal laws; differences are identified with changes; and one-way movements in time are treated like movements to and fro in space. The complexity of models is elaborated merely for display, far and away beyond the possibility of application to reality.⁹

This religion's refusal to reexamine its fixed assumptions in light of other sources of wisdom, competing value choices and evolving reality is accompanied by an exclusive preoccupation with extensive manipulation of the fixed elements of its models. This, in turn, creates an even more elaborate structure of complex rules and jargon, which attempts to adjust reality to the dictates of the underlying dogma. Such an approach cuts off constructive dialogue

TURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); A. WHITEHEAD, THE FUNCTION OF REASON (1957).

9. V. WALSH & H. GRAM, CLASSICAL AND NEO-CLASSICAL THEORIES OF EQUILIBRIUM xi (1979).

and thwarts the struggle we all face to understand reality and advance the common good. It is startling to read the works of economists discussing human motivation which fail to mention Freud or Jung, or which postulate simplistic theories about the behavior of modern business firms without mentioning C. Wright Mills or modern organizational theory. The cloister mentality of some forms of modern economic theory reminds one of medieval medical practitioners, content to eliminate the vapors by bleeding the patient until there was no blood left, whereupon the deity—or in our case, the market—would bear responsibility for the unfortunate results. Such a “scientific” system deceptively sidetracks the debate of what public policy *ought* to be into a rigid, closed and static system of analysis where the conclusions are as predetermined as the peculiar assumptions of fact and the narrow specification of certain values. Professor Mason has spelled out the roots of that deception as follows:

“Deception occurs because the pure theories of this [individualistic neoclassical] framework are consistently misapplied in the interpretation of concrete reality” Accordingly, so-called empiricists have sought to verify their own hypotheses and to demolish contrary views by selection and manipulation of data that cannot accomplish either purpose. Such performances have been characterized as “blatantly ascientific” . . . and “an abandonment of empirical science for a numerology similar to astrology”

Economic theory has developed from exchanges in the free market for ideas. Ironically, too many of the neoclassical defenders, of which monetarists comprise the dominant sect, attempt to restrict this market by making pronouncements based on unrealistic assumptions, then asserting the irrelevance of *the irrelevance* of the assumptions. Granting the validity of such methodology would terminate the dialogue on economics and convert the “science” into a babel of competing dogmas of self-appointed prophets.¹⁰

One of the underlying assumptions of the neoclassical approach to antitrust enforcement is that proponents of government intervention in private economic affairs bear a heavy burden to demonstrate that government intervention will provide positive benefits—“positive benefits” as defined by the neoclassicists’ model. This underlying assumption is based on the ideological premises of Professor Coase.¹¹ Coase postulated that the govern-

10. See Mason, *Some Negative Thoughts on Friedman's Positive Economics*, 3 J. POST-KEYNESIAN ECON. 235 (1980).

11. Coase, *The Problems of Social Cost*, 3 J.L. & ECON. 1 (1960).

ment operates imperfectly.¹² Thus, Coase believed that in determining whether governmental intervention in the economic system is appropriate, it is never sufficient to demonstrate that, without intervention, the market would operate imperfectly. Because government also operates imperfectly, Coase asserted that it also is necessary to compare the actual workings of the market and government in the particular setting and require proof that government intervention would be better than leaving the market to its own devices.¹³ Thus, Coase shifted the burden of proof in such a way that it is not enough to show that certain practices injure the common good; one also must show that government intervention will do better than an abstraction—"the market." Why this is so and how it can be proved are not explained. Coase put forward no evidence or hard data to support his ideological assumptions because there is none. They are political beliefs, not "scientific truths." But Coase's view of governmental intervention has become a fundamental premise of the neoclassicist's economic analysis of antitrust legal issues.

The proponents of a neoclassical economic analysis of anti-trust issues make several fundamental factual assumptions as well in constructing their models: First, they assume that there are numerous sellers who sell homogeneous goods to numerous and undifferentiable buyers.¹⁴ Second, they assume that those sellers and buyers possess complete information about goods, prices, supply and demand.¹⁵ Third, they believe that market entry is costless for both sellers and buyers.¹⁶ Lastly, they assume that there are no separate or external costs to seller and buyer transactions.¹⁷ Implicit in these assumptions is the belief that the parties have the capacity to engage in exchange and the power to do so on equal terms.¹⁸

Thus, this market theory "postulates that exchange will occur

12. *Id.* at 17.

13. *Id.* at 17-19.

14. D.A. RICE, CONSUMER TRANSACTIONS 32-34 (1975).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*:

This implicit assumption is limited, however, by the assumption of numerous sellers and buyers which dictates the existence of a distribution of goods and money and requires that all sellers and buyers operate within wealth or budget constraints, and further, by the assumption that individual transactions are very small in relation to the total volume of transactions.

and continue so long as each transaction is mutually advantageous to the parties to the transaction."¹⁹ When further exchanges will serve only to benefit one party while disadvantaging the other, no further exchanges will occur and economic equilibrium will have been reached. When equilibrium is reached, "efficiency" supposedly is achieved through "an efficient or value-maximizing allocation of resources . . . by mutually advantageous exchange."²⁰

Professor Sullivan has succinctly summarized where these assumptions lead one in fashioning specific antitrust rules:

This approach . . . uses two static, structural models, the competitive market and the monopolized market. From the assumptions of neoclassical economics it establishes theoretically that when an industry is monopolized, there will be less investment, lower output and higher prices than if, other things being equal, the industry were competitive. Chicago analysis asserts that where monopoly exists resource allocations will be inefficient in the sense that total consumer satisfaction, as measured by market prices, will be less than if the market were competitive.²¹

According to Sullivan, the Chicago school attributes all non-competitive performance to cartels or monopolies.²² The noncompetitive behavior is viewed as inherently short-lived as "the constant threat of entry and the constant discipline of inter-industry competition reduce both the probability of monopoly and the longevity of cartelization."²³ Recall that under the Chicago school's approach, few entry barriers are deemed to exist, and most vertical restraints are viewed as "efficiency producing."²⁴ Furthermore, because Chicago school theory recognizes few economic activities as

19. *Id.*

20. *Id.* at 32-33.

21. Sullivan, *Economics and More Humanistic Disciplines: What Are The Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1214-16 (1977).

22. *Id.* at 1214.

23. *Id.* at 1214-15.

24. *Id.* at 1215:

[Chicago school theory] deals with vertical restraint through monopoly and cartel theory. Restraints that threaten foreclosure, such as tying, tend to be deemed expressions of the urge to discriminate and, though signifying some degree of horizontal power, are viewed as having no greater operational significance than other modes of discrimination. Resale restraints are viewed as harmful only if imposed at the instance of dealers utilizing the manufacturer to implement their own cartel. If such restraints are imposed by the manufacturer they are regarded as incapable of raising prices above a competitive level because of competition from substitute products and adjacent industries, and the threat of new entry. Since the manufacturer is assumed, theoretically, to be acting in its own self interest and subject to the discipline of the market, it is inferred that these restraints are efficiency producing.

socially harmful, government intervention in the form of antitrust enforcement can be kept to a minimum.²⁵ Needless to say, "Chicago theory makes for an attractively tidy antitrust world," requiring little of the antitrust "policeman," save keeping a sharp eye out for cartels and those violations the closed model defines as "socially harmful."²⁶

The highly abstract and artificial assumptions underlying the neoclassical model do not equate with reality. Instead, they are a series of factual hypotheses premised on well hidden ideological value choices. The hypotheses give rise to several further static rules and subrules with which neoclassical economists then test experience and reality without reference to time, power, wealth distribution, imperfections in the market place and the dynamic nature of complex relationships. For example, the neoclassicist's assumption, borrowed from an earlier time, that man is the rational maximizer of his ends in life is an assumption blithely transferred to institutions Adam Smith never dreamed of, such as the large corporation, unions and the other complex institutions of modern post-industrial society. It also is a concept applied to wage-earning individuals living in a society with few frontiers. Furthermore, that society is inundated by advertising and is subject to mounting collectivism and homogenization by mass communication. Most of the individuals living in this society are dependent on their status with a large institution for their economic well-being and long term security. They are not the yeoman farmers or individual entrepreneurs of Adam Smith's time.

In addition to such gross generalizations about consumer and institutional behavior, neoclassical thought makes several other assumptions. It assumes that all demand curves slope downwards, that all producers are rational profit maximizers, that all consumers have the necessary information to make rational choices, that there are many sellers of equal strength in the market and none has power, that the distribution of wealth is irrelevant and that consumers are sovereign and have all power in the market. No empirical evidence, however, supports these claims and common experience refutes most of them.

25. *See id.* It is necessary, however, to look out for cartels, for although cartels generally are short-lived, they may be harmful before their demise. Thus, there is some socially efficient level of investment in antitrust enforcement. Congress simply must work out an efficient matrix of deterrents, and enforcement agencies must direct their activities solely toward those violations that Chicago school theory identifies as socially harmful. *Id.*

26. *Id.*

Advocates of a neoclassical analysis of legal issues argue that the legal system should follow the judgments of their abstract model of the market. They construct that market on a series of unreal assumptions inconsistent with the assumptions engaged in by Adam Smith when he formulated his basic free market theories. Smith and the other great thinkers of the western economic tradition assumed that the choices of rational maximizers would be controlled and directed by the moral views of the society as expressed through society's laws and other institutions.²⁷ Law serves as the means by which society sorts out the conflicting claims of rational maximizers. It prohibits some choices because they are inconsistent with the moral, social or political values of society. Other choices are regulated because of their impact on the culturally or legally defined claims of other individuals. Still other choices are not regulated because a moral evaluation of the circumstances indicates that choice "ought" not be regulated—at least not regulated by law. Legislative and judicial bodies are engaged primarily in making these moral choices when they adopt and interpret laws such as the antitrust laws. They are not engaged in the enshrinement of abstract theoretical models premised on unreal factual assumptions that are mechanistically applied without regard to either the moral purposes of the law or the practical consequences of the law's application to the real affairs of the world. Were this the case, and law's function was made subservient to the dictates of an abstraction, law would no longer serve as the pragmatic bridge between principle and reality.

In addition to making unrealistic primary assumptions, neoclassicists make subsidiary assumptions declaring how economic life ought to be ordered. "The first assumption is that there is an inverse relationship between price and quantity demanded."²⁸ A second assumption defines cost as the price at which resources consumed in making the product will command in their next alternative use.²⁹ A third assumption is that resources will gravitate freely to their highest use if free exchange is permitted in a perfectly functioning market, and that when so used, resources are employed "efficiently" under a condition of scarcity and rational maximization.³⁰ All these assumptions lead to a definition of efficiency as

27. A. SMITH, *THE WEALTH OF NATIONS* 669-81 (New York 1937) (1st ed. England 1776).

28. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 4-10 (2d ed. 1977).

29. *Id.*

30. *Id.*

“exploiting economic resources in such a way that value—human satisfaction *as measured by the aggregate consumer willingness to pay for goods and services*—is maximized.”³¹ Eugene Singer notes that those following this line of analysis are confronted “with insuperable difficulties because of the incomparability . . . of the utilities of different individuals. There is no economic or objective solution for finding a ‘bliss point’ which maximizes the satisfaction of consumers.”³² Economists ignore the problem by burying it in an aggregate measure of satisfaction in their definition of “efficiency,” a device the law cannot use if we expect to achieve a reasonable and peaceful accommodation of conflicting claims in the real world.

Proponents of economic analysis of the law also ignore non-quantifiable values such as equity, fairness and justice. Instead, “efficiency” is measured by static quantifiable factors—but only those factors deemed relevant by the model. It is a way of measuring “efficiency” similar to that followed in the Vietnam War. You may remember that the yardsticks of efficiency in that war were “body counts,” tons of bombs dropped and numbers of “pacified villages.” It is a form of analysis equally applicable to Chicago school thinking as a guide to wise antitrust enforcement:

The first step is to measure whatever can be easily measured. This is okay as far as it goes. The second step is to disregard that which can't be measured or give it an arbitrary quantitative value. This is artificial and misleading. The third step is to presume that what can't be measured easily really isn't very important. This is blindness. The fourth step is to say that what can't be easily measured really doesn't exist. This is suicide.³³

This strange concept of “efficiency” is the one that proponents of neoclassical economic analysis continuously invoke when criticizing existing antitrust rules. What this concept means, why it should be the sole goal of antitrust policy and what practical consequences flow from applying it to the affairs of a world not in conformity with the assumptions of the model, are all questions of considerable magnitude.³⁴

31. *Id.* at 10 (emphasis added).

32. E. SINGER, *ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC ANALYSIS* 23 (1968).

33. Smith, *The Last Days of Cowboy Capitalism*, *ATLANTIC MONTHLY* 43, 54 (Sept. 1972).

34. Economists and legal scholars are in wide disagreement as to what this concept of “efficiency” means and what consequences would flow from its use in the real world. Nor

If "efficiency" means that antitrust actions should only be brought against those with the power and inclination to restrict output, and if that meaning is coupled with a presumption that all other private activity is "efficient," the concept gives rise to a radical limitation on antitrust policy.³⁵ For example, such a concept of "efficiency" allows Professor Bork, now Judge Bork, to define competition as "a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree."³⁶ Such a definition makes judicial decrees the sole focus of antitrust analysis and amends section 1 of the Sherman Act to read: "Every judicial decision not enhancing consumer welfare is hereby declared to be unlawful." This is the antitrust philosophy followed by the current Administration and explains why there has been a dramatic decline in antitrust enforcement. It is a philosophy that turns the law on its head and is nothing more than the expression of a form of simplistic libertarianism applied to antitrust policy.

What is involved in this kind of thinking is a series of covert tautologies. Whatever the market does is efficient and "efficiency" is whatever the market does. The law should not interfere in whatever is efficient; whatever the "market" does is efficient; the law should not, therefore, interfere with the market. One would hope that modern intellectual inquiry has grown beyond the mysticism and simplistic logic of such an approach to reality.³⁷

The application of this ideology and methodology to antitrust enforcement makes antitrust enforcement an anomaly in the law. Rather than being viewed as society's means for bridging the gap

can economists agree on why "efficiency" ought to be the sole goal of antitrust policy. See *Symposium on Efficiency as a Legal Concern*, *supra* note 3.

35. See Fox, *supra* note 6, at 1159-62.

36. R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 61 (1978).

37. Peter Wiles has commented on the strange assumptions and logic of this form of analysis as follows:

Neoclassical economics consists of a highly idiosyncratic, protective, restrictive, lock-step methodology, that, surprisingly leaves its practitioners free to believe almost (but not quite) anything. The methodology studies intensively a narrow range of facts which it mercilessly preselects. *It is an only partly scientific methodology without an attached ideology.* The passions that used to characterize the latter in the classical period, however . . . now attach themselves to the former.

Thus the plodding ox of a commonplace, understated and tolerant *Weltanschauung* has been yoked to the racehorse of an axiomatic methodology. This is a unique state of affairs in the world of the intellect. It makes of economics a very peculiar subject indeed.

Wiles, *Ideology, Methodology, and Neoclassical Economics*, 2 J. POST-KEYNESIAN ECON. 155, 160-61 (1979).

between our political, social and economic ideals and reality while regulating the exercise of undue private power in the economy, this reasoning process becomes a rationale for ignoring those ideals and for defending such power by assuming it to be the expression of the "efficient operation of the market." It makes antitrust policy the defender of the very things Congress believed the law would regulate or foster.

A further fault with this type of approach to antitrust enforcement is the methodology that is employed in the application of the model.³⁸ In philosophical terms, it is a combination of discredited forms of determinism and positivism. To one trained in philosophy it has the earmarks of Rudolph Carnap's analytical positivism or Kelsen's "pure theory of law" and appears oblivious to modern insights about the function of perception, facts, concepts, language and logic in the thinking process. To avoid the obvious criticism that the assumptions of the model do not equate with current reality, some advocates argue that it is "scientifically" inappropriate to compare reality with the assumptions of the model. They claim that the true test of the model's validity is made by comparing the *implications* of the model with the facts observed.³⁹ This is indeed a curious notion about scientific reasoning—namely, that we must test a theory's implications, but not its assumptions, against fact.⁴⁰ The theory's assumptions, however, determine what is fact for the purposes of the model. Consequently, the implications always test out in agreement because the assumptions underlying the theory dictate what the theory will or will not consider to be fact or facts worthy of consideration. Thus the model assumes that no qualitative judgments should be made about the consumer's rational choices, and that the free exercise of each of those individual choices is the value to be pursued without regard to the morality or wisdom of the choices made. Legal constraints on the values being chosen, or legal constraints on institutions that affect the values being chosen, presumably are not to be condemned in the absence of some showing that legal intervention will enhance the abstract and peculiar definitions of "efficiency" and "consumer welfare."

This form of reasoning is totally at odds with the function and

38. Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 Sw. U.L. Rev. 334 (1981).

39. See F. FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3 (M. Friedman ed. 1953).

40. See Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 621-22 (1980).

functioning of the legal system. The common law process as it has been developed and is applied is primarily an inductive and not a deductive form of reasoning. It is a paradox of its logic that one must know the facts to determine what law is relevant and what it means, while one must know the law to know what are "facts" and what they mean. Its process is called upon to analyze particular disputes in light of general principles, and to resolve those disputes peaceably within the judicial system according to our notions of procedural and substantive justice. Converting the process into one where the rigid application of deductive reasoning from a fixed model to a reality the model defines short circuits the legal process. Values broader than those recognized by the model and facts that are inconsistent with the model's assumptions are ignored or are judged to be irrelevant. Factors such as an imbalance in bargaining power, the long and short term consequences of particular practices, the maldistribution of wealth and power in society, the existence of forces undermining the "rationality" of consumers, the function of time and causation in the analysis and imperfections in the market structure cannot be quantified and therefore are not factored into the equation. Inductive reasoning is thus sacrificed on the altar of logical positivism. Moreover, nonquantifiable values are rejected as potential foundations for antitrust rules because the model purports to ignore them. Admission of such values into the analysis would destroy the symmetry and frictionless functioning of the model as well as interject discretion into decisions dealing with the real world.

Reliance on social and political values in formulating what the law "ought" to be is rejected by the antitrust analysis of the Chicago school because those values are considered irrelevant and unknowable. Thus, the proponents of that school of thought become inhabitants of a world where it is assumed that all that is worth knowing are those things the model claims can be quantified and expressed mathematically by a two-dimensional model. Hence, nonquantifiable values are ignored. This leaves the proponents of economic theorizing in antitrust free to continue using their model, while ignoring reality, congressional intent, moral values, the contribution of other disciplines and the insights of other schools of economic thought. After all, they have "truth," and it is a "truth" that always tests out because the model is both the condition for truth as well as its expression.

These observations are both practical and philosophical. They undermine the entire approach advocated by the Baxter-Miller

viewpoint. Because the assumptions underlying the model do not comport with reality, the model does not comport with reality. Because the methodology by which the model is employed is rigidly deductive and the methodology of law is not and cannot be so rigid, the model's use in lieu of legal reasoning does not conform to the functions of law. Because the model's values do not equate with those values Congress and the courts have mandated for anti-trust policy, it cannot be made the exclusive predicate of that policy.⁴¹

In my judgment, the Baxter-Miller approach to antitrust is not an approach that one should dignify by calling it "scientific," describing it as "empirical" or believing it to be the epitome of rational and productive public policy making. Instead, it is an ideology based on a theology, which any citizen obviously is free to believe. However, it is a theology that neither equates with reality nor conforms to the policy Congress has expressed in the antitrust laws. It is a theology that would radically change existing antitrust policy and the goals that many believe the antitrust laws should promote. It is a theology that poses the substantial risk of foreclosing productive inquiry about the functioning of the economy and what role law ought to play in regulating the economy by freezing that inquiry within the confines of the detached abstractions of the model.

I do not wish to be understood as criticizing or belittling another's political or religious convictions. Each system of belief usually has some amount of truth to it or some insight worthy of serious consideration. I have no doubt in the integrity or honesty of the Administration, Assistant Attorney General Baxter or Chairman Miller, nor do I doubt the sincerity with which they hold their beliefs. Money supply, marginal tax rates and the values involved in neoclassical economic analysis all are relevant in some degree to the solution of our economic problems. Also relevant, however, are equitable considerations, the realities of wealth and power distributions, the implications of changing institutional structures, the function of law as a basic tool to express our moral values, the realities of consumer behavior and a host of other variables, as well as the insights of many other academic disciplines and schools of economic thought. Trouble occurs and public policy is diverted down

41. For a similar criticism of Mr. Baxter's application of economic analysis to environmental policy in his book *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* (1974), see Roberts & Stewart, *Book Review*, 88 HARV. L. REV. 1644 (1975).

a blind alley when a single factor is declared to be the exclusive one defining what reality is and what the law ought to be. Our current economic problems are relational and multidimensional; reality is complicated and untidy; the values involved are complex and multifaceted; and solutions cannot be simplistic and sequentially applied panaceas of temporary popularity.

The Baxter-Miller theology attempts to dictate a single goal for antitrust policy and a single way to achieve that goal. It is intolerant of conflicting or alternative solutions, because it is a theology that has become an inflexible ideology. In turn, it is an ideology that cannot withstand any tampering with its fixed and rigid assumptions. As the late Arthur Leff observed about this mode of thinking: "If you think you know what's going to happen when you vary 'your' variables, you're a booby."⁴² The proponents of neoclassical theorizing who now are dictating antitrust policy are not "boobies" who tolerate varying any of the variables of their model, but they are advocates of a form of tunnel vision. Like the tunnel vision of the monetarists and the supply-side economists, neoclassical theorizing is being recognized as inadequate to deal with the tasks that the law confronts. In my judgment, neoclassical theorizing has seen its day—however brief. I agree with an observation made by the legal historian Morton Horowitz:

I have the strong feeling that the economic analysis of law has "peaked out" as the latest fad in legal scholarship and that it will soon be treated by the historians of legal thought like the writings of Lasswell and McDougal. Future legal historians will need to exercise their imaginations to figure out why so many people could have taken most of this stuff so seriously.⁴³

Were this not enough, most of the observers of the antitrust scene subscribe to the view that Congress mandated the implementation of broader social, political and economic concerns when it passed the antitrust laws. The vast majority of qualified historians and students of antitrust who have investigated the matter have concluded that Congress was concerned with values far beyond the peculiar narrow and limited values subscribed to by the proponents of economic "efficiency" when it enacted the antitrust laws.⁴⁴

42. Leff, *Some Realism About Nominalism*, 60 VA. L. REV. 451, 476 (1974).

43. Horowitz, *Law and Economics: Science, Politics*, 8 HOFSTRA L. REV. 905, 905 (1980).

44. See W.B. LETWIN, *LAW AND ECONOMIC POLICY: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 105-09* (1966); H. THORELLI, *THE FEDERAL ANTITRUST POLICY—ORGANIZATION OF AN AMERICAN TRADITION* 225-32 (1954); Pitofsky, *The Political Content of Antitrust*, 127

Consequently, even if one were to subscribe to the neoclassicist's approach to antitrust policy, and the jurisprudential assumption that the policy could be implemented sensibly, one still would be confronted with the reality that Congress has mandated otherwise. Congress mandated that the antitrust laws be used to implement political and social values as well as economic ones and that those laws do so by protecting competition as a process. Professor Eleanor Fox has succinctly captured this criticism and its implications as follows:

As history teaches, "efficiency" is not the reason for antitrust. Indeed, those who value efficiency more than competition opposed the antitrust bills on grounds that they would constrain some activity that might save costs for a producer and forbid some activity that does not interfere with optimal allocation of resources. Rather than standing for efficiency, the American antitrust laws stand against private power. Distrust of power is the one central and common ground that over time has unified support for antitrust statutes. Interests of consumers have been a recurrent concern because consumers have been perceived as victims of the abuse of too much power. Interests of entrepreneurs and small business have been a recurrent concern because independent entrepreneurs have been seen as the heart and lifeblood of American free enterprise, and freedom of economic activity and opportunity has been thought central to the preservation of the American free enterprise system.

. . . .

One overarching idea has unified the 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 impersonable forces of competition, rather than public or private power, determine market behavior and outcomes power is by definition disbursed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair. Some measure of productive and allocated efficiency is a byproduct, because competition tends to stimulate low cost production and allocate resources more responsively than a visible public or private hand.⁴⁵

U. PA. L. REV. 1051, 1060-65 (1979); Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076, 1076-78 (1979).

45. See Fox, *supra* note 6, at 1152-54. Professor Fox reaches a position similar to one that I have stated as follows:

The issue is a qualitative one of measuring the impact of conduct on the ideal of a competitive process in the context of the particular industry or trade and in light of the political, social and economic purposes for relying on the competitive process as the rule of trade. The issue is not a quantitative one of determining how much com-

In an attempt to achieve "economic efficiency," however, the Chicago school states the goal of antitrust as the preservation of "competition" in a general quantitative sense. Therefore, unless a particular agreement or unilateral act restrains competition in the broad quantitative sense, there is no violation of the law. The law is not seen as a guarantee to each individual in the economy that he or she can operate a business or engage in consumer activities under a process of competition. Instead, the Chicago school views the law's function as only the elimination of output-restricting activity, particularly where such activity is mandated by government regulation. Private displacement of the competitive process in individual cases is not a concern unless that displacement restricts output generally. For example, a conspiracy to exclude an individual

petition is effected or destroyed by the practice, although power relevant market and quantitative effect may aid in determining the qualitative impact in some limited circumstances.

The basic duty imposed upon those engaged in trade or commerce is to avoid displacing the competitive process by collaborative action in violation of Section 1 or displacing the competitive process by a unilateral or conspiratorial exercise or possession of monopoly power or attempt to monopolize in violation of Section 2 of the Sherman Act.

A corresponding right to be protected from the risks of a displacement of the competitive process is vested in competitors and consumers injured in their business or property by an unreasonable displacement of the competitive process in violation of Sections 1 and 2 of the Sherman Act under Section 4 of the Clayton Act.

Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*, 49 ANTITRUST L.J. 1593, 1623-27 (1982) [hereinafter referred to as Flynn, *Rethinking Sherman Act Analysis*].

In an article entitled *The Function and Dysfunction of Per Se Rules in Vertical Market Restraints*, 58 WASH. U.L.Q. 767 (1980), I put the matter this way:

The general purpose of the antitrust laws is to protect and maintain the competitive process from unreasonable displacement by contracts, combinations, and conspiracies or by the unreasonable exercise of possession of monopoly power. This general purpose is designed to serve social, political and economic goals. Even those who believe that the goals of the law are purely "economic" cannot escape moral, political and social considerations in making their choice, giving it meaning, or applying the choice to factual controversies. The policies, however, behind choosing the competitive process as our fundamental method for governing economic activity in the private sphere always have been viewed as achieving goals broader than a materialistic measure of economic "efficiency." Those goals are limited not only to the narrowly defined and peculiar concepts of maximization of "efficiency" and "consumer welfare," but also include, inter alia, the goals of insuring that individual entrepreneurs succeed or fail on the competitive merits and not by the dictates of conspiracies of others who unreasonably displace the competitive process, maximizing intelligent consumer choice, disbursing undue economic power, and subjecting private power to the discipline of the competitive process in place of affirmative government regulation.

Flynn, *The Function and Dysfunction of Per Se Rules in Vertical Market Restraints*, 58 WASH. U.L.Q. 767, 776 (1980) [hereinafter cited as Flynn, *Vertical Market Restraints*] (footnotes omitted).

entrepreneur from the market is not actionable under this line of thinking unless one also can prove that competition in the entire market is destroyed or injured by the conduct.⁴⁶

The Sherman Act,⁴⁷ the Clayton Act⁴⁸ and the Robinson-Patman Act,⁴⁹ however, guarantee individual, as well as collective rights. The statutory language and legislative history of those acts make it apparent that Congress intended each statute to be interpreted as a guarantee *to each individual* that his or her rights in the economic sphere would be determined by the competitive process. The fact that a particular restraint does not injure competition generally does not preclude the use of antitrust policy to rectify a denial of the competitive process to a single individual,⁵⁰ for the laws are designed to judge the qualitative effect of anticompetitive conduct as well as its quantitative effect.⁵¹ Nor does the use of the legal process to achieve such goals necessarily conflict with the efficiency of the economic system. Protection of the former does not necessarily deny or impede the latter.

Protection of the competitive process serves goals broader than the narrow neoclassical definitions of "efficiency" and "consumer welfare."⁵² That protection furthers innovation, individual economic freedom, the contribution of both consumer's and distributor's competitive efforts to society's economic performance, the protection of economic and social freedom from undue exercises of power and the dispersion of economic power in our society among all levels of the economy.

The Baxter-Miller approach does not explicitly protect these values and goals. Rather, seller decisions are seen as surrogates for all of them. Their approach would allow most of them to fall by the wayside as a result of benign neglect. The Baxter-Miller ap-

46. Most decisions have not taken this "entire market" approach but instead generally have held that conspiracies aimed at displacing the competitive process in ways that fix prices or exclude a competitor are per se unlawful. *See, e.g., Arizona v. Maricopa County*, 102 S.Ct. 2466 (1982); *United States v. Topco Assoc.*, 405 U.S. 596 (1972); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

47. Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)).

48. Ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1976), 29 U.S.C. §§ 8-9 (1976)).

49. Ch. 592, 49 Stat. 1526 (1936) (current version at 15 U.S.C. §§ 13, 13a, 13b, 21a (1976)).

50. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959).

51. Flynn, *Rethinking Sherman Act Analysis*, *supra* note 45.

52. The narrowness of neoclassical economic theory illustrates the underlying reason why many courts and antitrust commentators disagree with the Administration's antitrust enforcement philosophy.

proach would require an antitrust plaintiff to show some sort of injury to competition generally before denial of the competitive process individually could be remedied, bringing us closer to "a nation of clerks," which Justice Douglas maintained "is anathema to the American antitrust dream."⁵³

The approach I advocate not only would permit courts to limit output-restricting activity that injures competition in general, but also would permit the courts to implement the values Congress sought to protect when it enacted the antitrust laws. Both the competitive process and competition in general would be protected, as would all of the values implicit in the antitrust laws.

III. SOME IMPLICATIONS FOR CURRENT ISSUES OF ENFORCEMENT POLICY

A. *Vertical Restraints*

Under the current Administration's policy, most vertical market restraints, restricting the freedom of traders and consumers to maximize their "utilities," are seen as presumptively lawful.⁵⁴ In presuming the legality of vertical price-fixing, vertical territorial restraints, vertical customer restraints and most forms of price discrimination, the Baxter-Miller approach goes too far. Exclusive weight is given to assumptions about the rationality of sellers while virtually ignoring the rationality of buyers and consumers entangled in a vertical restraint. Time and power are ignored in the

53. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 543 (1973) (Douglas, J., dissenting).

54. *Washington Post*, *supra* note 4; *see also* Flynn, *Vertical Market Restraints*, *supra* note 45, at 772-73:

If one begins with the proposition that the goal of antitrust policy is to maximize "consumer welfare" as defined by the fixed models of one brand of economic theorizing and the imaginary workings of a perfectly competitive market, which only permit a minor premise on factual assumptions in accord with the model's major premise but not necessarily in accord with unvarnished reality, the operations of deductive logic dictate the conclusion: Only those restraints that quantitatively displace the "market" and impair "consumer welfare" are unlawful under the antitrust laws because all others are either promoting "consumer welfare" or will be efficiently remedied by the functioning of the perfectly competitive market It is a conclusion, however, we cannot claim as true or false or right or wrong because the conclusion is assumed in the predicate. It is the logical fallacy of affirming the consequent. If the factual and legal postulates of the syllogism are either not true or not true in all circumstances, then the worth of the conclusion is worthless or nearly so. If the facts of the dispute do not comport with assumptions of fact and value of the model governing the decision of the case, then the decision is also misleading.

analysis. Market imperfections and the countervailing social and political values that are inevitably involved in assessing the dispute and in implementing the values of the law also are ignored. The possibility that those imposing the restraints are acting in ways contrary to the assumptions of the neoclassical model, or that the law ought to be concerned with goals and values not allowed by the model, are possibilities that the theology cannot tolerate lest the entire edifice crumble by varying the model's "variables."⁵⁵

Some explanation must be found, however, as to why and how sellers in a perfectly competitive market would impose those restraints. It must be an explanation that conforms with the efficiency and consumer welfare goals of the neoclassical theology. Thus, out of the fertile imagination of the neoclassical theoreticians has been born the "free rider," a villain who denies consumers any repair services, warranty work, fancy showrooms and the other imaginary "benefits" of non-price competition. "Free riders" are assumed to be a potential evil justifying every vertical restraint. The ill-defined concept of "free rider" apparently is attached to buyers or competitors not abiding by any goal a seller seeks to achieve by a vertical restraint. The neoclassical theology condemns "free riders" as a plague and denounces their rights and rationalities as beyond notice by the law. While there may be particular circumstances where it is wise or essential to sacrifice buyer and consumer freedom so that the public interest can be protected, those circumstances certainly do not justify a presumption of legality for all vertical restraints nor do they justify abandonment of any antitrust control of the restraint.

The neoclassical theoretician's method of decisionmaking, which postulates the existence of such a mythical villain, can do wonders for an ideology in trouble. The hypothetical straw man can be used to justify the ideology's preference for protecting private power, existing privileges and the economic status quo while warding off the ultimate enemy of government intervention. Hypotheticals and ruminations about imaginary "free riders" are substituted for the law's complex, empirical and realistic analysis of the facts and circumstances unique to the case, in light of the multiplicity of goals that Congress mandated be implemented by the antitrust laws.

My view of the antitrust laws begins with a broader set of

55. Unjustifiable vertical restraints can only be explained by the assumption that there must be horizontal collusion lurking in the vicinity.

goals and values that the competitive process is meant to achieve. Thus, I reach different results with regard to vertical price-fixing, vertical territorial and customer restraints and the wisdom of restraining by law some forms of price discrimination. With regard to vertical price-fixing, it is my view that vertical price-fixing ought to be presumptively—per se—unlawful. The Baxter-Miller approach, on the other hand, cannot reach that conclusion because it assumes the existence of a perfectly competitive market absent monopolies or cartels despite the facts of a particular case. It further assumes that, in the absence of horizontal collusion, if vertical price-fixing is imposed by a rational seller, the seller's decision must have been dictated by a market operating under the inexorable forces of perfect competition. No other explanation is possible because the constraints of the model do not permit it, reality to the contrary notwithstanding.

Mr. Baxter believes that vertical price-fixing should not be declared per se unlawful.⁵⁶ He would permit, for example, manufacturers of technologically complex products to dictate resale prices despite the prohibition of such a practice by Congress implied by its removal of the fair trade exemption.⁵⁷ Mr. Baxter would do so in the belief that a manufacturer of technologically complex products would only impose the restraint where it was necessary to prevent "free riders."⁵⁸ The "free riders" imagined in this circumstance are distributors that would cut prices and not provide service for the manufacturer's products. The fact that consumers or retailers exercising their rational judgment may wish to have the freedom to purchase from such sellers is given no importance. Instead, the seller's decision would be imposed on buyers and retailers on the assumption that the seller is subject to perfectly competitive market pressures, and that, therefore, the seller's judgment is a reliable surrogate for the public interest in these circumstances.

Mr. Miller apparently holds similar views. He has stated that vertical price-fixing—like vertical customer and territorial restraints—ought to be measured by a "rule of reason" rather than a test of per se illegality.⁵⁹ Presumably, Mr. Miller is willing to ac-

56. A position being asserted by the Antitrust Division as amicus in *Monsanto Corp. v. Spray-Rite Service Corp.*, 684 F.2d 1226 (7th Cir. 1982), cert. granted, 103 S.Ct. 1249 (1983); see also *Washington Post*, supra note 4.

57. *Washington Post*, supra note 4.

58. *Id.*

59. *Russell Stover Candies, Inc.*, 43 ANTITRUST & TRADE REG. REP. (BNA) 135, 164

cept the practical consequences of applying a "rule of reason" to vertical price-fixing. Under his approach, vertical price-fixing would be per se lawful despite its weak economic justifications, Supreme Court rejection of the argument for it in the past⁶⁰ and congressional action mandating otherwise.⁶¹

The underlying paternalism of assuming that seller rationality is a sufficient surrogate for the collective rationality of all decisionmakers in the marketplace does not justify giving sellers discretion to impose their view of the world on other rational maximizers. Moreover, Mr. Baxter's use of imaginary "free riders" to justify a restraint on price is wholly unnecessary, even in the circumstances he postulates. Sellers simply can restrict the distribution of their products to buyers whom they are certain will provide point of sale services. So long as there is no conspiracy with others, a seller remains free to choose those with whom he will deal. In this way, the objective of the seller in insuring that significant point of sale services are provided can be achieved without unilaterally repudiating Supreme Court precedent, undermining the congressional mandate, fostering a rebirth of resale price maintenance and generally undermining the goal of protecting the right of all entrepreneurs and consumers to contribute their competitive effort to the general welfare.

In the area of vertical customer and territorial restraints, the United States Supreme Court adopted the neoclassical position in *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*⁶² The Court's approach in *Sylvania* has created considerable controversy.⁶³ In my view, *Sylvania* adopted too broad a standard of legality for vertical customer and territorial restraints, just as the *Schwinn*⁶⁴ case it overruled had adopted too rigid a standard of per se illegality prohibiting these practices. Moreover, the *Sylvania* Court failed to

(July 1, 1982) (Miller, Comm'r, dissenting).

60. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

61. *See, e.g.*, Consumer Goods Pricing Act of 1975, S. REP. NO. 94-466, 94th Cong., 1st Sess. 1, 3 (1975), *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1569 (repealing two acts that had allowed states to recognize manufacturers' resale price-fixing schemes in their fair trade laws). The experience with fair trade inflating most resale prices and the increasing evidence that non-price competition tends to generate inflation deserve no consideration. *See* W.D. SLAWSEN, *THE NEW INFLATION: THE COLLAPSE OF FREE MARKETS* (1981).

62. 433 U.S. 36 (1977).

63. *See, e.g.*, Fox, *supra* note 6, at 1145 n.4; Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979, 987 (1977); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977).

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

establish a rational test for deciding the legality of vertical customer and territorial restraints in particular cases. Instead, the Court simply suggested that an undefined "rule of reason" approach should be applied to those vertical restraints—a state of affairs practicing lawyers know well has resulted in making such practices *per se* lawful.⁶⁵

The *Sylvania* Court's approach is wholly unrealistic in its assumption that perfectly competitive markets do in fact exist at all times and in all circumstances. In many cases, vertical restraints are an expression of market power, not an expression of a competitive process at work. In such circumstances, the market is not one governed by consumer sovereignty, but instead is a market managed by powerful firms operating in concentrated industries or is a market distorted by an imbalance of bargaining power. In such cases, it should not be presumed that manufacturers institute vertical restrictions to increase efficiency, lower marginal costs, increase profits and promote point of sale services and consumer welfare. Rather, vertical restraints should be presumed to be means for promoting artificial product differentiation based on advertising and promotional gimmickry or the taking advantage by unfair means of the weaker party to the bargaining.⁶⁶ Those restraints also should be presumed to be an exercise in market power that causes consumer prices to rise, thereby stimulating interbrand non-price competition, which insulates manufacturers from intrabrand and interbrand price competition and denies the competitive process to the victim of the restraint.

In these circumstances, vertical customer and territorial restraints may well be devices for promoting the seller's self-interested pursuit of noncompetitive profits and freedom from competition, rather than promotion of the overall public interest. Consequently, vertical non-price restraints, as well as vertical price-fixing, arguably should be presumed to be unlawful. As I shall explain later, this is a position I agree with, but it requires a

65. 433 U.S. at 47. The *Sylvania* Court's "rule of reason" approach has caused former Federal Trade Commission member Robert Pitofsky to state:

There is no existing analytical framework for applying a rule of reason generally, and certainly none for applying it to vertical non-price restraints. The technique of the *Sylvania* majority—quoting a long list of factors without any indication of priority or weight to be accorded each factor—unfortunately is standard operating procedure. Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 34 (1978).

66. See T. RIDDEL, S. STAMUS & J. SHACKELFORD, *ECONOMICS: A TOOL FOR UNDERSTANDING SOCIETY* 175-95 (1979).

modification of the traditional views about the per se and rule of reason distinctions to take account of circumstances where some vertical restraints may be necessary to protect or promote the public interest.

B. The Robinson-Patman Act

The Baxter-Miller approach to the Robinson-Patman Act⁶⁷ assumes that rational sellers will only engage in price discrimination for efficiency and consumer welfare objectives. This position also is premised on the artificial and unrealistic assumption that markets are perfectly competitive. If the market were perfectly competitive, a seller could not engage in price discrimination for anticompetitive reasons because other sellers would provide goods or services to retailers or wholesalers discriminated against on a more attractive basis. A perfectly competitive market also would punish irrational price discrimination by sellers because it would drive away the seller's customers. Because the market would correct itself, Baxter and Miller conclude that the law should not interfere in the market's natural regulatory process (in the absence of monopoly) with regard to price discrimination.

The supporters of the Robinson-Patman Act take an equally religious viewpoint about its significance. The supporters of the Act see it as a bastion for small business. They view it as the only defense for small business from the predatory and otherwise arrogant practices of large businesses and powerful suppliers who dictate to small businesses to whom they may sell, where they may sell and at what price they may sell. Many in the small business community go so far as to say the Robinson-Patman Act is the only means for insuring their survival and, incidently, the "American way of life." Thus, when a small retailer is competing with a chain store and the chain store can obtain comparable goods at a cheaper price and sells them at a lower price, the small retailer believes he is the victim of undue discrimination which will ultimately destroy him.

In some cases, the small retailer is correct. In others, the lower price to the large retailer may be the expression of the bona fide working of the competitive process, rather than an indication that the process is being unreasonably subverted. Nevertheless, the small retailer believes that this kind of discrimination, with the po-

67. 15 U.S.C. §§ 12-27 (1976); 29 U.S.C. §§ 8-9 (1976).

tential of destroying his business, whatever its relation to the competitive process, is unfair and unjust. Clearly, that also was the belief of the Congress that adopted the Act.⁶⁸ The continued congressional support for the Act rests on the Act's appeal to equity and fairness, even where there is an obvious sacrifice of purely economic benefits in particular cases. Consequently, small business groups and their supporters in Congress bring a religious fervor to the discussion of the wisdom and enforceability of the Robinson-Patman Act that is equaled only by the religious fervor of neoclassical economic theorists in attacking the Act.

I neither condemn nor praise the Act without reservation. To the Chicago school purists, I suggest that price discrimination that undermines the competitive process does, in fact, take place. In many of the industries with which I have been involved, particularly in the marketing of petroleum products, widespread and unjustified price discrimination takes place. This is particularly the case with regard to dual distributors.⁶⁹ For example, instances of powerful distributors who can force locked-in independent retailers to pump gasoline at a loss obviously are the product of localized power in the distribution of gasoline products. Most retailers have no choice but to deal with these suppliers because there is no other source of supply or they are locked into the supplier by lease or franchise agreements. Furthermore, this practice is not likely to be cured because the entry of other distributors into the market is unlikely, given the nature of the business. Thus, dealers are locked into their stations in ways that make unjustified price discrimination possible, the abstractions of the model to the contrary notwithstanding.

I have had several reports of similar practices elsewhere in the country from attorneys familiar with gasoline marketing. Moreover, other forms of unjustified and anticompetitive price discrimination regularly take place in industries characterized by an imbalance of bargaining strength. Those practices usually are the product of powerful buyers or sellers demanding or enforcing price differentials for the purpose of disciplining competitors, exploiting vulnerable retailers or excluding retailers or competitors from the

68. See Fox, *supra* note 6, at 1159-62.

69. Dual distributors are distributors who supply products to retailers and engage in retailing themselves. I know of several instances where refiners selling directly at retail through wholly owned outlets price their retail outlet product at or below the wholesale price charged independent distributors. I have investigated such instances and can find no cost savings justifying such a blatant form of discrimination.

market.⁷⁰

In the rarefied world of abstract economic theorizing, these kinds of practices simply cannot happen. They cannot happen because the model assumes that the market is perfectly competitive and that sellers are powerless—in the absence of a monopoly—to deviate from the rational demands of the market with regard to their pricing practices. Regional market power, the power obtained by successful product differentiation, an imbalance of bargaining power, advertising and other factors that exist in the real world simply are ignored. If one begins with the unreal and abstract assumptions of the neoclassical model, then one must inevitably conclude that anticompetitive price discrimination does not exist in the absence of a monopoly, or that if it does exist, it is a form of competitive activity in response to rational market factors.

If, on the other hand, one has some experience in the real world, it does not take long to appreciate the fact that market imperfections, market power, imbalances in bargaining power, irrational product differentiation and other factors, which undermine any possibility that reality will conform to the assumptions of the neoclassical model, make anticompetitive price discrimination a not uncommon event. Price discrimination in many instances cannot be legitimately judged by the abstract model; instead, it must be judged in light of the realities of the particular industry and the circumstances involved in a particular case.

To those who would defend the Robinson-Patman Act without qualification, I would say that there is a range of price discrimination, which is a reflection of the competitive process at work. Some forms of legitimate price discrimination are recognized by the

70. Recently, the Fifth Circuit was confronted with a case involving price discrimination in the national corn syrup market. See *Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc.*, 679 F.2d 516 (5th Cir. 1982). *Dimmitt* was identical to the 1916 price discrimination case of *United States v. Corn Products Refining Co.*, 234 F. 964 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1919). In *Dimmitt*, CPC, the successor corporation to Corn Products, was again charged with using low prices in one market supported by high prices in another market to drive out competitors. 679 F.2d at 518-19. The Fifth Circuit held that the action could not be maintained as an unlawful monopolization case under section 2 of the Sherman Act because CPC did not have a sufficient market share for a monopolization case. *Id.* at 529-31. The case, however, was remanded for further trial on the question of the legality of the practices of CPC under an attempt-to-monopolize theory and on a price discrimination theory. For examples of additional price discrimination actions, see *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1983); *Borden, Inc. (Realemon)*, [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,194 (1976).

provisos to section 2 of the Robinson-Patman Act.⁷¹ Those sections permit a difference in price, which reflects differences in the cost of a manufacturer's sale or delivery that result from the differing methods or quantities in which the commodities are sold to purchasers. Sections 2A and 2B recognize that a difference in price may be justified if it is necessary to meet, in good faith, an equally low price of a competitor. Some of the complaints of small business about price discrimination are reflections of changes in marketing methods that benefit the public by lowering costs, but the price differences do not technically meet the Act's requirements of a good faith response to a competitor's low price. The original price discrimination law was aimed at practices outlawed on monopolization grounds in *Standard Oil v. United States*,⁷² and *United States v. American Tobacco Co.*⁷³ In those cases, geographic price discrimination was engaged in by very powerful sellers with near-monopoly control of the market; hence, it could be attacked under section 2 of the Sherman Act. Section 2 of the original Clayton Act was adopted to prevent such predatory pricing before a seller had achieved full-blown monopoly power.

It is widely acknowledged that the 1936 amendments to section 2 of the Clayton Act⁷⁴ were aimed at the price and promotional concessions that chain stores obtained by virtue of their buying power. The 1936 amendments also attempted to preserve the existence of independent brokers in the food and apparel industries by protecting them from the development of chain store buying and selling. Thus, the Robinson-Patman Act amendments generally are viewed by most objective observers as running contrary from the beginning in some ways to the basic policies of the Sherman Act; legitimate price competition, as well as illegitimate price competition, was intentionally curbed by the Congress that adopted the Robinson-Patman Act.

Many objective viewers also have maintained that the Act encourages price rigidity by requiring sellers to extend price cuts to all buyers if they extend them to a few. Because of Robinson-Patman Act compliance difficulties, sellers in concentrated markets may not be willing to engage in price competition when attempting to take part of the market away from a competitor. New entrants

71. See 15 U.S.C. §§ 13a, 13b (1976).

72. 221 U.S. 1, 42-43 (1911).

73. 221 U.S. 106, 160-61 (1911).

74. Robinson-Patman Act, ch. 592, 49 Stat. 1528 (1936) (currently codified at 15 U.S.C. §§ 13a, 13b (1976)).

into a market who attempt to overcome existing trade relationships by way of price concessions also may find that their entry is made more difficult and risky by the Act. The prospective entrant may be unable to cut prices to a particular buyer in order to enter the market because of risks that the conduct may violate the Robinson-Patman Act.⁷⁵ While some of these observations obviously are opinions and speculative, they do identify risks, which should concern us. Empirical investigation should be undertaken to determine whether these risks are real or imaginary, and whether the more appropriate response would be a program of deconcentrating, where possible, those affected industries.

These observations also imply that the basic goals of the Robinson-Patman Act may require the sacrifice of the competitive process to achieve equality of opportunity and fairness. Clearly, equalizing opportunity and fairness were the congressional purposes behind the 1936 amendments to the original Act. Those currently charged with enforcing the statute are bound to carry out those purposes. It must be recognized, however, that in some cases, pursuit of the equitable goals of the Robinson-Patman Act may collide with the competitive concerns of the Sherman Act, and deciding which concern should be promoted in a particular case is not an obvious or easy task.

Proponents and opponents of the Robinson-Patman Act also must face another reality: The Robinson-Patman Act, as a practical matter, is inapplicable to a great many cases because the courts have severely restricted the applicability of the Act in a number of ways. For example, the courts have interpreted the commerce provision of the Act as requiring one or more of the discriminatory sales to be across state lines.⁷⁶ Price discrimination that takes place wholly within the borders of a single state is, therefore, beyond the reach of the statute. The statute also applies only to

75. The Act also may generate other risks to competition. A study found that: The Robinson-Patman Act has impaired competition and the development of new methods of distribution in numerous other respects: by discouraging sellers from passing on cost savings to buyers, it has impaired experimentation with possibly more efficient methods of distribution integrating wholesale and retail functions; by requiring proportionally equal treatment in certain promotional practices, it has discouraged experimentation with price-cutting methods which are equivalent to desirable types of price differentials; by prohibiting sellers from paying brokerage to customers or their agents, it has erected an artificial protective barrier around independent brokers and inhibited integration of brokerage functions. President Johnson's Task Force Report on Antitrust Policy, [415 Supp.] TRADE REG. REP. (CCH) (1969).

76. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200-01 (1974).

goods or commodities,⁷⁷ not to services. Furthermore, in *J. Truett Payne Co. v. Chrysler Motors Corp.*,⁷⁸ the Supreme Court held that the proof of damage requirement in private suits under the statute means that a plaintiff must make some showing of actual injury directly and clearly attributable to the price difference.⁷⁹ Prior decisions had allowed a plaintiff to rely on the amount of the price difference as the measure of damage.⁸⁰ The *Truett Payne* Court overruled this method of proving damages and imposed a standard of proof that probably is impossible to meet in many cases because the plaintiff will have to show the amount of injury directly attributable to the price difference, rather than simply assuming that the price difference equals the damage suffered.

Section 2(f) of the Act, prohibiting a buyer from inducing a discrimination in price, also has been limited by a recent decision. In *Great Atlantic & Pacific Tea Co. v. FTC.*,⁸¹ the Court held that the defense of "meeting competition" was available in a section 2(f) action. In that case, a powerful buyer had induced the seller, Borden Milk Company, to give the buyer a lower price in order to meet competition from another seller of dairy products. The Court held that because the "meeting competition" defense was available to the seller, who had been induced to give the discriminatory price to the buyer, the same defense was therefore available to the buyer.⁸² While I do not quarrel with the Court's analysis or result in *Great Atlantic*, it is a serious limitation on the effectiveness of section 2(f) in restricting powerful buyers from using fair or foul means to induce favorable price discrimination.

These practical limitations on the applicability of the Robinson-Patman Act make it very difficult to maintain a successful price discrimination case beyond the motion stage, let alone have it presented to a jury. In the case of private litigation, the feasibility of bringing a case is further limited by the cost of modern antitrust litigation. A small businessman victimized by illegal price discrimination must not only overcome the technical legal hurdles of the Act's commerce requirement, for example, but also must have a

77. See 15 U.S.C. §§ 13, 13a, 13b, 21a (1976).

78. 451 U.S. 557 (1981).

79. *Id.* at 562.

80. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251 (1946); *Eastman Kodak v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

81. 440 U.S. 69 (1979).

82. *Id.* at 81.

substantial amount of money in order to finance this highly complex litigation. No sensible attorney would consider taking any but the most blatant and clear-cut case unless many thousand dollars were paid in advance to finance the litigation.

Many of the same practical problems face the enforcement agencies. It is not surprising that the significant decline in Robinson-Patman Act private litigation in the last decade has been paralleled by a similar decline in the number of public enforcement actions by the federal agencies. The Act continues to have some vitality, however, because many businesses that wish to abide by the law or are fearful of expensive and time-consuming litigation, make substantial internal efforts to comply with the Act in their general marketing practices. Given the current Administration's obvious unwillingness to enforce the statute, however, it seems likely that many firms will simply abandon their compliance efforts. Consequently, I expect to see substantial price discrimination to begin taking place because the statute has been reduced to a paper tiger that no one need fear.

Whatever one might think about the merits and practicalities of the Robinson-Patman Act, however, it is clear that in passing the statute, Congress intended to protect small business from the power and influence of large businesses. Congress made the choice despite risks to the competitive process. Thus, the current lack of enforcement by the Justice Department and the FTC conflicts with the expressed congressional intent that the Act be enforced and that it be enforced in a manner that promotes equity and equality of opportunity in the marketplace. If enforcement officials do not like the statute and believe it should be substantially altered or amended, their responsibility is to ask Congress to adopt their views. The rejection by enforcement officials of their responsibility to enforce the statute clearly is a usurpation of legislative functions. It is not their function to practice benign neglect and thereby unilaterally repeal statutes that Congress has adopted. If it is a matter of conscience with them, they should seriously consider resigning their office because they no longer are following their oaths of office.

IV. RECOMMENDATIONS FOR ENFORCEMENT OF THE ANTITRUST LAWS

An unwise enforcement policy may do just as much damage as an outright refusal to follow the clear mandates of Congress and the courts. Some of our current economic difficulties probably are

attributable to the failure to enforce wisely and adequately the antitrust laws during the past two or three decades. Consequently, it is not enough to criticize the philosophical underpinnings of the Baxter-Miller approach to antitrust enforcement, nor is it enough simply to take ideological issue with that approach and point out its obvious shortcomings with regard to the public interest. It is also insufficient to reveal the arrogance of enforcement officials who either assume that they have the unilateral authority to repeal statutes adopted by Congress or that they can refuse to enforce the policies that the courts and Congress have declared to be goals of the antitrust laws. Serious as these questions are, there are substantial difficulties and policy questions with regard to how the antitrust laws should be enforced in late twentieth century America.

If one surveys the wreckage of our economic landscape, it is apparent that many of the major industries that are in difficulty have been characterized by substantial economic concentration during the post-World War II period. For the past twenty years, committees of Congress, most notably the House and Senate Antitrust Subcommittees, have engaged in extensive surveys of economic concentration in such industries as automobile manufacturing and steel. Those hearings before the antitrust subcommittees indicated that the levels of economic concentration in the auto and steel industries, for example, were much above the levels necessary for economies of scale. Warnings were put forth that the absence of competition in those industries was dangerous and ultimately could lead to adverse consequences for the public interest.

We currently are paying for our past failure to heed those warnings and maintain a competitive market structure in our basic automobile and steel industries. American companies have been allowed to become inefficient, inflexible and sloppy; they were content with the status quo and incapable of rapidly responding to changing circumstances and a new economic environment.⁸³ Large shares of the American market were seized by smaller and more competitive foreign producers, particularly producers in Japan, because American companies were not responsive to consumer demand. Instead, American companies operating in noncompetitive industries were accustomed to manipulating and controlling that demand while producing inferior products. While one may argue that the forces of competition ultimately prevailed in these in-

83. See *Battered by Imports, Car Makers Get Serious About Raising Quality*, Wall St. J., Aug. 26, 1982, at 1, col. 6.

stances, the severe economic damage done to our economy and to those regions of the country now suffering the consequences was a disproportionate and unnecessary price to pay. The intervention of the legal system some ten to twenty years ago may well have helped to avoid or at least have minimized the economic and human costs we now are paying.

I believe one could also make a strong case for the proposition that the changes in the law that have been occurring at the urging of the neoclassical ideologists are contributing to inflation and bringing about the demise of small businesses in record numbers. While not the exclusive cause of either of these problems, the current policy of allowing vertical restraints, including vertical price restraints, will shift even more the emphasis in the marketplace from one of competition on price to one of competition on non-price factors. Although not all non-price competition is evil, much of it contributes to higher consumer costs and to attempts to manipulate consumer demand by advertising, artificial product differentiation and other gimmicks. Price competition, on the other hand, can sort out worthwhile non-price competition from that which is not worthwhile.

Adverse social effects of current enforcement policy also may be taking place. Small business finds itself defenseless against the undue exercise of power in the economy. The innovation and competitive contributions of small business, often considered to be the primary source of innovation and competition in the economy, are subjected to the dictates of powerful buyers and sellers. Those powerful buyers and sellers often tell small business where they may sell, to whom they may sell, at what price they may sell and sometimes whether they may remain in business at all. Where not clearly justified, the exercise of such power interfering with individual economic freedom is just as objectionable as the unjustified exercise of government power interfering with individual political freedom. The refusal to interject antitrust policy into the situation means that the small businesses have no counterweight to the exercise of undue power by the economically powerful. Thus, we sacrifice the competitive contribution of the small on the altar of an unjustified presumption in favor of bigness. This is an unrealistic blindness to power in the economy.

In response to this current state of affairs I offer several recommendations. Some of these proposed changes are legislative, while others require a change in the basic emphasis of enforcement policy.

First, it should be made clear that the basic purpose of the antitrust laws is to guarantee that everyone engaged in economic activity in this society is entitled, to the maximum extent possible, to have their success or failure governed by a competitive process. Efficiency, particularly the strange concept associated with neo-classical economics, is not the sole goal of the antitrust laws. Rather, the American antitrust laws were passed and have been enforced as a means for controlling and dispersing private power.

The antitrust laws could be considered an economic bill of rights in the private sphere. They act as a check on any arbitrary and qualitatively anticompetitive exercise of power that attempts to displace the competitive process. Professor Fox has succinctly noted: "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."⁸⁴

This philosophy comports with the basic philosophy mandated by Congress and the courts—one that the committees of Congress should insist that enforcement officials follow. Adoption of this philosophy would require a shift in the present philosophy of the enforcement agencies, a shift I do not expect to occur so long as Mr. Baxter and Mr. Miller are in charge. If the enforcement agencies continue to follow their present policies, we will see the accelerating demise of small and medium-sized businesses. With that demise, their contributions of innovation, price competition, efficiency, independence and flexibility also will perish.

This is not a policy requiring atomization of large firms or one that assumes "big is bad." I do not favor destruction of economies of scale where they are clearly required, nor do I assume that big is evil or necessarily inefficient. On the other hand, it must be recognized that large-sized firms often possess power and often are characterized by large and unwieldy bureaucracies. Antitrust is a necessary constraint on power in the private sphere. Thus, the antitrust laws need an activist enforcement policy that aims primarily at the exercise of unnecessary power in the private sphere and not merely

84. Fox, *supra* note 6, at 1182:

A fifth possible goal of antitrust is the preservation of small size for its own sake. Because of the unusual potential for conflict between this objective and consumers' interests, I do not propose incorporation of this goal into antitrust policy. A sixth possible goal, justice, is vague in conception and is, in fact, a by-product of several more specific goals. I therefore do not treat this value separately.

at output-restricting practices.

The policy I propose is essential for our economic well-being. It carries with it the promise that the competitive process will sort out and reward optimum scale, efficient structure, worthwhile innovation and the proper measure of economic freedom, punishment and reward in the private sphere.

Second, the courts should view the basic purpose of section 1 of the Sherman Act as the protection of the competitive process in a qualitative sense, and the per se and rule of reason analyses should be viewed as a single form of analysis for establishing evidentiary presumptions of whether the law has been violated or not by an unreasonable displacement of the process in particular cases. By using the per se and rule of reason analyses as a means to detect a statutory violation rather than as rubrics to be employed as the major premise of a syllogism in deductive logic to then dictate what facts will be required or allowed to make up the minor premise, courts would reinstate the function of legal analysis as the bridge between theory and the tumultuous world of reality.⁸⁵

The current approach of the courts is to treat the per se and rule of reason concepts as establishing separate categories of hard line rules. Thus, the function of the courts becomes one of pigeonholing specific conduct within or outside a specific per se rule or of resolving the dispute under an undefined rule of reason analysis with its own set of meandering rules and factors to be weighed. This process has made antitrust litigation highly artificial, legalistic and expensive. It has come to resemble tax court litigation, where great effort is expended on exploring arcane conceptual minutiae and law becomes a religious dogma divorced from its moral

85. Flynn, *Rethinking Sherman Act Analysis*, *supra* note 45, at 1594-1600:

We should think of both [per se and rule of reason analyses] as a single method of analysis for establishing or not establishing evidentiary presumptions allocating burdens of proof rather than a series of substantive rules with square corners capable of neatly dictating legal results whatever the facts, whatever the industry and whatever the circumstances. To borrow a cliché from first year law school classes, per se and rule of reason analysis are tools—not rules. They are methods of analysis for determining whether the statute has been violated, not rubrics to be employed as the major premise of the syllogism in deductive logic to then dictate what facts will be required or allowed to make up the minor premise . . . [S]ome of the presumptions would be conclusive in most cases while in others the presumption would merely shift the burden of proof of justification, defense, or excuse to the defendant once a particular category of conduct is shown. In still other cases there would be no presumption shifting the burden of proof, but an affirmative burden on the plaintiff to go forward with the evidence proving a contract, combination, or conspiracy unreasonably restrains trade.

ends and the reality it is dealing with. As a result, antitrust litigation has become a highly expensive, complex and protracted process—a process that is far beyond what is required fairly to adjudicate and acceptably establish the facts and resolve the competing values involved in a particular case.

In part, this state of affairs is attributable to the needlessly complicated and excessive arguments over irrelevant and abstract economic concepts. While economic analysis is relevant to an understanding of the industry involved, and sometimes to the practical consequences of judicial intervention in a particular case, its importance has been exaggerated greatly in many cases. For example, the function of power in tying analysis should be limited to identifying the existence of a tie in cases where the transaction might be a voluntary one of mutual convenience or an exclusive dealing arrangement.⁸⁶ In a recent case applying an “injury to competition” philosophy, one court required proof that coercive tying injured “competition in a relevant market” before it would find a violation of the antitrust laws.⁸⁷ That type of inquiry is expensive, time-consuming and irrelevant because the essence of unlawful tying is the exercise of power that displaces the competitive process—not the destruction of competition generally in a relevant market.

A similar misunderstanding of the primary goals of antitrust policy has provoked a split in the circuits on cases involving vertical conspiracies to terminate price cutting distributors. These cases usually occur where retailers complain to a supplier about the price-cutting or other competitive tactics of another retailer. When the supplier joins with the complaining retailers and cuts off the price cutter, does the victim have an antitrust claim in the absence of proof of an injury to competition generally? The Third and Seventh Circuits have upheld an antitrust claim in that type of situation, implicitly recognizing the purpose of the law as protection of the competitive process.⁸⁸ The Second Circuit, however, has rejected a similar claim, implicitly holding that the purpose of the

86. See *Hyde v. Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982), cert. granted, 103 S.Ct. 1271 (1983); Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 VAND. L. REV. 283 (1980).

87. *In re Data General Corp. Antitrust Litigation*, 529 F. Supp. 801, 809 (N.D. Cal. 1981).

88. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 167-68 (3rd Cir. 1979); *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), cert. granted, 103 S.Ct. 1249 (1983).

law is protection of competition generally, despite the effect on the competitive process as it applies to a single firm.⁸⁹ I agree with the Third and Seventh Circuits' approach because it gives effect to the basic purposes of the law. However, under the analysis established by the Second Circuit, before the victim of such a restraint may recover, proof of injury to competition generally—an elaborate and expensive type of economic proof—must be advanced, even though there usually is no identifiable harm to shortrun “economic efficiency,” nor any enhancement of it by the restraint. That process of analysis results in a court's failure to implement the goals of the statute in light of the specific facts of individual cases and a failure to curb longrun harm to economic goals of antitrust policy.

Adoption of the reform that I advocate would enable antitrust analysis to accommodate itself to serving all the goals of the law while still accounting for the complexities of modern marketing practices, modern litigation, and modern economic institutions. For example, in vertical territorial and customer restraint cases, the conduct should be viewed as presumptively unlawful because it is often the product of undue power by a seller or a buyer that unnecessarily restricts the competitive effort of retailers. The conduct has the effect of reducing intrabrand and interbrand price competition and it frequently is an unnecessary infringement on the competitive freedom of the victim of the restraint. The *Sylvania* opinion leaves the law in a mass of confusion; there is no known standard for determining whether a particular use of vertical customer or territorial restraints is an “unreasonable” restraint of trade. For all practical purposes, such conduct is per se lawful. Under my proposal, the conduct would be presumed unlawful subject to a defense that the restraint is necessary to protect consumers (e.g., control the marketing of a dangerous product), that it is necessary to achieve some legitimate business objective that can be weighed and evaluated objectively (e.g., provide essential point of sale services) and that it is no more restrictive of intrabrand and interbrand competition than is absolutely necessary.

Third, in accord with my proposed change of approach that would establish evidentiary presumptions in place of the conception of per se and rule of reason as a catalogue of rigid pigeonholes, I would classify vertical price-fixing, vertical customer restraints and vertical territorial restraints as presumptively unlawful. In the

89. *Oreck v. Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980), cert. denied, 454 U.S. 1083 (1982).

case of vertical price-fixing the presumption would be a particularly strong one with very few, if any, exceptions to the rule.

Using vertical price-fixing to restrain the imaginary "free riders" with whom Mr. Baxter apparently is concerned, simply is too great a restraint on the competitive process, intrabrand price competition and the freedom of traders and consumers to be tolerated. There may be some unusual cases where such an argument might be made that efficiency requires the restraint, but I am aware of none that has been advanced or empirically justified. If such a case should arise in the future, treatment of the per se rule as an evidentiary presumption should permit a court in a specific case to take account of any legitimate and factually verified justification for the restraint. The Baxter-Miller approach simply would enable the widespread use of vertical price-fixing because those subject to the law would have no fear of enforcement action brought by the government or victims of the restraint. Even if an action were brought, it would be subject to an extensive and expensive trial under the current rule of reason approach. That result is unacceptable and would only further encourage the interference with the independence of traders and the growing rigidity in pricing structures, as well as result in higher prices to consumers in the long run.

In the case of vertical customer and territorial restraints, a somewhat broader range of justifications or defenses may be permitted if, for example, customer restraints are necessary because of the dangerous nature of a product or if territorial restraints are needed to induce a dealer to make the large capital investment necessary for the marketing of certain products. Such restraints, however, should be no more restrictive than objectively necessary under the facts of a specific case, a factor seldom weighed in the mass of confusion that now prevails in litigating a case under the ephemeral "rule of reason" standard mandated by *Sylvania*.

Fourth, with regard to the Robinson-Patman Act, I have several proposals. Initially, the Act should be enforced by the agencies charged with the responsibility of enforcing it. Those agencies have enforcement discretion and can avoid bringing actions that collide too directly with the Sherman Act philosophy of maintaining a competitive process. So far as I know, Congress still bears the basic law-making function and the function of choosing among such antitrust goals as "equity" and "efficiency." We have not delegated that authority to self-appointed and unelected experts who follow their own ideological preferences. In many price discrimination

cases there is an anticompetitive effect. Enforcement of the Act does not conflict with the Sherman Act's policy of controlling undue power in the economy. The outright refusal to prosecute any cases at all under the Robinson-Patman Act is just as harmful a policy as would be the prosecuting of all potential cases without regard to harmonizing conflict where possible.

Legislative reform of the Act is necessary, however. I suggest that the Sherman Act be amended in exchange for repeal of the Robinson-Patman Act. Section 2 of the Sherman Act should define "attempt to monopolize" more explicitly to deal with the unilateral exercise of power: "For the purposes of this Act, an attempt to monopolize shall include any unilateral conduct, done with the purpose *and* effect, unreasonably, of fixing prices or excluding a competitor." The proposed amendment not only would require proof of purpose and effect, but also would require that the conduct be unreasonable under the circumstances. It would provide a tool for sorting out procompetitive price discrimination from anticompetitive price discrimination. Such an amendment would enable courts to develop standards for regulating that type of price discrimination which is an unjustifiable exercise of economic power; price discrimination injuring the competitive process and the rights of individual entrepreneurs to succeed or fail by virtue of the competitive process.

At the same time, price discrimination consistent with the operation of the competitive process would not be illegal. At present, there is a gap in the Sherman Act. The statute does not provide legal recourse against a firm with only local or regional power unless that power is overwhelming and is therefore substantial enough to become unlawful monopolization in the structural sense of an overwhelming market share. Cases such as *United States v. Empire Gas Corp.*⁹⁰ no longer would escape legal control. In that case, a propane gas distributor in Missouri was engaged in a program of geographical price discrimination. The defendant raised prices in one town to support price cutting in another town, thereby driving out small distributors of liquid petroleum gas. The court held that the action could not be maintained as an attempt to monopolize because the defendant did not have a substantial enough market share to equal monopoly power.⁹¹ The case could not have been brought under the Robinson-Patman Act because

90. 537 F.2d 296 (8th Cir.), *cert. denied*, 429 U.S. 1122 (1977).

91. *Id.* at 307.

there were not two or more sales across state lines.

The amendment I propose would allow actions, similar to that attempted in *Empire Gas*, to be brought attacking unjust price discrimination, which undermines the competitive process or constitutes an undue exercise of economic power in a manner contrary to the historic purpose of the antitrust laws. The amended statute would be far less complicated than the Robinson-Patman Act. It also would avoid the difficulties arising from the "in commerce" standard of the Robinson-Patman Act, and prevent the practical difficulties generated by the standard of proof necessary to show damage in a case under the Act. Under my proposed amendment, services also would be covered. The amendment would allow courts to fashion, on a common law basis, a series of standards by which we could isolate necessary and beneficial forms of price discrimination from those that are unnecessary and harmful.

In addition, the amendment would close a gap in section 2 of the Sherman Act. As section 2 is now interpreted, unilateral exercises of economic power that are destructive to the competitive process by those without "monopoly power" or close to it cannot be remedied. If the amendment is not adopted however, I would leave the Robinson-Patman Act in force for the prophylactic value it still may carry, and the possibility that future enforcement officials may more responsibly deal with it than do those presently charged with its enforcement.

Fifth, both Houses of Congress should hold extensive hearings on the overall policies of the antitrust laws. Many others in the field, on both sides of the debate, should be invited to give their views to Congress. The issues involved here are fundamental, and their resolution has such far-reaching consequences that Congress must devote substantial time considering them. I suggest that the objective of such a hearing be the drafting of a "Statement of Purpose" for the Sherman Act to serve as a guide to its interpretation and implementation. The old Interstate Commerce Act⁹² had such a statement of purpose, called the "National Transportation Policy,"⁹³ which heavily influenced the interpretation and application of that statute. Interpretation and application of the antitrust laws could be substantially benefited by a similar declaration of congressional purpose. That statement should inform litigants, courts

92. Ch. 498, 49 Stat. 543 (1935) (currently codified at 49 U.S.C. §§ 301-327 (1976)).

93. See National Transportation Policy Act, ch. 722, 54 Stat. 899 (1940) (amended and currently codified at 49 U.S.C. § 10101 (Supp. 1981)).

and commentators of what Congress expects these laws to achieve. I would urge that the statement of purpose framed by Professor Fox⁹⁴ be the one Congress adopts. The congressional purpose would thereby be clear. Enforcement officials could no longer renounce their responsibility to fulfill that purpose by appeal to an ideology and methodology inconsistent with the law's goals and reality or by referring to transparent rewrites of history that distort the purpose of the law.

V. CONCLUSION

Antitrust policy is at an ideological crossroads. The debate today is not between irrational proponents of the atomization of the American economy (usually mislabeled "populists") and the proponents of reason and the public good (usually self-described as "economists"). Rather, the debate is whether one line of reasoning and one abstract source of wisdom among the many and conflicting schools of economic thought should be the sole guide of antitrust policy, or whether antitrust policy should foster a multiplicity of goals aimed at controlling private power in the economy and draw from a multiplicity of sources of wisdom so long as identifiable longrun economies of scale are not lost.

The proponents of an exclusively "economic" approach (the "Chicago school") have had three advantages in the debate. One advantage is the underlying appeal to individual freedom embraced in their economic model. The fact that it is unthinkingly applied to giant institutions, and that it falls to pieces when applied to the real affairs of a complex and highly interrelated society where one person's freedom is often another's deprivation, seems not to concern proponents of the model. It does, however, emphasize an important value of individual freedom, which should not be ignored. The Chicago school's second advantage is that it appears to produce certainty—square rules to decide every question—even though the certainty provided is a false certainty and the rules it generates exclude consideration of facts and values relevant to the problems antitrust regulation must address. Political economy confronts the complexities of the real world, and those complexities are not willing or apt to conform to the predictions of artificial rules or the political preferences of the theoretician. Furthermore, the use of a mechanical analytical system in law short circuits the

94. Fox, *supra* note 6, at 1190-91.

law's function of promoting commonly held moral beliefs and a sense of justice in the peaceful and pragmatic resolution of disputes. The Chicago school's third advantage is that it has captured the thinking and imagination of brilliant and persuasive advocates—the Baxters, Borks and Posners of this world. They are honest, brilliant, and persuasive in their advocacy. They enjoy widespread admiration and respect in the academic community, an admiration and respect I share as well. Some of my best friends are believers, but nevertheless the theology is misused in the pragmatic world of the legal process. It is impracticable, and it is misleading when applied to the affairs of the real world and the problems that individuals must confront each day. The certainty with which the beliefs are honestly held also is the source of a dangerous arrogance. It is an arrogance that justifies summary dismissal of competing viewpoints, the refusal to consider countervailing viewpoints and the assumption of powers that our political process has committed elsewhere. Lastly, its simplistic methodology undermines the complex analytical process that the law must use if the law is to cope constructively with resolving the reality of specific disputes in accord with the long term values Congress has mandated be implemented by antitrust policy. It is essential that the function of the legal process as the bridge between brute reality and principle for the effective and peaceful resolution of disputes in society in conformity with the values of society not be overwhelmed by the superficial appeal of a coherent but unrealistic model of a world that does not exist.

The philosophy and reforms I propose do not reject a role for economic analysis—I hope a more empirical, realistic and all-inclusive form of it—in the development of antitrust policy and its application to specific cases. That role, however, is a subservient one—not a role of displacing the legal process. Nor do the reforms I propose necessarily breed an ambiguity and uncertainty in the standards that would be developed. Instead, those reforms would create a deeper understanding of the principles and values on which antitrust policy rests and a means for explicitly reconciling conflict between those principles and values. They would provide a practical means by which those basic policies may be linked to the litigation of specific disputes. They also would make possible the constructive use of new insights from economics and other disciplines too often ignored, which have something to contribute to the understanding of the evolution of our society. Lastly, these reforms would fulfill the functions of the legal process, which too often

have been subverted by a simplistic and mechanical reliance on the arcane.

I believe that we are witnessing the effects of a distorted anti-trust doctrine, a doctrine redefined to serve the narrow ends and values of a political ideology inconsistent with the purposes Congress has mandated for antitrust policy and the affairs of the real world. If the choice is to be made to change the goals of antitrust policy and the means by which they are implemented, our constitutional and political systems vest the authority to do so in the hands of Congress, not in the transitory and unaccountable hands of political appointees of the executive branch. It is time for Congress to insist that its prerogative be followed and for the courts to recognize that the resolution of antitrust disputes cannot take place in the vacuum of an abstract model detached from reality, intolerant to wisdom from elsewhere, inconsistent with legal reasoning and at odds with unvarnished reality.