THE "IS" AND "OUGHT" OF VERTICAL RESTRAINTS AFTER *MONSANTO CO. v. SPRAY-RITE SERVICE CORP.*

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"[O]ur quest for certitude is so ardent that we pay an irrational reverence to a technique which uses symbols of certainty, even though experience again and again warns us that they are delusive."[1]

Great hopes and great fears accompanied the Supreme Court's decision to review the Seventh Circuit's decision in *Spray-Rite Service Corp. v. Monsanto Co.*[2] Proponents of a neoclassical economic model of antitrust analysis, including the Reagan administration, saw *Monsanto* as a vehicle for bringing coherence to the analysis of vertical market restraints. The neoclassicists hoped that the *Monsanto* Court would declare purely vertical price fixing per se lawful, or at least apply a rule of reason similar to the one applied to vertical divisions of territories and customers after *Continental T.V., Inc. v. GTE Sylvania Inc.*[3] Opponents of legalizing vertical price fixing, on the other hand, saw *Monsanto* as a serious challenge to their goal of a rule of per se illegality for vertical price fixing. The opponents included many members of Congress who thought that Congress had mandated per se illegality for vertical price fixing when it repealed the exemption for state fair trade laws.[4] The Antitrust Division of the Department of Justice, however, favored legalizing vertical price fixing, and it improperly sought to lead the charge by way of a subsequently aborted amicus brief in the case.

Although the Supreme Court gave neither side a clear victory or defeat, it created significant ambiguity about central issues in vertical price fixing litigation and other antitrust cases that were certain to follow.[5] As with many other interpretations of important laws

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1 Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 644 n.40 (1944) (Jackson, J., dissenting).

2 684 F.2d 1226 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984).

3 433 U.S. 36 (1977) (measuring agreements between manufacturers and retailers restricting geographical retail sales areas by rule of reason standard).

4 Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 3, 89 Stat. 801 (1975) (deleting paragraphs of 15 U.S.C. § 45(a) which permitted fair trade pricing of articles for retail sale and state enactment of nonsigner provisions).

5 Professor Hay perceptively explored this result in Hay, *Vertical Restraints After* Monsanto, 70 CORNELL L. REV. 418 (1985); *see also* Floyd, *Vertical Antitrust Conspiracies After* Monsanto *and* Russell Stover, 33 U. KAN. L. REV. 269 (1985).

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during times of doctrinal or economic upheaval or following significant changes in the Court's membership, the *Monsanto* decision is not satisfying. *Monsanto* reflects deep problems with the Burger Court's decision making. By using *Monsanto* and its progeny to illustrate problems with the Court's values and methodology in analyzing antitrust issues, this Article seeks to explore these deeper implications, for their significance for antitrust litigation reaches beyond vertical restraint cases.

Part I of this Article examines *Monsanto* and the issues that decision left unresolved. Part II examines post-*Monsanto* lower court decisions dealing with these open issues. Rather than attempting to reconcile these often contrary rulings, this survey demonstrates that, absent Supreme Court guidance, lower courts are reaching opposite conclusions on similar facts. Finally, Part III discusses the flaws of the neoclassical approach to antitrust adjudication. The Article concludes that neoclassicists fail to respect the antitrust laws' proper consideration of social and political values and that courts adopting the neoclassical argument injudiciously invade the legislature's role.

I
MONSANTO: ITS LEGAL AND DOCTRINAL SHORTCOMINGS

A. Unresolved Legal Issues

The *Monsanto* Court held that there was sufficient evidence at trial to find that Monsanto unlawfully terminated the plaintiff's distributorship of Monsanto herbicides.[6] Specifically, the Court upheld the jury's finding that Monsanto terminated the plaintiff, a price-cutting distributor, "pursuant to a price-fixing conspiracy between Monsanto and its distributors"[7] to fix the resale price of Monsanto's herbicides. The Court also found sufficient evidence of a causal connection between the conspiracy to fix prices and the plaintiff's antitrust injury to sustain a damage award under section 1 of the Sherman Act.[8] Beyond the scope of the immediate controversy, however, the decision left at least four issues unresolved: (1) whether the Court will continue to hold vertical price fixing a per se violation of section 1 of the Sherman Act; (2) what constitutes sufficient evidence to send to a jury the questions of whether there is a contract, combination or conspiracy to fix prices and whether that conspiracy caused antitrust injury to the plaintiff; (3) what conduct

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6 Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).

7 *Id.*

8 *Id.* at 767-68. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (1982).

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can courts identify as price fixing within the meaning of the per se rule prohibiting vertical price fixing; and (4) what factors identify conduct as horizontal or vertical for purposes of analyzing distribution restraints under section 1 of the Sherman Act?

The issue of the per se status of vertical price fixing remains unclear. Attempts by the Solicitor General and other *amici* to raise the issue before the Supreme Court were rejected because neither party had raised the issue in the courts below.[9] Justice Brennan's concurrence shed no light on this issue, but it underscored the majority opinion's ambiguity with regard to the future status of the per se rule against vertical price fixing. By stressing Congressional acquiesence to the rule of *Dr. Miles Medical Co. v. John D. Park & Sons*[10] and the majority's "adhere[nce] to that rule,"[11] Justice Brennan implicitly suggested that the Court's refusal to reconsider the per se rule fell short of a ringing endorsement.

The second issue *Monsanto* left unclear deals with the evidence sufficient to prove contract, combination or conspiracy and a causal connection between the conspiracy and the plaintiff's alleged antitrust injury. Instead of providing criteria for future litigation, the Court's legal analysis focused on rejecting appellate court dicta asserting that "proof of termination following competitor complaints is sufficient to support an inference of concerted action."[12] The *Monsanto* Court did find, however, sufficient evidence for the jury to infer a conspiracy from certain facts unique to this case.[13] The Court's naked identification of evidence sufficient in this case falls woefully short of a general test for evidentiary sufficiency, leaving future courts to guess where the Court meant the line dividing judge and jury functions to fall.[14]

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9 465 U.S. at 761 n.7.

10 220 U.S. 373 (1911).

11 465 U.S. at 769 (Brennan, J., concurring).

12 Monsanto Co. v. Spray-Rite Serv. Corp., 684 F.2d 1226, 1238 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984).

13 Specifically, the Court found sufficient evidence in the following: (1) competitor complaints plus efforts by Monsanto employees to coerce other price cutters into line (including communicating with one price cutter's parent corporation to secure adherence to Monsanto's resale prices); (2) Monsanto's failure to fill the plaintiff's herbicide orders during the shipping season (when the product was in short supply) in order to force compliance with suggested prices; and (3) a distributor's newsletter reporting a meeting with Monsanto officials who discussed efforts "to get the market in order" and represented that Monsanto agreed not to undercut retailer prices in its own retail outlets. 465 U.S. at 765-66 & n.10.

14 Justice Powell, writing for the majority in the post-*Monsanto* decision of Matsushita Elec. Co. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986), characterized *Monsanto* as holding that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 1357. This reading of *Monsanto* appears to increase the standard of proof for the conspiracy element of the offense. In *Monsanto* the Court held that "[t]here must be evidence that

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The *Monsanto* Court also neglected an opportunity to define more clearly the concept of "price fixing" prohibited by the per se rule. The Court refused to address the argument proffered by the Solicitor General as amicus that:

> If a supplier adopts a bona fide distribution program that includes nonprice restraints and if that program is reasonably addressed to distribution problems, the case must be judged by the rule of reason unless the plaintiff can show—by direct or circumstantial evidence—an *explicit* agreement about the prices distributors are to charge.[15]

The Court sidestepped this question by noting that Monsanto had conceded the applicability of the per se rule if nonprice restraints were found part of a price fixing conspiracy.[16] The Court acknowledged the difficulty of drawing a line between price and nonprice vertical restraints,[17] but offered little guidance to help resolve the difficulty. Consequently, subsequent courts have had to answer questions such as: (1) whether the conduct at issue should be categorized as "price fixing" within the meaning of the per se rule; (2) whether the conduct fits some other per se category; or (3) whether the conduct is some other form of vertical restraint to be measured on a more generous, but undefined, rule of reason basis.

The final issue left unresolved by *Monsanto* is the distinction between horizontal and vertical restraints. *Monsanto* implicitly raised this issue because Monsanto functioned as a dual distributor, selling its herbicides both to distributors and in its own retail outlets.[18] Although the Court did not make much of this fact, the opinion does note that the plaintiff's evidence to prove conspiracy included a distributor's newsletter reporting Monsanto's alleged agreement

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tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. . . . [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " 465 U.S. at 764 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)). To the extent that *Matsushita* held that one may use motivations in the neoclassical model's hypothetical world to determine whether real-world evidence tends to prove a conscious commitment to a common scheme, the opinion goes considerably further than the *Monsanto* holding on the questions of what evidence is legally sufficient to prove conspiracy and whether the factual determination is one for court or jury.

15 Summary of Argument Before the Court, 52 U.S.L.W. 3448 (U.S. Dec. 13, 1983) (No. 82-914); *see generally* Comment, Spray-Rite Service Corp. v. Monsanto Co.: *The Justice Department Challenges The Per Se Rule Against Resale Price Maintenance*, 46 U. PITT. L. REV. 171 (1984) (arguing that per se rule should govern legality of both vertical nonprice restraints and resale price maintenance plans).

16 465 U.S. at 759 n.6.

17 *Id.* at 762.

18 *See id.* at 766.

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to set the price of Monsanto herbicides at its own retail outlets at or above the suggested retail price.[19] Hence, one may argue that *Monsanto* is really a horizontal price fixing case involving a conspiracy among Monsanto's retailers. This horizontal aspect of the case could be used to distinguish *Monsanto* from future cases in which the conspiracy is more clearly vertical.

B. Unresolved Doctrinal Issues

A more general problem lies at the heart of the *Monsanto* decision. The question of how the moral or normative objectives of the relevant legal standards should inform the application of those standards underlies the resolution of any legal dispute. Stated another way, a court engaged in the application of a legal standard is also engaged in a complex series of "ought" decisions requiring a determination of the facts and rules relevant to the dispute.

The central paradox of legal reasoning is that whereas application of the appropriate rule presupposes knowledge of the relevant facts, determination of the relevancy of a given fact presupposes a knowledge of the appropriate rule. In addition, courts must interpret the concepts invoked by the rules in light of the facts found relevant and decide how those concepts ought to apply in light of the consequences such an interpretation will have in this and future cases. Unlike the deductive and mechanical application of premises to facts in some forms of economic analysis,[20] legal analysis should explore the moral and factual assumptions hidden in premises. Informal logic, not deductive logic, constitutes the essence of legal reasoning. It is in this sense that concepts are tools of analysis in law and that every legal decision is unavoidably a moral decision—a question of "ought."[21]

Different schools of antitrust thought disagree over the deeper social and economic values and objectives underlying the antitrust laws and how courts should bring those values to bear upon a specific dispute. Ought courts view antitrust solely as a means for achieving economic "efficiency," as that concept has been variously defined,[22] or ought they regard antitrust as invoking broader policy considerations encompassing additional economic, social and polit-

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19 *Id.* at 766.

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

21 *See* F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 3-7 (1959).

22 The concept "efficiency" has been used to mean, among other things, "productive" efficiency and "allocative" efficiency. *See, e.g.*, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980). Often the same author invokes first one, then another, and sometimes hybrid concepts of efficiency when discussing antitrust policy. *See* Peritz, *The Predicament of Antitrust Jurisprudence: Economics and the Monopolization of Price Discrimination*

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ical values?[23] Judge Posner, a relentless advocate of the deductive logic methodology inherent in neoclassical economic analysis, summed up succinctly the consequences of the "economic efficiency" approach in *Roland Machinery Co. v. Dresser Industries*[24]:

> The welfare of a particular competitor who may be hurt as the result of some trade practice is the concern not of the federal antitrnst laws, . . . but of state unfair competition law . . . .
>
> The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself.[25]

One of many difficulties with Posner's position and such cliches as "the 'antitrust laws . . . were enacted for the protection of *competition,* not competitors,' "[26] is that courts, including the Supreme Court, continue to grant antitrust relief in cases lacking any showing of injury to "competition" in Posner's sense. Indeed, in the context of per se violations courts assume an injury to competition even though the proof often shows only injury to a particular competitor.

If one adopts Posner's view of antitrust, and the libertarian consequences its premises and rigid reliance upon deductive logic compel, then proof of injury to competition in a relevant market, or even proof of a reduction in output,[27] should be a prerequisite to a finding of illegality for conduct currently classified as per se illegal.[28]

Argument, 1984 DUKE L.J. 1205, 1287 (1984) (discussing confusion in Richard Posner's writings concerning various meanings of "efficiency").

23 Among the social or political values antitrust policy might invoke is ensuring that an individual's or a firm's success or failure be guaranteed by a competitive process free from unreasonable collective or unilateral acts of others, without regard for whether the challenged conduct necessarily injures competition by increasing price above marginal cost or reducing output. Professor Fox has defined the "qualitative" goals of antitrust policy: "There are four major historical goals of antitrust, and all should continue to be respected. These are: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor." Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 CORNELL L. REV.1140, 1182 (1981); *see also infra* notes 219-27 and accompanying text.

24 749 F.2d 380 (7th Cir. 1984).

25 *Id.* at 394.

26 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 n.14 (1984) (quoting Brown Shoe Co. v. United States, 370 U.S. 294 (1962), opinion reflecting the Warren Court's view that competition is dynamic, not static).

27 *See* Bork, *Vertical Restraints:* Schwinn *Overruled,* 1977 SUP. CT. REV. 171 (1977).

28 Judge Easterbrook, Judge Posner's co-author of ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS (2d ed. 1981), adopted, or a least came close to adopting, such an approach in Polk Bros. v. Forest City Enters., 776 F.2d 185 (7th Cir. 1985). The case involved a horizontal division of product markets by the plaintiff/landlord, who ran an appliance business, and the defendant/tenant, who owned a building supply business. Before plaintiff constructed a building to house both businesses, the parties negotiated a covenant running with the land which restricted each of them from selling certain products carried by the other. When the tenant realized that the restriction prevented it from running advertising for all of its stores on certain products because the products were not available in the store subject to the covenant, it advised the landlord

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Given this requirement and the other assumptions of the neoclassical model, very little collaborative conduct would be of antitrust concern, with the possible exception of horizontal price fixing by dominant firms. Even then, neoclassicists might claim that market forces would remedy the problem more efficiently than government interference through the legal process.

Justice Powell, writing for the majority in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[29] purported to reject the position asserted by the dissent below that social and political values are goals that courts are bound to protect in giving meaning to and applying the antitrust laws. Justice Powell observed that"[c]ompetitive economies have social and political as well as economic advantages, . . . but an antitrust policy divorced from market considerations would lack any objective benchmarks."[30] Justice Powell's statement hardly represents a resounding rejection of injecting social and economic values and broader economic goals into the interpretation of antitrust concepts, nor does it endorse a complete acceptance of limiting antitrust analysis to considerations of economic efficiency as defined by neoclassical economic analysis. Yet the statement, particularly when coupled with Justice Powell's acknowledgment of "free rider" analysis in *Monsanto*,[31] is a sufficient endorsement of efficiency to raise several questions. Among other issues, Powell's statement calls into question whether courts should require proof of adverse market ef-

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that it would no longer abide by the covenant. The tenant defended a suit to enforce the covenant by claiming that the covenant was an illegal division of markets, 776 F.2d at 187-88, and therefore void under the Illinois Antitrust Act, ILL. REV. STAT. ch. 38, § 60 (1975), a statute patterned after federal antitrust laws.

The case was removed to a federal district court which held the covenant an illegal horizontal division of product markets. Polk Bros. v. Forest City Enters., 1985-1 Trade Cas. (CCH) 66,450 (N.D. Ill.), *rev'd*, 776 F.2d 185 (7th Cir. 1985). In the course of reversing the district court, Judge Easterbrook wrote:

> Although federal law treats almost all contracts allocating products and markets as unlawful *per se*, . . . the *per se* rule is designed for "naked" restraints rather than agreements that facilitate productive activity. . . .
>
> Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production. . . . Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment. When cooperation contributes to productivity through integration of efforts, the Rule of Reason is the norm.

776 F.2d at 188 (citations omitted). Distinguishing "ancillary" from "naked" restraints, Judge Easterbrook found the restraint ancillary because the agreement was a cooperative venture with "prospects for increasing output." *Id.* at 190. He reasoned that a showing of "market power" is required before such a restraint may be struck down. *Id.* at 191. Finding none, the court reversed the district court's opinion that the horizontal restraint dividing markets was illegal. *Id.*

29 433 U.S. 36 (1977).

30 *Id.* at 53 n.21 (citations omitted).

31 465 U.S. at 762-63.

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fects in all section 1 cases, whether they should require proof of a relevant market in all rule of reason cases, whether the Supreme Court is preparing to abandon the per se rule against vertical price fixing, and whether trial courts should interpret the antitrust standards strictly to ensure that a restraint deemed illegal injures both consumers generally and targeted firms.

Judicial disagreement over the goals of antitrust (the "oughts") rumbles beneath the surface of post-*Monsanto* opinions. Indeed, *Monsanto*'s condemnation of vertical price fixing on a per se basis ensures perpetuation of the ideological conflict. While the *Monsanto* majority held vertical price fixing illegal per se because such agreements deprive dealers of the ability to exercise judgment in "making independent pricing decisions,"[32] it made no mention of the plaintiff's need to prove an injury to consumers by demonstrating that the manufacturer's marketing strategy restricted output or fixed prices above marginal cost.

Judicial condemnation of horizontal and other restraints on a per se basis, without proof of a relevant market and injury to competition in that market, suggests a judicial recognition that Congress intended the antitrust laws to serve goals other than preventing reductions in output.[33] The *Monsanto* Court's failure to resolve this issue has spawned continuing ideological controversy over the goals of antitrust and the identity and definition of the elements of the per se and rule of reason standards—controversy which is reflected in the litigation following that case.

II
THE "IS" OF LOWER COURT DECISIONS FOLLOWING *MONSANTO*

By the first quarter of 1986, over sixty reported antitrust decisions and several unreported decisions had cited *Monsanto*. Perhaps a dozen other cases did not cite *Monsanto* directly but did involve vertical restraints relevant to the policies discussed therein. All these cases share a general characteristic, one that should surprise no one familiar with the Reagan administration's antitrust ideology: none have been brought by the Antitrust Division of the United States Department of Justice.

Another striking feature of these cases is that more than half have involved rulings on motions for summary judgment or directed

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32 *Id.* at 762. Justice Powell also recognized the validity of a manufacturer's control over "marketing strategy," *id.*, for his products in order to "assure an efficient distribution system," *id.* at 763.

33 A dealer's freedom to compete on the merits would be an example of an antitrust goal unrelated to output reduction. *See* Fox, *supra* note 23, at 1169.

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verdict in favor of defendants. In many of the summary judgment cases, courts cite precedent suggesting that summary judgment should rarely be granted in antitrust cases where intent and motive play a major role.[34] Nevertheless, many of the same courts grant, or affirm the granting of, the summary judgment motion. Judges often grant preliminary motions with little or no mention of the constitutional right to a jury trial on contested matters of fact or of the Federal Rules of Civil Procedure philosophy of de-emphasizing pleadings. Indeed, judges frequently use preliminary motions in ways which suggest that code pleading has returned to federal courts in antitrust cases.[35] Surprisingly, these particularly significant issues are little noticed in post-*Monsanto* litigation.[36]

The post-*Monsanto* decisions may be categorized according to the issues with which they deal: (1) the evidence sufficient to allow the fact-finder to infer the existence of a conspiracy and whether the conspiracy caused antitrust injury;[37] (2) whether the conspiratorial activity is price fixing or some other form of per se illegal conduct;[38] and (3) whether the conduct involved is horizontal or vertical.[39] Litigation concerning these issues continues against the background controversy over the goals of antitrust policy.

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34 Lower courts regularly cite the standard set forth in Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962) ("summary procedures should be used sparingly in complex litigation where motive and intent play leading roles"). *See, e.g.*, Terry's Floor Fashions Inc. v. Burlington Indus., 763 F.2d 604 (4th Cir. 1985) (citing *Poller* but granting summary judgment for defendant).

35 *See, e.g.*, Mueller v. Rayon Consultants, Inc., 170 F. Supp. 555 (S.D.N.Y.) (function of pleading under Federal Rules of Civil Procedure is to give fair notice of claim asserted, and no more), *appeal denied*, 271 F.2d 591 (2d Cir. 1959); *see also* Trebuhs Realty Co. v. News Syndicate Co., 12 F.R.D. 110 (S.D.N.Y. 1951); Shepard v. Popular Publications, 10 F.R.D. 389 (S.D.N.Y. 1950).

36 One could interpret *Monsanto* as dealing with the appropriate functions of judge and jury in vertical restraint cases or even as an indirect endorsement of the Federal Rules of Civil Procedure's notice pleading philosophy. These two issues supplement the question of the character and degree of evidence necessary to prove the elements of an antitrust conspiracy involving vertical or other restraints.

The post-*Monsanto* cases share another general characteristic: former law professors are writing many of the significant antitrust decisions. *See* Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985) (Easterbrook, J.), *cert. denied*, 106 S. Ct. 1659 (1986); Polk Bros. v. Forest City Enters., 776 F.2d 185 (7th Cir. 1985) (Easterbrook, J.); Jack Walters & Sons v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir.) (Posner, J.), *cert. denied*, 469 U.S. 1018 (1984); Roland Mach. Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984) (Posner, J.); Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922 (1st Cir. 1984) (Breyer, J.), *cert. denied*, 105 S. Ct. 2040 (1985). Some of these judges use the cases before them to criticize still-binding Supreme Court opinions in extensive dicta. The institutional constraints on a lower court judge, namely, following the decisions of the Supreme Court and deferring to congressional purposes in enacting economic regulation, apparently carry little weight with some of the appointees from the academic ranks.

37 *See infra* notes 42-94 and accompanying text.

38 *See infra* notes 102-52 and accompanying text.

39 *See infra* notes 156-68 and accompanying text.

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A. Sufficiency of the Evidence to Infer Conspiracy

Following *Monsanto,* a plaintiff alleging a conspiracy in violation of the antitrust laws must prove: (1) a "conscious commitment to a common scheme"; and (2) that the alleged conspiracy caused an antitrust injury to the plaintiff.[40] Some of the post-*Monsanto* cases were filed or tried prior to *Monsanto,* with motions or appeals argued after the Supreme Court's decision. Hence, some of these cases involve mere competitor complaints followed by termination of the plaintiff and lack the additional "plus" necessary to prove a "conscious commitment to a common scheme," a "unity of purpose," or a "meeting of the minds."[41] Although courts usually dismiss such cases with a citation to *Monsanto* or the *Colgate* doctrine's[42] recognition of the right of traders to unilaterally refuse to deal,[43] some of these cases present close questions as to whether there was sufficient evidence of a "plus" to permit a jury to infer the existence of a conspiracy.[44] Other decisions confuse the question of whether there was any con-

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40 *See Monsanto,* 465 U.S. at 767.

41 *See* National Marine Elec. Distrib., Inc. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1985); Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919 (2d Cir. 1985); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486 (11th Cir. 1985), *cert. denied,* 106 S. Ct. 1513 (1986); McMorris v. Williamsport Hosp., 597 F. Supp. 899 (M.D. Pa. 1984).

42 *Colgate* provides:

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

United States v. Colgate & Co., 250 U.S. 300, 307 (1919). For an argument that the *Colgate* doctrine should be abolished, see Andersen, *The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case For Presumptive Illegality,* 54 WASH. L. REV. 763 (1979); *see also* Note, *A Definition of Agreement: Identifying Purely Unilateral Conduct in Vertical Price Restriction Cases,* 19 VAL. U.L. REV. 766 (1985) (proposing motive as basis for distinguishing permissible vertical price restraints).

43 *See, e.g.,* Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 374 (3d Cir. 1985) (manufacturer's unilateral decision to rearrange its distribution scheme does not violate § 1 of the Sherman Act); Landmark Dev. Corp. v. Chambers Corp., 752 F.2d 369, 372 (9th Cir. 1985) (evidence of exchange of correspondence between manufacturer and complaining distributor too "highly ambiguous" to justify inference of agreement to fix prices). *See also* Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 684 (9th Cir. 1985) (insufficient evidence to infer conspiracy); Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922 (1st Cir. 1984) (no conspiracy where entities are not competitors in same market and no independent decision-making was compromised), *cert. denied,* 105 S. Ct. 2040 (1985); Morrison v. Murray Biscuit Co., 617 F. Supp. 800 (N.D. Ind. 1985) (same), *aff'd,* 797 F.2d 1430 (7th Cir. 1986); O.S.C. Corp. v. Apple Computer, Inc., 601 F. Supp. 1274 (C.D. Cal. 1985) (same), *aff'd,* 792 F.2d 1464 (9th Cir. 1986); Moffat v. Lane Co., 595 F. Supp. 43 (D. Mass. 1984) (same).

44 *See* National Marine Elec. Distribs., Inc. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1985); Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919 (2d Cir. 1985).

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spiracy with that of whether the conspiracy was one to "fix prices."[45] Still other decisions dispose of the case on the ground of insufficient evidence of a causal connection between the agreement to fix prices and antitrust injury to the plaintiff.[46] None of the opinions adequately discuss whether such issues should be determined by the judge or the jury.

Northwest Publications, Inc. v. Crumb[47] presents a rare case in which the plaintiff had no difficulty proving a contract, combination, or conspiracy. The defendant newspaper publisher had contracts with its "independent contractor" distributors which fixed the maximum price at which they could resell its newspapers. Despite Judge Posner's claim in another case that the rule of *Albrecht v. Herald Co.*[48] condemning maximum resale price maintenance "is in doubt after *Continental T.V., Inc. v. GTE Sylvania, Inc.*,"[49] the Ninth Circuit in *Northwest Publications* found no indication that the Supreme Court had questioned *Albrecht*'s per se rule.[50] The court went on to find, however, that the plaintiff had failed to show that the contract fixing maximum prices had caused it not to raise prices; the evidence instead supported a finding that other market factors prevented plaintiff from raising prices.

Although the *Northwest Publications* court did not refer to *Monsanto*, its decision mirrors *Monsanto*'s two-step analysis.[51] The Ninth Circuit's opinion ignores, however, the issue of whether such questions ought to be decided by a judge or a jury.

Other cases have focused on the first part of the *Monsanto* conspiracy test, discussing the minimum level of evidence required to send to the jury the question of whether there was a conscious commitment to a common scheme. In *National Marine Electronics Distributors, Inc. v. Raytheon Co.*,[52] a mail-order distributor of Raytheon's marine electronics products claimed that Raytheon had conspired

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45 *See* Motive Parts Warehouse v. Facet Enters., 774 F.2d 380 (10th Cir. 1985); O.S.C. Corp. v. Apple Computer, Inc., 601 F. Supp. 1274 (D.C. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986); Computer Place, Inc. v. Hewlett-Packard Co., 607 F. Supp. 822 (N.D. Cal. 1984), *aff'd*, 779 F.2d 56 (9th Cir. 1985).

46 Other cases have involved unusual fact patterns which produce equally unusual analyses. *See* Beutler Sheetmetal Works v. McMorgan & Co., 616 F. Supp. 453 (N.D. Cal. 1985) (absence of anticompetitive purpose by builders and lenders in acquiescing to "union-only" policy for mortgage funds from union trust fund justified dismissal of complaint; trust fund could not be co-conspirator absent competition with nonunion subcontractors denied funding).

47 752 F.2d 473 (9th Cir. 1985).

48 390 U.S. 145 (1968).

49 Jack Walters & Sons v. Morton Bldg., Inc., 737 F.2d 698, 706 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

50 752 F.2d at 475.

51 *See supra* note 40 and accompanying text.

52 778 F.2d 190 (4th Cir. 1985).

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with its regular distributors to terminate plaintiff's distributorship. The evidence was unclear about whether dealer complaints were based on plaintiff's pricing or lack of a service facility[53] and whether the dealer complaints also included threats to discontinue dealing with Raytheon if it continued to do business with the plaintiff.[54] Raytheon countered the plaintiff's claim by arguing that its termination of the plaintiff arose from an internal review resulting in a decision against selling through mail-order dealers. The district court directed a verdict for Raytheon on the ground that the plaintiff had failed to produce sufficient evidence to go to the jury on the question of conspiracy. Citing *Monsanto,* the court of appeals affirmed, holding that there was a lack of evidence that Raytheon and its dealers "schemed to terminate the plaintiff for the purpose of restraining price competition."[55] Citing evidence that the defendant dictated neither the plaintiff's nor any of its other dealers' prices, the court found the evidence insufficient to prove a conspiracy to restrain prices.

The Tenth Circuit, on the other hand, reaffirmed its finding of sufficient evidence of a conspiracy to withstand a motion for summary judgement in *Black Gold, Ltd. v. Rockwool Industries,*[56] From 1975 until 1979, the Public Service Company of Colorado (PSC) had operated and subsidized a program whereby residential customers could upgrade the insulation of their homes. Participants could choose either PSC-approved brands of rockwool, fiberglass, or cellulose insulation. The defendant, Rockwool Industries, sold the only brand of rockwool insulation so approved.[57] The plaintiff in *Black Gold* claimed that the defendant had illegally tied the sale of blown rockwool insulation to the sale of rockwool insulation in batts and had engaged in a concerted refusal to deal[58] in the fiberglass batt insulation. The court upheld the trial court's directed verdict for the defendant on the plaintiff's tying claim, but reversed the lower court's directed verdict for the defendant on the plaintiff's allegation of a concerted refusal to deal. The court of appeals found that the evidence demonstrated a firm policy of refusing to deal with buyers who refused to buy both forms of its insulation, that the defendant had continued to deal with the plaintiff's competitors who

53 *Id.* at 191-92.

54 *Id.* at 192. There was also evidence that Raytheon agreed to supply the plaintiff on the condition that the plaintiff not advertise its prices for certain Raytheon products in its catalogues. *Id.*

55 *Id.* at 192-93.

56 729 F.2d 676, *reh'g denied,* 732 F.2d 779 (10th Cir.), *cert. denied,* 469 U.S. 854 (1984)). The Tenth Circuit issued its original opinion in *Black Gold* before the Supreme Court's *Monsanto* decision; after *Monsanto,* the Tenth Circuit denied a rehearing.

57 729 F.2d 676, 679.

58 *Id.*

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purchased both forms of insulation, and that the defendant had terminated the plaintiff for refusing to do so.[59] The court also found evidence from which a jury could infer that the defendant, by manipulating its prices, was aiding the plaintiff's competitor to regain a customer lost to the plaintiff.[60]

In its opinion denying a rehearing after *Monsanto*, the Tenth Circuit reaffirmed its prior holding, citing a specific example of evidence that the *Monsanto* Court deemed sufficient to permit inferring the existence of a conspiracy. The Tenth Circuit stated:

> Among other things, the [*Monsanto*] Court noted that a threat to cut off a nonacquiescing distributor during a time when the product is in short supply is probative evidence of concerted action because it permits a jury to conclude that the manufacturer "sought this agreement at a time when it was able to use supply as a lever to force compliance."[61]

Post-*Monsanto* cases exhibit considerable disagreement over the degree to which coercion can transform unilateral, and thus protected, conduct into conduct amounting to a "conscious commitment to a common scheme." The *Monsanto* opinion expressly sanctions the announcement of a *Colgate*-type policy, that is, a unilateral refusal to deal with price cutters,[62] even though this policy often causes the distributor to forego his or her independent pricing discretion. Although *Monsanto* sanctions such conduct when purely unilateral, it also suggests that coercion can constitute evidence of a "plus" from which, in addition to complaints and termination, a jury may infer a section 1 conspiracy.

Several lower courts faced with resolving this conflict held that finding coercion to follow a seller's suggested prices allows a jury to find a price fixing conspiracy, either between the seller and the complaining buyer or between the seller and others. In these cases, courts found that evidence of dealer complaints permitted an inference that the seller had agreed with the complaining dealers to terminate the plaintiff.[63] In one case, for example, the Tenth Circuit

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59 *Id.*

60 *Id.*

61 *Black Gold, Ltd.*, 732 F.2d at 780 (quoting *Monsanto*, 465 U.S. at 765 n.10); *see also* Marco Holding Co. v. Lear Siegler, Inc., 606 F. Supp. 204 (N.D.Ill. 1985) (refusing summary judgment where jury could infer conspiracy from competing distributor's threats to manufacturer).

62 *Monsanto*, 465 U.S. at 761 ("A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. . . . Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply.") (citations omitted).

63 *See, e.g.*, World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467 (10th Cir.), *cert. denied*, 106 S. Ct. 77 (1985); Pierce v. Ramsey Winch Co., 753 F.2d 416 (5th Cir. 1985); Motive Parts Warehouse v. Facet Enters., 774 F.2d 380 (10th Cir. 1985).

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stated that an agreement may be inferred in circumstances where the defendant has taken action "adverse to . . . [the plaintiff] as a means of enforcing price fixing . . . by showing that although he refused to acquiesce in the price fixing, other buyers agreed to the arrangement."[64] Other courts have held that a supplier engages in an illegal agreement where competing dealers have formed a horizontal conspiracy to terminate the plaintiff and secured the supplier's acquiescence in the scheme.[65] A sufficient basis for a factfinder to infer an agreement, even if not coercive, has also been found in meetings between a defendant prime contractor and labor unions followed by picketing of a job site designed to cause the defendant to cease dealing with a plaintiff subcontractor employing workers from different unions,[66] and in termination of a plaintiff due to recommendations or manipulation by a seller's employees or agents who were acting independently as competitors of the plaintiff.[67]

In a newspaper distributor case where an independent contractor-distributor claimed that publication of a suggested retail price to home subscribers, collection of subscriber bills at the suggested retail price, and promotions to home subscribers prevented it from exercising its independent pricing discretion, the court did not find sufficient coercion to allow finding an agreement. In *Dunn v. Phoenix Newspapers, Inc.*,[68] the Ninth Circuit declined to follow the well-known *Albrecht v. Herald Co.* footnote[69] suggesting that it was not a "frivolous contention" for Albrecht to claim a conspiracy between the newspaper and his customers to maintain maximum prices. The Ninth Circuit instead read *Albrecht* as holding not that there was a combination between the newspaper and Albrecht's customers, but only that it was not "frivolous" to suggest the possibility. The court refused to find that customer complaints, plus the newspaper's noti-

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64 World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1475 (10th Cir.), *cert. denied,* 106 S. Ct. 77 (1985).

65 *See* Pierce v. Ramsey Winch Co., 753 F.2d 416 (5th Cir. 1985); Motive Parts Warehouse v. Facet Enters., 774 F.2d 380 (10th Cir. 1985); Marco Holding Co. v. Lear Siegler, Inc., 606 F. Supp. 204 (N.D. Ill. 1985). *But see* National Marine Elec. Distribs., Inc. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1985).

66 James Julian, Inc. v. Raytheon Co., 593 F. Supp. 915 (D. Del. 1984).

67 *See* Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466 (8th Cir. 1985) (conspiracy between shoe marketer and its distributor who operated retail stores to cut off plaintiff for underpricing distributor); Malley-Duff & Assocs. v. Crown Life Ins. Co., 734 F.2d 133 (3rd Cir.) (conspiracy between insurance company, former vice-president, employee, and insurance agency established by vice-president through front while in insurance company's employ to take over plaintiff's agency by terminating its relationship with defendant insurance company), *cert. denied,* Agency Holding Corp. v. Malley-Duff & Assocs., 469 U.S. 1072 (1984).

68 735 F.2d 1184 (9th Cir. 1984).

69 390 U.S. 145, 150 n.6 (1968).

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fication to its customers of its suggested retail price, amounted to a coerced agreement between the plaintiff and the defendant to maintain retail prices. The court noted that the defendants were free to charge whatever price they liked, although "the carriers might have blushed to explain to their customers why they charged more than the suggested subscription prices."[70]

The Sixth Circuit found coercion sufficient to allow a jury to infer agreement where a franchiser imposed unreasonable paperwork requirements on a franchisee as part of a scheme designed to force franchisees to buy from sources and sell at prices determined by the franchiser. In *Bender v. Southland Corp.*,[71] the court found that the franchiser's "7-Eleven" franchisee "Retail Accounting System" could be seen as an attempt to coerce franchisee compliance[72] and therefore reversed the district court's grant of summary judgment for the defendant. In addition to the paperwork burden, the court relied on evidence of special surveillance of the plaintiff's accounts, threats to terminate the plaintiff, refusal to honor the plaintiff's price change reports resulting in inventory shortages chargeable to plaintiff, delayed payroll payment from funds withheld from the franchisee for that purpose, and visits by Southland employees demanding that the plaintiff raise prices on items sold below the defendant's suggested price.[73] Defining "[c]oercion in the vertical price fixing context" as "actual or threatened affirmative action beyond suggestion or persuasion, taken by a defendant in order to induce a plaintiff to follow the defendants' prices,"[74] the court found sufficient evidence of a coerced agreement to merit a trial.

The Ninth Circuit, relying on its pre-*Monsanto* decision in *Filco v. Amana Refrigeration, Inc.*[75] has taken a somewhat different approach to coercion. In *Filco* the court held that competitor complaints, followed by termination, are insufficient evidence from which to infer agreement.[76] Instead, a plaintiff must show concerted action and an attempt to coerce the plaintiff to abide by suggested prices in order to reach the jury. In addition, the Ninth Circuit held that plaintiffs may establish the element of causation by evidence of: (1) the volume and intensity of complaints; (2) the time gap between receipt of the complaints and termination; and (3) whether the de-

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70 735 F.2d at 1187.

71 749 F.2d 1205 (6th Cir. 1984).

72 The defendant's system imposed extensive reporting requirements which the defendant failed to explain adequately. *See id.* at 1200-10, 1212-14.

73 *Id.* at 1212-13.

74 *Id.* at 1213.

75 709 F.2d 1257 (9th Cir.), *cert. dismissed*, 464 U.S. 956 (1983).

76 *Id.* at 1263.

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fendant had a valid, independent reason for the termination.[77]

Subsequent courts have used elements of *Filco*'s three-part causal test to determine whether there is sufficient evidence to send the conspiracy question to the jury. In particular, courts have focused on whether a defendant had a business reason for terminating a distributor, whether a conspiracy was one to fix prices,[78] and whether the plaintiff produced sufficient evidence of causation.[79] Finding a good business reason, such as the defendant's undertaking an independent study of changing its marketing system in a way which the plaintiff claims caused termination, has sufficed to refute a claim of a dealer-supplier conspiracy to terminate the plaintiff.[80] Similarly, courts have deemed vertical conduct required by government regulation a sufficient business reason to defeat a conspiracy claim.[81]

In one case, however, where the plaintiff demonstrated that the defendants' claimed business justification was factually unsupported or highly questionable, the court chose to send the question of conspiracy to the jury. In *Fragale & Sons Beverage v. Dill*,[82] two independent wholesalers promised to supply a retailer taking over a beer outlet in Cameron County, Pennsylvania, only to change their minds and refuse to deal with the plaintiff later.[83] The plaintiff proved that the defendant wholesalers had met with the only other beer distributor in the county just prior to notifying the plaintiff that they would not supply his business.[84] The defendants claimed that they refused to deal with the plaintiff because they had made independent business decisions that Cameron County was too small to support two distributors, that the plaintiff's demand was too small to justify the paperwork, and that the plaintiff was inexperienced in the business

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77 *Id.* at 1264. The court noted, "Although none of these factors alone would be strong evidence of illegal concerted action, a combination of them could provide the necessary nexus between complaints and termination and at least allow the plaintiff to present his case to the jury." *Id.* at 1265.

78 *See* Barnes v. Arden Mayfair, Inc., 759 F.2d 676 (9th Cir. 1985); O.S.C. Corp. v. Apple Computer, Inc., 601 F. Supp. 1274 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986); Computer Place, Inc. v. Hewlett-Packard Co., 607 F. Supp. 822 (N.D. Cal. 1984), *aff'd*, 779 F.2d 56 (9th Cir. 1985).

79 *See* Burlington Coat Factory Warehouse Co. v. Esprit De Corp., 769 F.2d 919 (2d Cir. 1985); Landmark Dev. Corp. v. Chambers Corp., 752 F.2d 369 (9th Cir. 1985); Moffat v. Lane Co., 595 F. Supp. 43 (D. Mass. 1984).

80 *See* Burlington Coat Factory Warehouse Co. v. Esprit De Corp., 769 F.2d 919 (2d Cir. 1985); Computer Place, Inc. v. Hewlett-Packard Co., 607 F. Supp. 822 (N.D. Cal. 1984), *aff'd*, 779 F.2d 56 (9th Cir. 1985); O.S.C. Corp. v. Apple Computer, Inc., 601 F. Supp. 1274 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986).

81 *See infra* notes 88-94 and accompanying text.

82 760 F.2d 469 (3d Cir. 1985).

83 *Id.* at 471.

84 *Id.* at 474.

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of beer retailing.[85] The plaintiff contested these claims with evidence that the defendants served smaller areas than Cameron County and smaller accounts than his. The court noted that the "opportunity to conspire," by itself, was insufficient evidence to prove conspiracy, but concluded that a jury could infer a conspiracy where the opportunity to conspire closely preceded the defendants' repudiation of the agreement to deal.[86] Taking the evidence of opportunity to conspire with the plaintiff's evidence undermining the defendants' supposed business purpose, the court found sufficient justification for allowing a jury to hear the case.[87]

As noted above, one court concluded that the defendant's injurious conduct was excused and withheld the question of conspiracy or causation from the jury where the defendant engaged in that conduct in order to comply with government regulations. In *Barnes v. Arden Mayfair, Inc.*,[88] the developer of a new method for sterilizing milk to increase its shelf life claimed that several Alaskan dairies and a shipper had conspired to exclude its product from the Alaskan market. The plaintiff's suit against the shipper[89] rested on the theory that the shipper had raised its rates at the dairies' insistence.[90] The shipper conceded that it had increased the plaintiff's shipping rates in response to dairies' complaints that the product was being shipped under the wrong Interstate Commerce Commission rate.

The court held that because the Interstate Commerce Act mandated the defendant's conduct, the plaintiff failed to produce specific evidence of conspiracy.[91] In so holding, the court reiterated the Ninth Circuit's test for evaluating summary judgment motions in antitrust conspiracy cases: "Once the allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, if the plaintiff then fails to come forward with specific factual support of its allegations of conspiracy, summary judgment for the defendant becomes proper."[92] This standard seems consistent with *Monsanto*'s requirement of "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently"[93] and the requirement of "direct or circumstantial evidence

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85 *Id.* at 471-72.

86 *Id.* at 474.

87 *Id.*

88 759 F.2d 676 (9th Cir. 1985).

89 The plaintiff settled its dispute with the dairies. *Id.* at 678.

90 *Id.* at 681-83.

91 *Id.* at 682-84.

92 759 F.2d at 680 (quoting ALW, Inc. v. United Air Lines, 510 F.2d 52, 55 (9th Cir. 1975)).

93 465 U.S. at 764.

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that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' "[94] To the extent that such standards apply at the motion stage of litigation, however, they appear to be devices of code pleading that could seriously curb the antitrust plaintiff's right to a jury trial on the question of conspiracy.

B. Whether the Conduct Is Price Fixing or Some Other Form of Per Se Illegal Activity

In *Monsanto* the Court acknowledged the difficulty in distributor termination cases of applying the distinction between concerted action to set prices and concerted action on nonprice restrictions.[95] Unfortunately, the Court provided even less guidance on this issue than on the question of whether evidence of conspiracy is sufficient to send a case to a jury. Post-*Monsanto* litigation has grappled with this problem by asking two fundamental questions: (1) whether the facts as presented support a conspiracy to fix prices or merely indicate joint conduct for some other purpose;[96] and (2) whether the claimed conspiracy constitutes per se illegal price fixing or is some other activity which is or ought to be considered per se illegal.

The majority opinion in *Matsushita Electric Industrial Co. v. Zenith*

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94 *Id.* (quoting Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

95 465 U.S. at 762 (noting "similar or identical" economic effects).

96 Many of the cases finding a business justification by suggesting that a defendant's conduct is unilateral and thereby rebuts evidence of a conspiracy, could also have been decided on the ground that the conduct involved was not for the purpose of fixing prices. For example, in Moffat v. Lane Co., 595 F. Supp. 43 (D. Mass. 1984), the defendant furniture supplier inquired of its southern dealers where the plaintiff catalog seller was obtaining the defendant's furniture for resale. The defendant sold its furniture only through authorized dealers whose franchise agreements contained location restrictions. The court dismissed the case for lack of conspiracy and causation, but might have achieved a similar result on the ground that the defendant was exercising a *GTE Sylvania*, 433 U.S. 36 (1977), right to enforce its location clause.

The Ninth Circuit could have reached a similar result in Landmark Development Corp. v. Chambers Corp., 752 F.2d 369 (9th Cir. 1985). The *Landmark* plaintiff obtained large quantities of defendant's appliances by claiming they would be installed in modular housing destined for Alaska. The plaintiff instead sold the appliances at retail in California markets where the defendant had established exclusive distributorship. Upon discovering the scheme, the defendant terminated sales to the plaintiff. Although the court relied upon a business justification theory, it could also have decided the case on the ground that the defendant was exercising its *GTE Sylvania* right to restrict the distribution of its product by territorial exclusivity clauses or customer restraints.

Substituting a *GTE Sylvania* analysis for the business justification rule, however, would raise additional questions. A court might face the issue of whether a vertical refusal to deal for purposes other than price fixing ought to be categorized as a per se illegal boycott. Alternatively, a court might have to decide what factors a plaintiff must prove to demonstrate that a vertical restraint is unreasonable under the rule of reason. For discussion of these questions, see *infra* notes 230-42 and accompanying text.

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Radio Corp.,[97] a post-*Monsanto* Supreme Court decision involving allegations of a horizontal conspiracy to engage in predatory pricing, appears to sanction such an approach. In *Matsushita,* the plaintiff charged that manufacturers and sellers of consumer electronics products in Japan conspired to exclude others from the American market by raising prices in Japan to subsidize low prices for their exports to the United States. The district court dismissed the complaint on a summary judgment motion, finding insufficient evidence of conspiracy to sustain the antitrust claim; the Third Circuit reversed after determining that the trial court had improperly excluded much of the evidence.[98] The Supreme Court relied upon the neoclassical economic model, which dictates that predatory pricing is "economically irrational," "practically infeasible," "inherently uncertain," and "speculative,"[99] and noted that "[t]he alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist."[100] The Court remanded the case to the Third Circuit to consider the summary judgment in light of other evidence.[101] The majority's reasoning threatens to limit significantly the number of antitrust cases that will go to the jury by encouraging the use of motions to bring factual issues to the judge before meaningful discovery takes place.

Various factors seem to affect a court's characterization of the defendant's actions. Cases finding price fixing usually contain evidence that the plaintiff was cutting prices, that the defendant's motive for the termination was the plaintiff's pricing, or that competing dealers complained about the plaintiff's pricing practices.[102] On the other hand, sound business justifications or circumstances indicating that the defendant was attempting to exercise *GTE Sylvania*-sanctioned vertical restraints without the taint of a motive or intent to fix prices have moved courts to hold that a jury could not classify the restraint as price fixing, thus allowing the courts to dismiss complaints.[103]

Several courts, following the rule enunciated in *Cernuto, Inc. v. United Cabinet Corp.*,[104] have held that where a supplier cuts off a dis-

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97 106 S. Ct. 1348 (1986).

98 *Id.* at 1351-53.

99 *Id.* at 1357.

100 *Id.* at 1359.

101 *Id.* at 1362.

102 *See* cases cited *supra* notes 63 & 65.

103 *See, e.g.*, Moffat v. Lane Co., 595 F. Supp. 43 (D. Mass. 1984); O.S.C. Corp. v. Apple Computer, Inc., 601 F. Supp. 1274 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986); Computer Place, Inc. v. Hewlett-Packard Co., 607 F. Supp. 822 (N.D. Cal. 1984), *aff'd*, 779 F.2d 56 (9th Cir. 1985).

104 595 F.2d 164 (3d Cir. 1979); *see also* Victorian House, Inc. v. Fisher Camuto

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tributor at a competing distributor's request, the supplier commits a per se violation of the antitrust laws. The *Cernuto* rule, however, is seemingly inconsistent with the "termination plus" requirement of *Monsanto*. Courts now seeking to determine whether a supplier that terminates a price-cutting dealer at the insistence of a competing dealer is engaged in per se illegal price fixing have encountered difficulties reconciling the two cases.

The Fifth Circuit in *Business Electronics Corp. v. Sharp Electronics Corp.*[105] reached an opposite conclusion from that in *Cernuto*. In *Business Electronics Corp.* the court held it erroneous to instruct a jury that it could find per se price fixing solely on the basis of facts similar to those in *Cernuto*. In language indicating that the Fifth Circuit ascribed unique meaning to "price fixing," the court asserted that "[a]n agreement to terminate a price cutter does not fix prices at any specific or general level but merely frees the complaining dealer to set prices as he chooses."[106] The court then recognized that, under *Monsanto,* dealer complaints followed by termination are not sufficient to prove conspiracy and that courts must take care when drawing the line between vertical price fixing and other types of vertical restraints in determining whether a per se rule should be followed.[107] Ultimately, the court concluded that

> in order for a manufacturer's termination of a distributor to be illegal *per se*, it must be pursuant to a price maintenance agreement with another distributor. That distributor must expressly or impliedly agree to set its prices at some level, though not a specific one. The distributor cannot retain complete freedom to set whatever price it chooses.[108]

The Fifth Circuit's decision in *Business Electronics Corp.* badly distorted the *Monsanto* analysis. The *Monsanto* Court nowhere required that a plaintiff prove the existence of a *contract* between the supplier and the complaining dealer to maintain prices "at some level" resulting in the price-cutting dealer's termination before allowing a jury to find illegal price fixing. Concededly, *Monsanto* does require proof of a causal connection between an agreement to maintain prices and the cut-off of a dealer before the dealer can prove anti-

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Corp., 769 F.2d 466, 469 (8th Cir. 1985) ("A conspiracy between a wholesaler and one or more of its retailers to terminate a competing retailer on the basis of price constitutes a *per se* violation of the Sherman Act."); Zidell Explorations, Inc. v. Conval Int'l, Ltd., 719 F.2d 1465 (9th Cir. 1983) (same).

105 780 F.2d 1212 (5th Cir. 1986).

106 *Id.* at 1216.

107 The Fifth Circuit's confusing discussion leaves unclear whether the court concluded that the evidence was legally insufficient to send the case to a jury on the question of conspiracy or that the evidence would not support a jury finding of price fixing. *Id.*

108 *Id.* at 1218.

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trust injury.[109] The Fifth Circuit, however, overstated this requirement.

The *Business Electronics Corp.* court's interpretation of *Monsanto* likely reflects a belief that vertical price fixing ought not be per se illegal. Judge Jones explicitly asserted this position in her concurrence. Although Judge Jones has not been appointed to the Supreme Court or elected to Congress, she apparently felt no constraint in claiming that the case "perfectly illustrates the arguments why vertical price restraints should be tested under antitrust's Rule of Reason,"[110] that the "flaws in *Monsanto*'s continued recognition of per se illegality are highlighted by this case,"[111] and that the "Supreme Court should take the earliest opportunity to review its Russian roulette approach to vertical price restraints."[112]

A more difficult variation of the problem of distinguishing price fixing activity from protected joint conduct arises where either the supplier's motive or the effect on price are less direct than in the case of a discounter terminated pursuant to an agreement with a competing distributor. For example, is it price fixing for a supplier to reduce its wholesale price through a "sales assistance" program in order to help a dealer meet price competition on a specific sale? Some appellate courts upheld such programs prior to *Monsanto,* noting that they were essentially procompetitive because they allowed the dealer to engage in price competition.[113] Similarly, in one post-*Monsanto* case, *Bryant Heating & Air Conditioning Corp. v. Carrier Corp.*,[114] a district court found that a supplier's sales assistance program did not constitute a price fixing agreement because it did not "have the effect of depriving the dealer of pricing freedom, but instead sought only to ensure that the discount be passed on to the customer."[115]

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109 465 U.S. at 767. ("If . . . there was evidence of an agreement with one or more distributors to maintain prices, the remaining question is whether the termination of Spray-Rite was part of or pursuant to that agreement.").

110 780 F.2d at 1221 (Jones, J., concurring).

111 *Id.*

112 *Id.* at 1222 (Jones, J., concurring).

113 *See* Lewis Serv. Center, Inc. v. Mack Trucks, Inc., 714 F.2d 842, 848 (8th Cir. 1982), *cert. denied,* 467 U.S. 1226 (1984); AAA Liquors, Inc. v. Joseph Seagram & Sons, 705 F.2d 1203 (10th Cir. 1982), *cert. denied,* 461 U.S. 919 (1983).

114 597 F. Supp. 1045 (S.D. Fla. 1984); *see also* Jack Walters & Sons v. Morton Bldg., Inc., 737 F.2d 698, 706-07 (7th Cir. 1984) (post-*Monsanto* case stating that sales assistance programs do not necessarily violate the Sherman Act), *cert. denied,* 469 U.S. 1018 (1984).

115 597 F. Supp. at 1051. The court further supported its conclusion that no price fixing had occurred by noting that the dealer had initiated the reduction in price, that the manufacturer had never refused to sell because of the dealer's pricing policies, and that the manufacturer had never threatened to terminate the dealer over a pricing dispute. *Id.*

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More controversially, the First Circuit found no price fixing as a matter of law in *Kartell v. Blue Shield of Massachusetts*.[116] There, the court scrutinized Blue Shield's full service health insurance program allowing subscribers to see any doctor who signed a participating physician's agreement with Blue Shield. Under that contract, the doctor agreed to accept as payment in full for his services an amount Blue Shield determined under its formula for ascertaining customary charges. The plaintiff doctors claimed the plan constituted unlawful price fixing under section 1 of the Sherman Act, as well as unlawful monopolization and an attempt to monopolize under section 2 of the Act.[117] The district court accepted the plaintiffs' section 1 claim, finding that the plan unreasonably restrained competition because the payment method, when coupled with Blue Shield's size and economic power,[118] produced unreasonably rigid and low prices, interfered with the doctors' freedom to set the price of their services, and deterred doctors from offering better and more expensive services.[119]

The First Circuit reversed, holding that "from a commercial perspective, Blue Shield in essence 'buys' medical services for the account of others"[120] and that a buyer is entitled to bargain over a purchase's essential terms; even a monopoly buyer "is entitled to use its market power to keep prices down."[121] The court thus held that the conduct did not constitute price fixing, an unreasonable restraint of trade, or a section 2 violation. The court's finding that Blue Shield was a "buyer" for its third party subscribers played a crucial role in the decision. The court's analogies to the relationships of a father buying a toy his son picks out, a landlord hiring a painter to paint his tenant's apartment in accord with the tenant's specification, or an employer hiring a doctor to treat its employees,[122] however, are somewhat limp. For example, a patient who buys doctor services normally selects the doctor-seller of the services, while the insurer agrees to pay the bill or reimburse the patient. Moreover, whereas most health care insurance claims involve just one contract, Blue Shield's plan contained three: the agreement between doctor and patient, the agreement between patient

116 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 2040 (1985).

117 Section 2 of the Sherman Act deems guilty of a felony "[e]very person who shall monopolize, or attempt . . . or combine or conspire with any other person . . . to monopolize . . . trade or commerce." 15 U.S.C. § 2 (1982).

118 The district court found that Blue Shield insured 56% of the Massachusetts population (45% under the balance billing plan) and accounted for 74% of the privately insured population of Massachusetts. 749 F.2d at 924.

119 *Id.*

120 *Id.* at 925.

121 *Id.* at 929.

122 *Id.* at 925.

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and insurer, and the agreement between doctor and insurer. Thus, *Kartell* raises a serious question as to whether normal assumptions about the competitive process apply in a market where third party reimbursement might distort the normal incentives of buyers and sellers of the service.

Regardless of whether these distinctions merit a different result from the one reached, the court should have acknowledged them. Instead, the court simply held:

> The relevant antitrust facts are that Blue Shield pays the bill and seeks to set the amount of the charge. Those facts led other courts in similar circumstances to treat insurers as if they were 'buyers'. The same facts convince us that Blue Shield's activities here are *like* those of a buyer.[123]

From this basic finding, it followed that the prices set by Blue Shield were not unlawful unless predatory;[124] that as a buyer, Blue Shield had a right to refuse to deal so long as it acted unilaterally;[125] and that Blue Shield's ban on balance billing was a lawful part of the bargain.[126]

Kartell illustrates the significance of the assumptions one makes about the policy goals underlying antitrust laws. Those who see the purpose of antitrust as promoting "consumer welfare," as defined by neoclassical economic analysis, would probably agree with the *Kartell* Court's analysis because the Blue Shield plan created lower prices for consumers. However, the decision will likely trouble those who view the antitrust laws as securing broader goals such as guaranteeing the independence of entrepreneurs or preventing private power centers from exercising undue "governmental" power. Blue Shield's plan interfered with both the pricing discretion of doctors and the freedom of subscribers and took on the trappings of rate regulation—a power normally exercised by government.

The *Kartell* court, rather than grappling with the facts in light of the assumptions underlying the model, ultimately redefined the facts to fit that model. In the absence of a constructive legislative response to the market forces' failure to handle the problems of delivering health care services, the court was confronted with a difficult choice between conferring excessive market power on either insurers or doctors. Confronting the real dimensions of the choice would reveal that although antitrust policy cannot resolve all market imperfections, an unrealistically abstract *laissez faire* approach does little better.

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123 *Id.* at 926 (emphasis in original).
124 *Id.* at 927-28.
125 *Id.* at 932.
126 *Id.* at 929-30.

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Judge Posner's opinion in *Jack Walters & Sons v. Morton Building, Inc.*[127] illustrates the significance of both a judge's assumptions about the policy underlying antitrust laws and the ideology he or she brings to the process of determining whether conduct should be legally categorized as price fixing. In that case, a terminated franchisee of prefabricated buildings claimed that its franchiser had illegally imposed a tying arrangement and resale price maintenance agreement. In a lengthy and dicta-laden opinion, Judge Posner upheld the district court's partial grant of summary judgment for the defendant. Writing for the Seventh Circuit, Judge Posner found that the plaintiff had failed to prove the existence of two separate products as required to sustain a tying claim. The plaintiff further argued that the defendant had fixed prices by advertising special deals on its buildings to consumers and providing sales assistance to enable its dealers to sell at the advertised price; this claim also failed to move the court. It held that because the defendant's advertising program was lawful, steps taken to insure that dealers passed along wholesale price concessions to consumers did not constitute vertical price fixing. Moreover, the court held that the plaintiff could not prove antitrust injury even if it could show a conspiracy to fix prices. Competing dealers could always harm the plaintiff by selling at lower prices; the court stated that the plaintiff "will not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage."[128]

In his concurring opinion, Judge Swygert justifiably objected to Judge Posner's extensive dicta.[129] Nevertheless, Judge Posner used this case to question the validity and continued vitality of the prohibition against vertical maximum price fixing. Although admitting it was "premature" to "explore this maze further,"[130] Judge Posner wrote that "[i]t is minimum price fixing that creates the analogy to a dealers' cartel upon which the per se rule against resale price maintenance rests."[131] Reasoning that the Supreme Court held maximum price fixing illegal in *Albrecht v. Herald Co.*[132] because the exclusive territories in that case were illegal under the rule of *United*

127 737 F.2d 698 (7th Cir.), *cert. denied,* 469 U.S. 1018 (1984).

128 737 F.2d at 709.

129 *Id.* at 713-14. In Roland Mach. Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984), an exclusive dealing case, Judge Posner vacated a preliminary injunction by overruling the trial court's finding of irreparable injury and holding that the law of exclusive dealing required application of a rule of reason rather than the strict test of Standard Oil v. United States, 337 U.S. 293 (1949). Judge Swygert dissented strongly, claiming that Judge Posner improperly second-guessed the trial judge and failed to apply the appropriate legal standards. *Id.* at 396-97 (Swygert, J., dissenting).

130 737 F.2d at 707.

131 *Id.* at 706.

132 390 U.S. 145 (1968).

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States v. Arnold, Schwinn & Co.,[133] Judge Posner concluded that the Court's *GTE Sylvania* decision overruling *Schwinn*'s per se rule against vertical territorial restrictions undermined the *Albrecht* holding.[134] Judge Posner further concluded that if exclusive territories are lawful, then a franchiser should be allowed to set maximum prices for dealers within exclusive territories to prevent franchisee monopoly pricing.

This dicta-laden analysis ultimately concludes that vertical maximum price fixing agreements are not price fixing within the per se rule.[135] The conclusion is based on the premises of neoclassical economic analysis and conflicts with the position of those who maintain that the antitrust laws were designed to promote and ought to be interpreted as promoting goals broader than those recognized by Judge Posner's ideology.

The conflict over the goals of antitrust policy becomes even more apparent in post-*Monsanto* litigation concerned with the extent to which vertical restraints unassociated with price fixing ought to fall within some category of per se analysis. The legal status of boycotts provides an example of this conflict. In a Seventh Circuit case decided before *Monsanto*, *Products Liability Insurance Agency v. Crum & Forster Insurance Cos.*,[136] Judge Posner concluded in dicta that a vertically induced refusal to deal is not per se unlawful absent a purpose to fix prices.[137] Without intent to fix prices, Judge Posner stated, "the plaintiff must show that the refusal to deal is likely to reduce competition."[138] Judge Posner then attacked the plaintiff's claim that *Klor's, Inc. v. Broadway-Hale Stores, Inc.*[139] established a rule that

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133 388 U.S. 365 (1967).

134 *See Morton Bldg.*, 737 F.2d at 706-07.

135 *But see* Northwest Publications, Inc. v. Crumb, 752 F.2d 473 (9th Cir. 1985) (finding vitality in Supreme Court precedents holding maximum price fixing per se illegal).

136 682 F.2d 660 (7th Cir. 1982) (upholding grant of summary judgment for defendant on ground that plaintiff failed to present evidence of conspiracy).

137 *Id.* at 663. Judge Posner's colleagues on the Fifth Circuit have more openly applied neoclassical economic theories to the issue of concerted refusals to deal, albeit in a case involving a price fixing claim. *See* Business Elec. Corp. v. Sharp Elec. Corp., 780 F.2d 1212 (5th Cir. 1986); *see also supra* notes 105-12 and accompanying text.

138 682 F.2d at 663.

139 359 U.S. 207, 213 (1959) (holding group boycott per se illegal even though "the victim is just one merchant whose business is so small that his destruction makes little difference to the economy" (footnote omitted)).

In United States v. General Motors Corp., 384 U.S. 127 (1966), the Supreme Court held a vertically induced boycott of discount car dealers per se unlawful. The Court reaffirmed its *Klor's* opinion:

> The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be

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injury to any competitor could violate the antitrust laws even if the action did not reduce competition. Judge Posner questioned the continuing validity of *Klor's*' protection of individual competitors[140] and asserted that even if *Klor's* was still good law, the plaintiff had failed to show that "his exclusion [from the market] will turn out to have been the first step in a march toward [the] monopoly"[141] that the *Klor's* Court feared.

The *Monsanto* Court's implicit recognition that the antitrust laws seek to protect traders' freedom to sell in accordance with their own judgment suggests that *Klor's* is not the relic that Judge Posner's dicta claims. Nor can his claim that a victim must prove that the boycott is the "first step in a march toward . . . monopoly"[142] of some relevant market withstand scrntiny. Indeed, the Third Circuit continues to respect *Klor's* and the goal of protecting the traders' freedom and has explicitly rejected Judge Posner's view that non-price vertical boycotts are not per se illegal.

In *Malley-Duff & Associates v. Crown Life Insurance Co.*,[143] an insurance agency showed that the defendant insurance company terminated its contract as the result of a conspiracy between the defendant's former vice-president and another employee. As part of the conspiracy, the individual defendants, while in the employ of the insurance company, secretly set up a front agency for the purpose of taking over the plaintiff's territory. The defendants then caused the insurance company to extend credit to their front agency and used their corporate positions to impose unreasonable quotas on the plaintiff's agency. When the plaintiff failed to meet these quotas, the individual defendants, as employees of the insurance company, terminated the plaintiff's agency relationship. They then transferred the plaintiff's business to their own agency and resigned from the insurance company to work for their new agency.[144] Despite these facts, the district court relied on Judge Posner's dicta in *Product's Liability Insurance Agency*[145] to dismiss the complaint, believ-

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> saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles.

Id. at 146 (citations omitted).

140 682 F.2d at 665.

141 *Id.*

142 *Id.*

143 734 F.2d 133 (3d Cir.), *cert. denied*, Agency Holding Corp. v. Malley-Duff & Assocs., 469 U.S. 1072 (1984); *see also* Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367 (3d Cir. 1985) (no antitrust violation for commercial bribery scheme between manufacturer's employee and sales agent because legitimate agency relationship existed and no sales occurred between the two).

144 734 F.2d at 137-39.

145 Product Liab. Ins. Agency v. Crum & Forster Ins. Cos., 682 F.2d 660 (7th Cir. 1982); *see supra* notes 135-44 and accompanying text.

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ing that no antitrust offense could be established in the absence of proof that the conduct adversely affected consumers.[146]

On appeal, the Third Circuit reversed. Judge Aldisert, writing for the court, concluded that a jury could find that the defendants and their agency had conspired among themselves and with the insurance company to terminate the plaintiff.[147] The court then "part[ed] company" with Judge Posner's *Products Liability Insurance Agency* analysis.[148] Quoting the Third Circuit decision in *Cernuto, Inc. v. United Cabinet Corp.*,[149] the court held that a common supplier's refusal to deal induced by a competitor of the plaintiff may be horizontal in nature, even though vertical in form.[150] The court therefore concluded that Judge Posner's characterization of such restraints as vertical "is not binding and does not foreclose inquiry as to whether the defendants' alleged agreement may have constituted a *per se* violation where its principle impact was on the horizontal level."[151] Citing *Klor's*[152] and *United States v. General Motors Corp.*,[153] the court held that the plaintiff was entitled to a jury finding on the per se theory of horizontal group boycott.[154]

The "ought" question—what "ought" the goals of antitrust policy be—lies beneath courts' manipulative categorization of a restraint as horizontal or vertical, their classification of conduct as within or without a category of per se illegality, and their deductive application of abstract economic theories. The results in *Monsanto* and *Malley-Duff & Associates* assume that the values stressed by *Klor's* are still applicable to antitrust analysis. In contrast, Judge Posner's neoclassical approach in *Products Liability Insurance Agency* rejects these values as inappropriate goals for the federal antitrust laws.

Divisions over the legal definition of per se categories of liability, determinations of whether certain facts fall within a category of condemned conduct, and what categories of conduct ought to be condemned on a per se basis will persist until this question of antitrust policy is resolved. A reflective resolution of this question requires consideration of at least the following: (1) the legislative policies behind the antitrust laws; (2) the role of precedent; (3) the division of powers between Congress and the courts; (4) the facts

146 734 F.2d at 140.

147 *Id.* at 142-44.

148 *Id.* at 140.

149 595 F.2d 164 (3d Cir. 1979) (reversing summary judgment for defendant manufacturer who terminated price-cutting distributor at request of competing distributor).

150 734 F.2d at 140-41.

151 *Id.* at 141.

152 359 U.S. 207 (1959); *see supra* note 139 and accompanying text.

153 384 U.S. 127 (1966); *see supra* note 139.

154 734 F.2d at 143-44.

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peculiar to disputes brought as antitrust cases; (5) the rights of all parties to the dispute; (6) the long-range public interest; and (7) the nature of legal reasoning and its deeper moral responsibilities. The final section of this Article will expand upon these themes.[155]

C. The Horizontal/Vertical Distinction

Although Monsanto operated as both supplier and retail distributor of herbicides, the *Monsanto* Court did not address the question of whether Monsanto's conduct constituted a horizontal price fixing conspiracy. Subsequent cases have ignored this horizontal aspect of the *Monsanto* decision, although it could be used to narrow the holding's significance. The Third Circuit's need to characterize a vertically induced concerted refusal to deal as horizontal in impact in *Malley-Duff & Associates v. Crown Life Insurance Co.*[156] may represent a partial recognition of the increased significance of the horizontal/vertical distinction in an era of Supreme Court deference to neoclassical economic analysis.

Regents of the University of California v. American Broadcasting Companies[157] illustrates the horizontal/vertical distinction's significance. In that case the plaintiffs, members of the Pacific-10 and Big Ten college football conferences, signed a contract with the Columbia Broadcasting System to broadcast their football games[158] after the Supreme Court struck down the National Collegiate Athletic Association's (NCAA's) exclusive bargaining agent status in *NCAA v. Board of Regents of the University of Oklahoma.*[159] In contrast, the College Football Association ("CFA"), an association of sixty-three major college football programs, had signed a contract designating the American Broadcasting Company ("ABC") "as the exclusive network for member television coverage."[160] That contract prohibited CFA members from broadcasting their games on other networks, even when the game involved a non-CFA member like the Pacific-10 and Big Ten schools.[161] The plaintiffs claimed that the ABC-CFA contract restraint amounted to a group boycott and a cartel restricting the output of televised games so as to enhance the value of the ABC-CFA contract.[162]

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155 *See infra* notes 169-242 and accompanying text.

156 734 F.2d 133 (3d Cir.), *cert. denied,* Agency Holding Corp. v. Malley-Duff & Assocs., 469 U.S. 1072 (1984).

157 747 F.2d 511 (9th Cir. 1984).

158 *Id.* at 513-14.

159 468 U.S. 85 (1984) (holding NCAA's position as exclusive bargaining agent unreasonable restraint).

160 747 F.2d at 512-13.

161 *Id.*

162 *Id.* at 516.

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On review of the grant of a preliminary injunction against the defendants, the court characterized the complaint as one alleging per se illegal price fixing and a group boycott. The court then distinguished the Supreme Court's application of the rule of reason standard in *NCAA,* by noting that, unlike the NCAA, the CFA did not produce a product in its regulation of competition between member schools.[163] Instead, the CFA seemed to exist solely for the purpose of marketing its members' television rights.[164] Accordingly, the Court rejected the defendants' claim that their contract was essentially a vertical restraint on the distribution of a product and suggested that the restraint amounted to a horizontal group boycott, rendering it per se illegal.[165]

Once an activity is classified as a horizontal restraint and characterized as price fixing or a group boycott, few would hesitate to find it illegal per se. The assumptions and logic of a neoclassical approach to the problem, however, suggest that a court should require that the plaintiffs prove injury to consumers, as well as to themselves, before condemning the restraint as illegal per se. In dissent, Judge Beezer seemed to adopt such a stance; he contested the question of whether the restraint was horizontal or vertical[166] and characterized the dispute as involving competition between network "packages" of games rather than between the televising of particular games.[167] Whether all consumers of televised college football games should be treated alike is subject to doubt, as anyone familiar with the loyalties of college alumni will attest. The model nonetheless homogenizes consumers in markets with vertical distributional restraints, in order to protect the model's consistency, reality to the contrary notwithstanding.

The *ABC* decision may be siguificant for post-*Monsanto* litigation even though the horizontal/vertical discussion is dicta. Many of the distributor termination cases following *Monsanto* might be categorized as horizontal restraints because they involve claims of a combination or conspiracy of competing dealers using their common supplier to cut off or otherwise coerce a competing dealer.[168] If a

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163 *Id.* at 517-18.

164 *Id.* at 516-18.

165 *Id.* at 518. Although the court was merely evaluating the defendants' likelihood of success at trial, it suggested that the ABC-CFA agreement was virtually indistinguishable from that held illegal in *NCAA. Id.*

166 *Id.* at 526 (Beezer, J., dissenting).

167 *Id.*

168 *Compare* Motive Parts Warehouse v. Facet Enters., 774 F.2d 380 (10th Cir. 1985) (finding sufficient evidence to go to jury on allegation that supplier and prospective franchisees conspired to fix prices charged to competing present distributors) *with* National Marine Elec. Distribs. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1985) (finding no merit in claim that supplier's termination of plaintiff following competing dealers' com-

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plaintiff proves such a conspiracy, apart from whether its purpose is price related, some courts seem willing to classify the restraint as horizontal. These courts would characterize the conduct as one of the horizontal per se restraints of price fixing, division of territories or customers, or a group boycott.

Watching future courts struggle with such abstract classification problems should prove interesting; the rise or fall of distinctions like horizontal or vertical, and classifications such as per se or rule of reason restraints, will undoubtedly inspire plaintiffs to cast their complaints as horizontal restraints by competing dealers who use their common supplier to terminate or discipline the plaintiff, or whatever other form appears most advantageous. Even more interesting will be whether the courts will recognize the problem as springing from their tendency to rely upon the rigid methodology of deductive reasoning from a model detached from reality, and their practice of establishing rigid per se rules to assess a complex reality. If so, courts may finally begin using inductive reasoning to weigh the actual facts of the dispute in light of the general values Congress determined courts should implement in enforcing the antitrust laws.

III
THE "OUGHT" OF POST-*MONSANTO* ANTITRUST REGULATION OF VERTICAL RESTRAINTS

One cannot complete a tour of the post-*Monsanto* litigation without concluding that courts are in substantial conflict over important elements of the antitrust standards to be applied to vertical market restraints, a conflict which is the product of on-going ideological warfare over the goals of antitrust policy. There is also a less-noticed problem with the methodology followed in judicial analysis of antitrust cases generally, regardless of their underlying assumptions about antitrust policy. This problem is the *way* in which courts and commentators approach fact analysis in antitrust disputes and the antitrust laws' general policy, as opposed to the preconceived substantive rules they bring to the process. Courts and commentators have come to rely upon fixed rules, rigid economic and legal concepts, a mechanical deductive logic, and cliches. In the process, they sacrifice a creative and inductive analysis of the dispute's actual facts in light of the law's underlying policy goals and values, the insights available from other disciplines, institutional constraints upon the courts, and concern for the long term consequences of a particular decision. As a result, courts and commentators determine the

plaints reflected horizontal agreement to fix prices). *See also* Marco Holding Co. v. Lear Siegler, Inc., 606 F. Supp. 204 (N.D. Ill. 1985) (denying summary judgment on allegation that supplier terminated dealer to placate complaining dealers).

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"is" of the dispute without reference to its underlying facts; furthermore, they arrive at an "ought" that is dictated solely by the assumptions and methodology they follow in applying predetermined rules to predefined facts, never examining the antitrust laws' relevance, meaning, and application as envisioned by Congress. As a long term consequence of such a process, antitrust policy will become a wooden and irrelevant system of law, incapable of implementing the policies that Congress intended it to fulfill.

A. Defects In The Current Analytical Methodology For Judging The "Ought" Of Vertical Restraints

In *United States v. Arnold, Schwinn & Co.*[169] the United States Supreme Court struck down vertical territorial and customer restrictions where title to the goods has passed from a supplier to a distributor. The majority based its decision on the assumption that such restraints were "obviously destructive of competition,"[170] reasoning that the common-law rule against restraints on alienation forbade the imposition of controls over the use or subsequent distribution of property once title had passed to a buyer.[171] Justices Stewart and Harlan, concurring in part and dissenting in part, attacked the majority's method of reasoning; they accused the majority of relying upon the rigid application of an "'ancient rule' "[172] derived during the "reign of Queen Elizabeth I"[173] without taking account of modern reality, stating that:

> [T]he state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today. The problems involved are difficult and complex, and our response should be more reasoned and sensitive than the simple acceptance of a hoary formula. . . . [T]he Court's answer makes everything turn on whether the arrangement between a manufacturer and his distributor is denominated a "sale" or "agency." Such a rule ignores and conceals the "economic and business stuff out of which" a sound answer should be fashioned.[174]

The majority's reliance upon a "wooden application of the venerable rule against restraints on alienation"[175] was widely and

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169 388 U.S. 365 (1967).

170 *Id.* at 379.

171 *Id.* at 380.

172 *Id.* at 393 (Stewart, J., concurring in part and dissenting in part).

173 *Id.* at 393 (quoting Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 983 (1928)).

174 *Id.* at 392-93 (footnote omitted) (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

175 Flynn, *The Function and Dysfunction of Per Se Rules In Vertical Market Restraints*, 58 WASH. U.L.Q. 767, 769 (1980).

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rightly criticized as "an exercise in barren formalism."[176] The decision ignored the complexities of modern mass marketing, the interests of all of the parties to the restraint, and the insights of economic analysis applied to legal problems. On a more basic, jurisprudential level, the *Schwinn* Court's *method* of analysis was inconsistent with a legitimate and sophisticated legal analysis of the "is" and the "ought" of the dispute. The *Schwinn* Court should have used a creative analysis of all of the facts in light of the many broad values underlying antitrust policy and the rich sources of wisdom (including but not limited to the potential insights of economics and the purposes underlying common law property rules) to pour contemporary meaning into those values. Instead, the *Schwinn* Court's method of reasoning constituted an epistemological decapitation of the fact-finding process and bound its analysis with an intellectual straitjacket which prevented exploration of a multitude of disciplines for insights into the contemporary meaning and application of the antitrust policies.[177]

Advocates of the exclusive use of neoclassical economic analysis as the one true path for determining what the antitrust rules ought to be and how they ought to apply in specific antitrust disputes criticized *Schwinn* with particular vigor.[178] In essence, these critics complained that the Court ignored the teachings of the hypotheses of "economic analysis," the deductively derived rules dictated by the artificial assumptions and hidden value choices of neoclassical economic analysis. "Economic analysis," according to its proponents, would demonstrate that all purely vertical restraints should be analyzed under the "rule of reason" or should be presumed per se lawful.[179]

The basis of the economic analysis argument is easily explained. Pursuant to the model's definitions and underlying value

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176 Baker, *Vertical Restraints in Times of Change: From* White *to* Schwinn *to Where?*, 44 ANTITRUST L.J. 537, 537 (1975). The leading articles criticizing *Schwinn* are collected in L. SCHWARTZ, J. FLYNN, & H. FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST 637 n.99 (6th ed. 1983).

177 The best summary of those values may be found in Fox, *supra* note 23, at 1146-55.

178 *See* Bork, *supra* note 27, at 172 ("*Schwinn*'s result was not only wrong, but its rationale verged on mere wittiness."); Posner, *The Next Step In The Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 1 (1981) (same); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975) (same) [hereinafter cited as *Antitrust Policy*]. In some instances, the criticism bordered on ridicule. *See, e.g.*, Bork, *supra* note 27, at 179 (*Schwinn* opinion "inspired criticism bordering on ribaldry").

179 *See, e.g.*, Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *a Way Out?*, 67 VA. L. REV. 1457 (1981) (advocating rule of reason analysis); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981) (advocating per se legality).

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choices, one assumes that the market is perfectly competitive, that a supplier's motive for imposing a vertical restraint is to maximize output, that complex organizations behave in accord with the model's definitions, and that the aggregate of the micro will reflect the macro common good.[180] Accordingly, courts should consider the proponent of the restraint's judgment as a surrogate for the legal system's responsibility to determine whether the restraint violates the Sherman Act.[181] In other words, neoclassicists would have courts adopt a wooden and inflexible rule of per se legality premised upon definitions and values extant in the time of King George III, rather than rely like the *Schwinn* Court upon the rigid application of the common law concepts of restraints upon alienation derived during the reign of Queen Elizabeth I.

Substituting one set of rigid and artificial rules for another continues the process of short-circuiting the legal process's function.[182] The model distorts the "is" of disputes to obtain the necessary con-

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180 Elsewhere, I have dissected the underlying assumptions of neoclassical economic analysis, including, among others, the concepts of rationality, supply, demand, and marginal cost. *See* Flynn, *Appendix: Definitions and Assumptions of Economic Analysis,* 12 Sw. U.L. Rev. 361 (1981); *see also* Flynn, *The Misuse of Economic Analysis in Antitrust Litigation,* 12 Sw. U.L. Rev. 335 (1981) (criticizing simplified assumptions of economic analysis) [hereinafter cited as *Misuse*].

Advocates of economic analysis use definitions rather than assumptions founded upon empirical observation, and they ignore the insights of psychologists, sociologists, or others having some experience with reality. *See* Leff, *Economic Analysis of Law: Some Realism About Nominalism,* 60 Va. L. Rev. 451 (1974). Moreover, economic analysis ignores time, causation, and the existence of a legal system defining pre-existing rights based on a pre-existing distribution of entitlements. One of course needs to control the number of variables in constructing a hypothesis, lest it become too complex to be manageable. However, there must be a limit to simplification if the model is to have any potential relevance to reality. The compulsion to be a "science" may overwhelm common sense in some areas of human inquiry, preventing the "scientist" from understanding that a particular area of human inquiry requires performance on the higher level of the artist.

181 *See* Bork, *supra* note 27, at 180-82 (vertical restraints are proconsumer and should be lawful); *Antitrust Policy, supra* note 178, at 298-99 (government must demonstrate supplier's bad motive for vertical restraint).

182 The economic analysis methodology resembles the Court's approach during the era of "substantive due process," when the Court used the undefined concept of due process to implement unstated normative objectives. In the last days of the judiciary's assertion of power to determine economic policy, proponents of this form of simplistic rule application stated their analytical methodology in a single sentence:

> When an act of Congress is appropriately cballenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

United States v. Butler, 297 U.S. 1, 62 (1936). Advocates of exclusively using neoclassical economics as the guide to antitrust policy appear to claim courts should follow a substantive due process type of methodology in antitrust litigation. Their basic maxim seems to be that when an activity is challenged in the courts as not conforming to the

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formity of the facts to its unverified assumptions and definitions. Thus, the "scientific" model unknowingly sacrifices the process for determining the "ought" of the decision. Not surprisingly, exclusive reliance upon this form of rigid rule application to analyze legal disputes is coming under increasing criticism, some of which verges on outright ridicule.[183]

The law and economics approach of neoclassical economics advocates patterns its methodology after an outmoded notion of "scientific" analysis which examines reality with fixed assumptions defining that reality.[184] Based upon a series of unrealistic assump-

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model of neoclassical economic theory, the judicial branch has only one duty—to lay the model beside the practice and "to decide whether the latter squares with the former."

For an application of a fixed ideological model to the work of the Supreme Court, see Easterbrook, *The Supreme Court 1983 Term—Foreword: The Supreme Court and the Economic System,* 98 HARV. L. REV. 4 (1984). The Easterbrook reincarnation of the *Butler* methodology of legal reasoning is criticized in Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?,* 98 HARV. L. REV. 592 (1985) (utilitarian approach ignores distribution of wealth and power and underlying definitions of social values and perspectives). Judge Easterbrook responded to Tribe's criticism in Easterbrook, *Method, Result, and Authority: A Reply,* 98 HARV. L. REV. 622 (1985), asserting the moral value of judges' applying neoclassical economic analysis while claiming that judges ought not impose their own moral views when deciding cases. A judge unaware of and incapable of questioning his or her own moral values poses serious risks to the realistic, fair, and effective functioning of the legal process. *See* Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809 (1935). In effect, Judge Easterbrook advocates judges' assuming the role of philosopher kings while claiming to eschew such a role.

183 *See, e.g.,* Flynn, *Misuse, supra* note 180, at 346 ("To make a fixed deductive model the premise of an inductive legal system is to jam a square peg into a round hole. The deductive square peg of this kind of economic analysis mutilates the inductive round hole of the legal process . . . ."); Horowitz, *Law and Economics: Science or Politics?,* 8 HOFSTRA L. REV. 905, 905 (1980) ("Future legal historians will need to exercise their imaginations to figure out why so many people could have taken [economic analysis] so seriously."). For a particularly harsh criticism of antitrust's exclusive reliance upon neoclassical economic analysis, see Rowe, *The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics,* 72 GEO. L.J. 1511 (1984).

Critical Legal Studies (CLS) scholars, sensitive to the complexities of establishing the meaning of legal concepts, launch particularly harsh criticisms at the law and economics movement. *See* Heller, *The Importance of Normative Decision-Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development,* 1976 WIS.L. REV. 385; Kelman, *Choice and Utility,* 1979 WIS. L. REV. 769; Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem,* 52 S. CAL. L. REV. 669 (1979); Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities,* 34 AM. U.L. REV. 939 (1985); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique,* 33 STAN. L. REV. 387 (1981). For a thoughtful rejoinder to CLS, see Kornhauser, *The Great Image of Authority,* 36 STAN. L. REV. 349 (1984).

184 As Nobel Prize winner Wassily Leontief observed in an interview, this notion posits that scientific inquiry proceeds from theory to verification by observation, rather than from observation to theory with a never-ending interaction between the two (as in legal analysis):

> Q. But don't the mathematical physicists like, say, Einstein, start out with a formula first and then try to demonstrate it or prove it in the universe?
>
> A. But Einstein knew what the concepts meant; they were not given. . . .

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tions, the neoclassical law and economics school derives definitions to create an abstract and static model.[185] It then uses that model to make predictions about the real world and to determine the "is" and the "ought" for resolving legal disputes under antitrust policies defined by Congress.[186]

Many leaders of the neoclassical movement claim that one should not compare reality with the model's assumptions, but should compare the model's implications with the facts observed in light of the model.[187] Apart from the questionable assertion that an allegedly empirically based model can be created out of the thin air of ideologically based definitions, the model itself dictates which facts and which values are relevant to an evaluation of its own impli-

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> Q. So then you think a lot of our [economists] empirical work has gone way beyond the quality and extent of our data base?
> A. Exactly, economics is getting too far removed from observation. Observation must be the origin of the idea. Then there must be an interplay between observation and theory. . . . Observation by itself is the beginning of any science. At the outset you can only point out the object of your curiosity with your finger, because once you use words to describe it you are already beginning to theorize. Then you translate it into theoretical terms. . . . You translate the theoretical results into factual statements, and you move forward by shuttling back and forth. That process is what propels you forward in developing a science.

Leontief, *Why Economics Needs Input-Output Analysis* (Interview), CHALLENGE, Mar.-Apr. 1985, at 27, 29, 30; *see also infra* notes 217 & 227.

185 This abstract and static model is one of perfect competition. "Perfect competition" has been described as follows:

> "Perfect" competition, in the terminology which seems to me most useful, means an absolutely "frictionless" world. Everybody knows everything, everyone can be everywhere at once, coal heavers can become brain surgeons, and brain surgeons coal heavers, overnight. The capital embodied in a university can transfer itself instantaneously into a battleship and so on. Obviously such a set of requirements defines an impossibility; yet nothing less would give us the automatically functioning market some people are looking for.

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

186 For an application of such an approach across the board which ignores the goals for antitrust policy defined by Congress, see Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard,* 38 VAND. L. REV. 1125 (1985).

187 *See, e.g.,* M. FRIEDMAN, *The Methodology of Positive Economics,* in ESSAYS IN POSITIVE ECONOMICS 3 (1966). The model's assumptions determine what is "fact." Thus, facts always conform to the model's assumptions, because reality not in conformity with the model is not considered "reality." Professor Mason has criticized such an approach, observing:

> Deception occurs because the pure theories of this framework are consistently misapplied in the interpretation of concrete reality. . . . [A]ccordingly, 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."

Mason, *Some Negative Thoughts on Friedman's Positive Economics,* 3 J. POST KEYNESIAN ECON. 235, 244 (1980-81).

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cations. Testing the validity of the model's implications thus becomes a tautological exercise.[188]

The neoclassical economists' reliance upon a rigid form of deductive logic in applying their model aids and abets this anti-empirical and anti-intellectual consequence.[189] With its rigid use of deductive logic, the model becomes an analytical meat cleaver which ignores noneconomic assumptions and fails to draw noneconomic inferences. The result: a form of "tunnel vision,"[190] intolerant of any questioning of its assumptions or tampering with its predictions through observation of facts other than those defined by the model.

The pattern of post-*Monsanto* gyrations by advocates of an exclusively neoclassical approach to vertical market restraints demonstrates the model's inability to explain factual situations that go beyond the model's prescribed ontology. The model dictates that the only valid reason for a supplier to impose a restraint (other than as part of a horizontal dealer or supplier cartel) is to maximize production or distributional efficiencies to the great benefit of consumers.[191] The model assumes that suppliers imposing such restraints

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188 For example, the model defines "rational" choice without regard to the wisdom or social acceptability of the choice. Defining "rational" as whatever someone chooses renders the concept virtually meaningless and can mislead the unsophisticated into believing that the model defines "rational" in its broader sense. The late Arthur Leff, commenting on Richard Posner's *Economic Analysis of Law,* made the following observations about this type of circular reasoning:

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

Leff, *supra* note 180, at 458 (quoting R. POSNER, ECONOMIC ANALYSIS OF LAW 5 (1973)); *see also id.* at 458 n.21 ("That is often the problem with heuristically simplified models; when you think you are describing a curve, you are really describing the graph paper.").

189 Instead, more informal logic should be the tool for testing the assumptions underlying the relevant rules. Ideally, logic in legal reasoning uses induction and analogy to examine the meaning and relevance of facts as well as the assumptions underlying rules in light of many factors: history, experience, cultural mores, common sense, changing values, and the insights of such disciplines as sociology, psychology, and economics. *See* Cohen, *The Ethical Basis of Legal Criticism,* 41 YALE L.J. 201 (1931).

190 Leff, *supra* note 180, at 452.

191 *See, e.g., Antitrust Policy, supra* note 178, at 283-85 (restraints serve to increase point-of-sale services to consumer). Professional economists consider the problem far more complicated than the simplistic analysis one usually encounters in the law reviews would suggest. Williamson, *Assessing Contract,* 1 J.L. ECON. & ORGANIZATION 177 (1985); *cf.* Acheson, *The Maine Lobster Market: Between Market and Hierarchy,* 1 J.L. ECON. &ORGANIZATION 385 (1985)(highly fragmented industry not obeying classical model). *See* Phillips,

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are incapable of raising prices above a certain level because of competition[192] from similar or fungible products, or the threat of new entries to the market. Consequently, a supplier imposing such restraints is acting in its own self-interest, and will only do so if the restraint enhances efficiency under conditions of perfect competition and profit maximization.[193]

The exercise of vertical restraints often increases prices to consumers by curbing or abolishing intrabrand competition.[194] The model must therefore provide some justification to consumers and distributors for the legal system's allowing such activity. Hence, neoclassical economists created the concept of the "free rider,"[195]

Schwinn *Rules and the "New Economics" of Vertical Relations,* 44 ANTITRUST L.J. 573 (1975) ("The motives for vertical integration are treated superficially in orthodox theory.") ; Scherer, *The Economics of Vertical Restraints,* 52 ANTITRUST L.J. 687 (1983) ("The theory is at something like the state of celestial mechanics at the time of Ptolemy . . . i.e., everything revolved around the earth . . . . Law is some distance behind. It is more or less at the state where the stars are on fixed poles relative to the earth."); Steiner, *The Nature of Vertical Restraints,* 30 ANTITRUST BULL. 143, 171-87 (1985) (describing several scenarios in which vertical restraints are common yet socially inefficient).

192 There are, of course, several concepts of "competition," suggesting the need for great care when using the term to draw the line between legality and illegality. As one commentator has written:

> Competition is different things to different men and many things to all men. . . . It may be free, pure, perfect, open, imperfect, atomistic, vicious, destructive, cut-throat, monopolistic, oligopolistic, workable, effective, capitalistic, socialistic, Darwinian. A large variety of meanings for a term, when a precise meaning is difficult or impossible to distinguish clearly from the context, may make seemingly clear statements deceptive or meaningless. . . .
>
> The elusive and changing character of the term, competition, becomes more than just semantics when that which is illegal is defined in terms of competition.

Bernhard, *Competition in Law and in Economics,* 12 ANTITRUST BULL. 1099, 1100 (1967).

The same may be said for the concept of "efficiency." "Efficiency" may be, and is, used in several different senses: productive efficiency, allocative efficiency, innovative efficiency, etc. More often than not, the neoclassical economic model uses the tautological sense of defining whatever outcome the model predicts as "efficient." This use once again misleads the unsophisticated into believing that following the model produces efficiency and that rejecting the model (or considering other factors) produces an inefficient result. *See* Peritz, *supra* note 22, at 1281-92 (defining and criticizing Posner's various uses of "efficiency").

193 Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?,* 125 U. PA. L. REV. 1214, 1215 (1977) (restating and criticizing neoclassical model).

194 Even where the conduct does not lead to higher prices, it may still violate the antitrust laws by infringing upon other congressional goals for antitrust enforcement. *See infra* notes 221-26 and accompanying text; *see also* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (viewing maximum price fixing as interference with traders' freedom to set prices, displacement of competitive market pricing, and assumption of governmental powers by private combination); Albrecht v. Herald Co., 390 U.S. 145 (1968) (same).

195 The "free rider" concept originated in Telser, *Why Should Manufacturers Want Fair Trade?,* 3 J.L. & ECON. 86, 91 (1960). For a review of the evolution of the "free rider"

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the notion that suppliers must be free to shelter distributors performing demonstration, repair, warranty, or other services from competition by distributors not performing such services and therefore able to sell the product at a lower price. The label suggests that the "free rider" gets something (a competitive advantage) for nothing, and does so at the expense of an honest supplier and its dealers who are slavishly devoted to the public interest.[196] Admitting that the "free rider" may be engaged in the very competition the antitrust laws were designed to foster[197] would call into question the model's coherence and reliance upon the supplier's self-interested choice to impose his or her will on dealers (or vice versa). It would also call into question the suitability of the model's legal enforcement as a surrogate for independent determination of the permissible scope of vertical restraints.

For example, the use of resale price maintenance in the distribution of products where the provision of customer services is nonexistent[198] spurred the model's true believers to provide a broader rationale. The explanation needed to be consistent with both the model's assumptions and the *laissez faire* ideology which fuels it. Professor Victor Goldberg advanced one such hypothesis: manufacturers impose vertical restrictions to obtain the "provision of services by retailers to *manufacturers*" as well as consumers where a "free rider" threat exists.[199] The manufacturer "services" Goldberg hypothesizes as justifying vertical restraints include the rental of "shelf space,"[200] the buying of "endorsement" services by association with

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theory, see Popofsky & Bomse, *From* Sylvania *to* Monsanto: *No Longer a "Free Ride,"* 30 ANTITRUST BULL. 67, 87 (1985); *see also* Easterbrook, *Vertical Arrangements and the Rule of Reason,* 53 ANTITRUST L.J. 135 (1984) (carrying theory to its potentially libertarian extreme by urging legality of all vertical restrictions); Scherer, *supra* note 191, at 694-97 (questioning "free rider" phenomenon).

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> "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.

Flynn, *"Reaganomics" and Antitrust Enforcement: A Jurisprudential Critique,* 1983 UTAH L. REV. 269, 290.

197 *See* Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing,* 71 GEO. L.J. 1487, 1493 (1983) ("Until the recent ideology about 'free riders' became fashionable, they were regarded as the very heart of a free market competitive system.").

198 *See* Pitofsky, *Why* "Dr. Miles" *Was Right,* 8 REG. 27, 29 (1984); Scherer, *supra* note 191, at 694; Steiner, *supra* note 191, at 156-60.

199 *See* Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services,* 79 NW. U.L. REV. 736, 737 (1984).

200 *Id.* at 738-44.

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the distributor's reputation,[201] and the "bonding" of a distributor by "paying" the distributor a high return on present sales.[202]

Although much of Goldberg's hypothesis remains speculative,[203] it is an imaginative attempt to square recalcitrant reality with the model's dictates. Some may object that the hypothesis would result in higher prices to consumers forced to pay for the "service" of shelf space rental, "endorsement" services, or "bonding."[204]

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201 *Id.* at 744-48.

202 *Id.* at 749.

203 Professor Goldberg's article is laden with "can", "might", "could" and hypotheticals introduced by these modifiers. Although speculation of this sort can be a useful way to challenge existing assumptions, it is highly misleading when used for the opposite purpose—that is, to confirm assumptions rather than question their predicates.

> The perspective adopted here provides a rich array of plausible rationales for adopting vertical restrictions. Indeed, this article concludes that we have almost an embarrassment of riches; there are too many explanations. That does not mean that we will be incapable of distinguishing among alternative explanations. It simply means that we cannot get away with flip answers to hard questions.

Goldberg, *supra* note 199, at 738 (citations omitted).

The fact that these rationales may be plausible does not mean that they are in fact true, or that the legal system ought to recognize them, or that they provide a less "flip answer" to "hard questions" than those answers found by relying upon the model. Generalizing from a specific hypothetical, particularly where one's understanding of the hypothetical is dictated by an abstract model premised upon artificial assumptions, does little to advance the law's understanding of reality. Basing the rules of the legal control of vertical restraints upon such speculation detaches the analysis of specific disputes even further from reality and confines the analysis of what the law ought to be to the narrow range of values underlying the speculation.

Professor Goldberg's remarks at the 1986 meeting of the Antitrust Law and Economics Section of the AALS proceeded on the assumption that markets are perfectly competitive and that Congress adopted that model as the sole guide for the courts to use in defining the scope of antitrust policy. Goldberg, The Vertical Restraints Guidelines of the DOJ: An Appreciation, Remarks before the Antitrust Law and Economics Section of the American Association of Law Schools (Jan. 5, 1986) (on file at *Cornell Law Review*) [hereinafter cited as Goldberg's Remarks]. The former is unrealistic; the latter has been discredited by both the careful scholarship of objective scholars, *see* Fox, *supra* note 23; H. THORELLI, THE FEDERAL ANTITRUST POLICY (1955), and Congress's continued expressions of disapproval of the Reagan administration's antitrust enforcement policy in the area of vertical restraints, *see infra* note 242.

During the debate following his remarks, Goldberg misstated my criticism as one seeking increased "job security for dealers." *Antitrust and Economic Regulation and Comparative Law Sections Joint Program* (cassette tape of proceedings available from Recorded Resources Corp., Crofton, Md.). As should be obvious from this article, my criticism is a much broader and deeper jurisprudential one. Moreover, my criticism does not favor "job security for dealers," although the Goldberg hypothesis may be characterized as "welfare for suppliers" in that it unquestioningly protects their absolute property and contract rights while ignoring the rights of others affected by the restraint.

204 *See* Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 990-92 (1985) (consumers not homogenous in need of same services).

In many instances, vertical restraints result in higher prices for all consumers in order to cover the cost of services a supplier or its distributors believe some consumers need. Professor Goldberg bluntly justifies his shelf space/endorsement/bonding thesis

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Such complaints, however, would probably issue from those not embracing the assumption that a supplier freely exercising its property and contract rights also acts in the best interests of the otherwise uninformed consumer coerced by the restraint.[205]

An unenlightened consumer or distributor may not appreciate the benefit being conferred upon him or her because the model assumes that only the *supplier's* legally protected property and contract rights matter. The model's use of a fixed assumption about rights and rationalities to define distributors' and consumers' rights in antitrust litigation is never explicitly acknowledged. The situation is analogous to the assumptions relied upon to justify the "fair trade" movement which was designed to freeze the status quo of distribution practices in order to protect existing distributors' rights from the methods, such as catalog and discount sales, employed by distributors whose rights were ignored.[206] Perhaps such reasoning is based upon a variant of the "trickle down" theory in that it argues that by protecting and enhancing the "haves' " power and wealth, benefits will "trickle down" to the "have nots."

The model, despite its superficial libertarian appeal, presupposes the existence of a legal system and a set of property and contract rights belonging to the proponent of a restraint. This legal system, according to the model, ought to protect these rights without concern for the property and contract rights of others affected by the restraint.[207] Thus, the model presents "half-a-loaf" libertari-

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in the name of retailer services to manufacturers, Goldberg's Remarks, *supra* note 203, at 7, or, to coin a slogan, "manufacturer welfare." He assumes, of course, that the manufacturer is subject to perfect competition and therefore maximizes both consumer and manufacturer welfare. The "rich array of plausible rationales for adopting vertical restrictions," Goldberg, *supra* note 199, at 738, does not account for the possibility of imperfections in either competition or some of the assumptions underlying the model (i.e., perfect information, consumers can be everywhere at once, all parties are bargaining freely). Because he does not recognize the possibility of such imperfections, Professor Goldberg sees no reason why the rational supplier might be tempted to impose vertical restraints for monopolistic purposes, rather than on behalf of consumer welfare. Embracing such an imperfect reality would disrupt the frictionless functioning of the model, destroy its internal coherence, and threaten the underlying ideology tbe model serves.

205 The text focuses on the scenario of the supplier-imposed restraint on dealers for convenience, and because that is the most common pattern in antitrust litigation. However, powerful distributors may impose vertical restraints on unwilling suppliers. *Cf.* Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922 (1st Cir. 1984) (insurance company imposed price schedule upon physicians supplying services to insured patients), *cert. denied*, 105 S. Ct. 2040 (1985).

206 The history of the "fair trade" movement is summarized in L. SCHWARTZ, J. FLYNN, & H. FIRST, *supra* note 176, at 590-98.

207 The common law tradition recognizes both property and contract rights as creations of society. *See* Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) ("In the world of nature apart from more or less organized society, there are things but clearly no property rights."); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909) (contract

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anism; it objects to government interference with the market except to enforce the property and contract rights and rationality of those imposing the restraint. The model then uses the right to legally enforce one side's "rationality" to define what the legal system's rules ought to be concerning the scope of property and other rights of suppliers, distributors, and consumers. One commentator pointedly observed:

> [M]ost current law and economics theory represents neo-conceptualism strikingly similar to the classical conceptualism successfully undermined by the realists. The law and economics model is the model of free, value-enhancing exchange, yet . . .market exchanges are in fact a function of the legal order; the terms of so-called free bargains (and, taken collectively, the supposedly objective market price) are determined by the legally protected right to withhold what is owned. Exchange "value" (and "costs") is a function of that right, so that the rationale of exchange is ultimately as circular and self-referencing as the rationale for legal rights.The legitimacy of every exchange calculus depends upon the legitimacy of prior legal decisions; it neither establishes that legitimacy nor evades the problem of legitimacy by a purported ahistorical objectivity. Similarly, judges cannot escape responsibility for the distributional consequences of legal decisions. The exchange calculus cannot be divorced from the question of distribution, since exchange is a function of the existing distribution of legal entitlement, and every new legal decision (including those that rigorously apply the law and economics approach) will inevitably affect subsequent distribution and, in turn, affect subsequent exchanges, costs, values, etc. Like the older spheres of private and public, questions of market exchange and of distribution simply collapse into each other.[208]

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rights created by society). Although it does not explicitly state that property and contract rights are inherent in individuals, the neoclassical paradigm appears to proceed from such a premise. If so, the assumption is contrary to basic legal and normative assumptions about the nature of such rights in our society and is contrary to the traditional view that the antitrust laws are a limitation upon the exercise of such rights by the sovereign creating them.

The paradigm thus asserts a radical set of normative values premised on an absolutist view of property and contract rights held by one class of society against the rest. As a consequence, the model provides the means for an absolute defense of the *status quo* that is antithetical to the goals of antitrust policy and the moral objectives of classical economic theorists who argued for regulating society's economic affairs through the maintenance of competition.

208 E. Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 18, 37 (D. Kairys ed. 1982). In a similar vein, Professor Samuels has observed:

> Regnlation involves choices between alternative rules of the game and between alternative assignments of rights that are logically prior to economic analysis. Economics can no more tell us what rules and rights structures should be than what technology and tastes should exist. Thus,

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Although seldom clearly articulated, the model assumes that a supplier's property rights and the rights of a dealer seeking to impose the restraint are absolute. The model both adopts a libertarian conception of property and assumes that vertical relationships are the product of freely-bargained contracts, thus presenting an uneasy marriage of a nineteenth-century view of contracts and an eighteenth-century view of reality.

Legal theorists, however, have long considered property rights negative rights, that is, community-defined rights to invoke the state's aid to exclude others from the use or possession of something of value.[209] Antitrust's prohibition on contracts in restraint of trade is part of the community's definition of the scope of one's enforceable property and contract rights. In vertical restraint cases, society calls upon courts to sort out conflicting rights between buyer, seller, and community in light of the antitrust laws' goals. For example, in *Dr. Miles Medical Co. v. John D. Park & Sons,*[210] the Court refused to enforce Doctor Miles's property rights in its patent medicines in a way restricting a subsequent owner's property right to alienate the property at a price of its choosing. The Court's action proceeded from the assumption that the creation and enforcement of property rights are central functions of a society's legal system.[211] The Court weighed the scope of one's right to call upon the legal system to enforce the community-created right in light of the distributor's and the public's property and contract rights.

Similarly, *United States v. Addyston Pipe & Steel Co.,*[212] a nineteenth-century case examining the common law attitude toward

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> for the economist to assert the substance of "optimal" regulation, or the regulatory policy that will result in the optimal level or direction of control . . . is to assert covertly the rules and rights structures and to reach beyond economic analysis to antecedent normative premises as to whose interests should count. . . .
>
> . . . With no unique optimal use of resources and opportunities independent of rights identification and assignment, the legal system must select the result to be pursued: *the definition of the efficient solution is both the object and the subject of the legal system.* It is ironic that much conventional analysis assumes fully defined rights and a principle mandating compensation. . . .
>
> . . . .
>
> . . . Too often, policy conclusions are tautological, with implicit normative premises that assume something about the object to be determined which prefigures the determination—typically, of whose interest is to count.

Samuels, *Normative Premises in Regulatory Theory,* 1 J. POST KEYNESIAN ECON. 100, 105-06, 111 (1978) (emphasis in original).

209 *See* Cohen, *supra* note 207. For a historical examination of the nature of contract rights, see Pound, *supra* note 207.

210 220 U.S. 373 (1911).

211 *Id.* at 406-09 (discussing public interests at stake in litigation).

212 85 F. 271 (6th Cir. 1898), *modified,* 175 U.S. 211 (1899).

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contracts in restraint of trade, proceeded from the assumption that even freely bargained contract rights are creatures of the legal system which creates them for reasons beyond the mere advancement of the rationality of one party to the "bargain." Defining the scope of enforceable contract rights necessarily involves the rationality and interests of both parties and the public.[213]

The antitrust laws constitute a community-imposed limitation on the right to contract, a limitation which transcends the bare assumption that the right to contract is absolute on one side of the bargain, that in the real world parties of equal power in a perfectly competitive market freely bargain, or that one may ignore the rights of other parties to the contract and the public in general. Among the factors to be considered in fixing one's contract rights are the impact of the exercise of those rights upon the other party to the contract and the community, defined by reference to the congressional purposes of the antitrust laws and to the courts' experience in enforcing those purposes in actual disputes.

An analytical model that precludes a court from balancing these interests, such as the model employed in *Schwinn*[214] or that proposed by advocates of the exclusive use of neoclassical economics to decide such disputes, is fundamentally at odds with the analytical methodology of the legal process. The legal process's most basic purpose is to resolve disputes in accord with their facts, in light of the normative values underlying society's laws. To achieve its purpose, the legal process must avoid locking itself into an unrealistic view of reality and a doctrinaire ideology detached from the law's normative objectives.

Unsurprisingly, the neoclassical economic model has been described as "blatantly ascientific" and an abandonment of "empirical science for a numerology similar to astrology."[215] Nor is it any wonder that many leading professional economists have come to despair the "poverty" of their discipline[216] as it is consumed by an ever more arcane pursuit to defend the model's internal coherence and ideology in light of a reality that stubbornly refuses to validate the model's assumptions.[217]

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213 *Id.* at 280.

214 United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); *see supra* notes 169-77 and accompanying text.

215 Mason, *supra* note 187, at 244.

216 *See* Kuttner, *The Poverty of Economics*, THE ATLANTIC MONTHLY, Feb. 1985, at 74.

217 *See* Leontief, *supra* note 184. Professor Leontief observed:

> I really had some magnificent ideas from those [eighteenth- and early nineteenth-century] economists to develop my approach. But other economists who inherited those ideas continued to theorize instead of collecting more facts. When they ran out of facts, they began to make assumptions. This is where modern academic economics began to go

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Unthinking application of the model may also transgress the constitutional right to a jury trial on contested issues of fact[218] and the underlying separation of governmental powers. Although courts possess wide discretion in interpreting broadly worded statutes like the Sherman Act, that discretion is not unlimited. Since the end of the reign of economic substantive due process, courts have recognized Congress's power to determine economic policy.[219] Now, as during the time of economic substantive due process, the failure to acknowledge the appropriate division of lawmaking powers between the courts and Congress threatens to sacrifice the judiciary's policy-making function in areas where that function is appropriate.[220]

The Congresses that adopted the antitrust laws did not envision the enshrinement of the abstract and unrealistic neoclassical concept of efficiency as the sole goal of antitrust policy. Indeed, Professor Fox has pointed out that the primary *opponents* of the Sherman Act were those who subscribed to the neoclassical concept of efficiency.[221] The majority of the legislators, however, had in mind four

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> wrong. In the 1930's . . . I suggested that the way to build a quantitative theory is to observe reality, and to define certain concepts. . . . Your concepts first need some empirical meaning and content. . . . Academic economists in our day have generally not been subject to the harsh discipline of systematic fact-finding. Our colleagues in the natural sciences have always had to find data, to generate data from observations. Since economists can't run controlled experiments, they developed an irresistible predilection for deductive reasoning. In fact, many of our economists entered the discipline after specializing in pure or applied mathematics. . . . Typically, such economists first developed a theory, then wrote it as a formula, and then proceeded with defining its terms in such a way as to make it true.

Id. at 29 (citation omitted).

218 The extensive and widespread use of summary judgment to terminate vertical restraint cases, usually on the ground of insufficient evidence to prove a contract, conspiracy, or price-fixing conduct, raises the question of whether some courts are infringing upon the right to jury trial. This issue clearly concerned the *Monsanto* Court, as did the division of powers between the Court and Congress in determining what economic policy ought to be followed with regard to vertical price fixing. *Monsanto*, 465 U.S. at 769 (Brennan, J., concurring). *See* S. REP. No. 466, 94th Cong., 1st Sess. 3, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1569, 1572 (repeal of "Fair Trade" exemption for resale price maintenance intentionally left "coerce[d] adherence" to suggested resale prices "illegal").

Advocates of a neoclassical approach to vertical and other restraints ignore the important issue of the institutional constraints on courts in determining what antitrust policy ought to mean. *See* Business Elecs. Corp. v. Sharp Elecs. Corp, 780 F.2d 1212, 1217 & n.1 (5th Cir. 1986) and articles cited therein.

219 *See* G. GUNTHER, CONSTITUTIONAL LAW 128-47 (11th ed. 1985); L. TRIBE. AMERICAN CONSTITUTIONAL LAW 47-52, 232-36 (1978).

220 *See* Pound, *supra* note 207, at 487 (economic substantive due process causes "lost respect for courts and law").

221 Fox, *supra* note 23, at 1152-53 & n.71 (citing Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555 (1973)); *see also* H. THORELLI, *supra* note 203 (ex-

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major goals when they adopted the antitrust laws, goals which have continued to motivate recent amendments. Professor Fox has summarized these goals as: "(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."[222] In her extensive elaboration of the sources and meanings for these antitrust goals, Professor Fox identifies a central meaning for the concept of "competition" that has significance in the context of vertical restraints:

> One overarching idea has unified these three concerns (distrust of power, concern for consumers, and commitment to opportunity for entrepreneurs): *competition as process*. The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by def-

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haustive study of events and contemporary thought surrounding passage of Sherman Act).

Judge Bork is the only proponent of neoclassical economic analysis who pays much attention to the legislative purposes of the federal antitrust laws. He interprets that history to say that Congress's sole goal in adopting the Sherman Act was to enforce the neoclassical concept of economic efficiency. R. BORK, THE ANTITRUST PARADOX 50-71 (1978). In fact, the legislative history of the Sherman Act is "overwhelming[ly] to the contrary," Fox, *supra* note 23, at 1154 n. 76, indicating that Judge Bork has fitted the legislative history to his preordained theory, rather than constructed his theory out of the legislative history. As Professor Leontief observed, it is a case of first developing a theory, then writing it as a formula, and then defining its terms in such a way as to make it "true." Leontief, *supra* note 184, at 29.

222 Fox, *supra* note 23, at 1182. The goals of antitrust policy in the private sphere are analogous to the goals of the dormant commerce clause as a limitation upon the exercise of protectionist state economic regulation. Justice Jackson stated the Court's philosophy in interpreting the commerce clause as follows:

> This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety. . . .
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> . . . .
>
> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs, duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 535, 539 (1949).

The Court's role in applying this function of the Commerce Clause has evolved from the mechanical application of formulae (such as direct and indirect effects on commerce, or physical movement in commerce versus an effect on commerce) to a complex balancing of the competing qualitative interests of the federal and state governments. The Court usually relies on a competitive process of free trade at the federal level, but at times curbs the competitive process to serve the public interest in light of the specific facts of individual cases and the local impact of state-regnlated practices.

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> inition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair. Some measure of productive and allocative efficiency is a by-product, because competition tends to stimulate lowest-cost production and allocate resources more responsively than a visible public or private hand.[223]

Advocates of the exclusive use of neoclassical analysis to determine the "ought" of antitrust policy reject Congress's intent regarding vertical and other restraints. They do so in part because they see the model and its seductive two dimensional graphs as a way to quantify "reality" and bring certainty to courts' determination of what the rules ought to mean and how they ought to apply in specific cases. Their solution, however, is a false quantification constructed upon the mysticism of the model's underlying assumptions, and the theological definitions dictating what facts and values are relevant to the analysis.

Neoclassical advocates also dismiss the unavoidable concern[224] with normative goals other than those their model assumes by claiming that these other goals are unknowable, undefined, or "poetry."[225] But legal analysis constantly confronts a reality that refuses to conform with fixed, preconceived notions; it always deals with vagueness in the central concepts used in decision making. When scratched by reality, concepts like "efficiency" and "rational" are similarly vague and poetic, for they are defined tautologically from a model which is detached from the reality it purports to characterize. The neoclassicists view the interpretation of vague con-

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223 Fox, *supra* note 23, at 1154 (footnotes omitted, emphasis added).

Elsewhere, I have suggested that the concept of competition, when used to give meaning to the Sherman Act's ban on contracts in restraint of trade, be understood as a congressional mandate to ensure that the competitive process be the rule of trade. I have also suggested that the concept of the competitive process be understood in the qualitative sense of measuring the impact of the conduct upon the rights of those affected by the restraint and the rights of consumers to the benefits of a competitive process. *See* Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*, 49 ANTITRUST L.J. 1593, 1623-27 (1980) [hereinafter cited as *Chaos*]; Flynn, *supra* note 175, at 768-70. "The issue is not a *quantitative* one of determining how much competition is effected [sic] or destroyed by the practice, although power, relevant market and quantitative effect may aid in determining qualitative impact in some limited circumstances." *Chaos, supra*, at 1611 (emphasis in original). Framing the type of competition the Sherman Act was meant to protect in this way gives effect to congressional purposes in enacting the antitrust laws, while providing guidance for determining the general meaning of the common law rules.

224 *See* Cohen, *supra* note 182 (every legal decision is unavoidably a moral decision).

225 Judge Bork used the concept of poetry in a debate before President Carter's National Commission for the Review of Antitrust Laws and Procedures to describe the reliance upon social and political values, as well as economic ones, to establish the antitrust laws' meaning. *See "No-Fault" Monopolization Proposal Debated by Presidential Commission on Antitrust Reform*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 880, at A-22 (Sept. 14, 1978).

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cepts as merely subjective "poetry," as opposed to objective analysis, and they are equally extreme in their claim that their model affords objective certainty by reducing to two static dimensions multidimensional, complex, and dynamic phenomena.[226]

Exclusive reliance upon the model provides for the enforcement of the property and contract rights of the restraint's proponent, without regard for the rights of others entangled by the restraint. Thus, the model does not protect those entangled by the restraint, including consumers, all of whom have a right to receive the economic, social, and political benefits of the competitive process mandated by Congress. Furthermore, with all its imperfections, reality requires a more flexible approach than the one dictated by the model. At best, courts should only use the model to identify facts diverging from the model's "perfect competition" axiom, thereby stimulating greater thought about the model itself, the facts of the dispute, and solutions that acknowledge Congress's goals for antitrust policy.[227] Courts should not use the model to impose fixed

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226 Paradoxically, law's over-reliance on formalistic economic analysis is probably a consequence of the success of the legal realists' attack on formalism in law. Legal formalism depends upon the parsing of legal rules and past decisions to derive the "right" rule, followed by the deductive application of that rule to the dispute's facts. The realist attack stressed the superficiality of such an approach and its failure to account for reality, the insights of other disciplines, and the relevance of the decision maker's values in the decision-making process. Some proponents of the law and economics approach are constructively responding to the legal formalism of another age when they offer the insights of economic analysis (at least empirically based economic analysis) as one source of wisdom to inform legal decision making about reality. *See* Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy—Introduction*, 125 U. PA. L. REV. 1182 (1977) (discussing approaches of different scholars). There are, of course, a multiplicity of other sources of wisdom to inform antitrust policy. *See, e.g.*, Sullivan, *supra* note 193.

Many proponents of the neoclassical approach to law, including Judges Bork, Posner, and Easterbrook, argue that the neoclassical approach should be the *sole* consideration in determining what antitrust rules ought to be. In effect, they seek the restoration of a discredited form of formalism or analytical positivism. They advocate a form of "flatlaw"—one dimensional thinking which is incapable of discharging the functions Congress has assigned to the courts in antitrust enforcement or the functions of the legal process generally. *See* Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 CALIF. L. REV. 288 (1984). Although Terrell cites the use of economic analysis in law as a potential means of rising above the relatively low level of "flatlaw" analysis, *id.* at 304-06, the type of analysis offered by those cited and the insistence that it be used to the exclusion of all other considerations, constitutes the reimposition of a "flatlaw" type of analysis, or an even lower form of one dimensional analysis—"linelaw" analysis, *id.* at 306.

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> True advance can be achieved only through an iterative process in which improved theoretical formulation raises new empirical questions and the answers to these questions, in their turn, lead to new theoretical insights. The "givens" of today become the "unknowns" that will have to be explained tomorrow. This, incidentally, makes untenable the admittedly convenient methodological position according to which a theorist does

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conceptions of the "ought" of vertical restraints upon a legal process charged with defining the "ought" in light of the "is" and in light of Congress's antitrust values.

B. A Proposed Method For The Analysis Of Vertical Restraints

The courts have swung from the rigid application of a rule against restraints on alienation to the utilization of a rigid economic model detached from the reality of the dispute before the court. Substituting one incomplete set of premises and a wooden methodology for another is a curious jurisprudential development perhaps driven by a "quest for certitude [that] is so ardent that we pay an irrational reverence to a technique which uses symbols of certainty, even though experience again and again warns us that they are delusive."[228] The magic of simple definitions and graphs claiming to be empirically based can easily beguile even the sophisticated. Yet the certainty and predictability it offers is an illusion, and a dangerous one at that. The neoclassical model frustrates the congressionally mandated goals of antitrust policy, the functions and responsibilities of the judicial process vis-à-vis the other branches of government, and the obligations of the legal process to deal constructively with the reality of disputes presented. It imports into the flexible process of legal analysis a rigid and narrow analytical methodology that is hostile to the legal decision making's obligation to decide the "is" and "ought" of disputes in accord with the normative objectives of the law involved and an evolving understanding of reality sensitive to the insights of a variety of disciplines.[229]

The per se/rule of reason dichotomy has generated much of the present difficulty in antitrust litigation. The Court's early reliance upon an identical form of rigid deductive reasoning to determine the legality of vertical restraints led to the diametrically opposed conclusions it reached in *Schwinn* and *GTE Sylvania*. This dichotomy

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> not need to verify directly the factual assumptions on which he chooses to base his deductive arguments, provided his empirical conclusions seem to be correct. The prevalence of such a point of view is, to a large extent, responsible for the state of splendid isolation in which our discipline [economics] nowadays finds itself.

W. LEONTIEF, ESSAYS IN ECONOMICS 278 (1985).

228 Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 644 n.40 (1944) (Jackson, J., dissenting).

229 Elsewhere, I have suggested a sensible alternative method of analyzing antitrust disputes. My suggestion relegates economic analysis and other sources of wisdom for antitrust policy to a significant but subsidiary role. The role of insight from economics and other disciplines is to inform the legal process of the implications of the facts in light of the values underlying the law involved. *See* Flynn, *supra* note 175; *Chaos*, *supra* note 223.

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is also the source of the *Monsanto* Court's ambivalence concerning the continued per se status of vertical price fixing, the ambiguity over what conduct it will classify as price fixing, and what evidence it will deem sufficient to prove illegal price fixing. The exclusive use of a fixed concept of restraints upon alienation, followed by exclusive reliance on the neoclassical analytic model to sort out conflict in the rights of buyers, sellers, and consumers is not the sole root of the problem. More fundamentally, the courts have adopted a mechanical methodology for analyzing antitrust disputes *whatever* the rules and the underlying normative assumptions. At one extreme is the fixed methodology of per se analysis, reasoning deductively from a fixed rule applied to an everchanging reality. At the other extreme is the undefined analytical methodology of the rule of reason, proceeding inductively without defined standards or meaningful guidelines for the decision maker. A more appropriate methodology combines these positivist and ad hoc realist extremes. Courts must use a methodology capable of incorporating and weighing all of the congressionally mandated antitrust policy goals, in light of the facts involved in the dispute and the insights provided by a multiplicity of relevant disciplines.

Courts should view the per se and rule of reason methods primarily as a single method of analysis, regarding them as evidentiary rules establishing presumptions and burdens of proof rather than as hard and fast substantive rules to be rigidly applied. The Court has, in fact, sometimes followed this better form of analysis.[230] With this method, courts use presumptions as tools for investigating the actual facts of cases and the assumptions underlying the relevant rules. Such an approach recognizes the dynamic interaction of fact

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230 *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.26 (1984) ("Indeed, there is often no bright line separating *per se* from Rule of Reason analysis."); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (analyzing competitive impact under both per se and reasonableness standards); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 8 (1979) ("This *per se* rule is a valid and useful tool of antitrust policy and enforcement .... But easy labels do not always supply ready answers.") (footnotes omitted); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978) ("In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint ....").

Even in the case of "hard core" per se violations there can be considerable litigation over whether the conduct is pursuant to a contract, combination, or conspiracy, *see* United States v. Container Corp. of Am., 393 U.S. 333 (1969); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), whether the conduct is within the per se category, *see* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982), or whether there should be some justification for conduct which rebuts the presumption of per se illegality, *see* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

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and law, and how that interaction determines what ought to be done in a particular case.

This method of analyzing vertical restraints justifies a relatively strong presumption of illegality in vertical price fixing cases. Such conduct impairs a central goal of antitrust policy—the independence of traders to set their own price and the concomitant public interest in receiving the benefit of one's individual effort. In unusual cases, such as where joint effort is necessary to produce a product, some form of government regulation requires coercive or collective action to affect pricing or the circumstances indicate that the competitive process cannot work, some justification or excuse may warrant a defense to the general rule. Normally, however, the Court should adopt a relatively strong presumption against vertical price fixing, particularly where a seller's legitimate goals may be achieved by less restrictive means.[231]

The Court should establish a similarly strong presumption of illegality when faced with vertically induced refusals to deal, as in *Malley-Duff & Associates,*[232] even where the refusal to deal is not associated with price fixing. Such conduct denies the victim of the restraint the right to succeed or fail under the regime of a competitive process, as well as the right to be free from others' unreasonable and unjustified conspiracies in the enjoyment of property and contract rights. To suggest that plaintiffs in such cases should be left to their state tort remedies is no answer. Reliance on state remedies denies congressionally mandated antitrust goals and frustrates Congress's intention to create federal restrictions against restraints of trade.[233] The suggestion that the antitrust laws "protect competition and not competitors" similarly misses the mark; it is a meaningless cliche that assumes the answer in its concept of "competition."[234]

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231 *See* Comanor, *supra* note 204, at 1001 (advocating strict standards against vertical restraints in context of established products); Levmore, *Rescuing Some Antitrust Law: An Essay on Vertical Restrictions and Consumer Information,* 67 IOWA L. REV. 981 (1982) (suggesting alternative solutions to free rider problem that would meet economic objectives without changing general rnle disfavoring vertical restraints).

232 734 F.2d 133 (3d Cir.), *cert. denied,* Agency Holding Corp. v. Malley-Duff & Assocs., 469 U.S. 1072 (1984); *see supra* notes 143-46 and accompanying text.

233 *See* United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *modified.* 175 U.S. 211 (1899).

234 Here the concept of "competition" is defined as promoting consumer welfare without concern for the rights of competitors Congress intended to protect by guaranteeing a competitive process. A counter-cliche suggests itself: "You can not have competition without competitors." Another favorite and meaningless cliche in antitrust is: "Bigness isn't necessarily bad," countered by "Bigness isn't necessarily good." Cliches are not only meaningless, but are often also dangerously misleading if relied upon for justification of their unstated conclusions.

The concept that the antitrust laws "protect competition and not competitors" as-

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The Court should subject other vertical restraints to a less conclusive presumption of illegality. In some circumstances, a vertical customer, location, or territorial restraint may produce public benefits or be of such significance to a seller and its product that the presumption in favor of other private and public rights should yield to the public good achieved by allowing the restraint. For example, the need for new entry into an otherwise concentrated market, for protection of public health and safety, or for the provision of necessary repair or warranty services to the public by the least restrictive means may justify the imposition of customer, location, or territorial restraints in some circumstances.[235] The facts of these individual cases, in light of the values underlying the antitrust laws, should determine the "ought" of the rules in light of the "is" before the court.

Where applying the rule of reason to a case is appropriate, however, the analysis should not normally require proof of a relevant market and market power. Many lower courts have unthinkingly applied this requirement in rule of reason cases,[236] but the leading

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sumes that protecting competitors is necessarily inconsistent with competition. This idea operates on an erroneous assumption about the congressionally mandated goals of antitrust policy and indulges in an assumption which contains the either/or fallacy that there are only two choices in evaluating vertical market restraints: they are either wholly pro-competitive or wholly anti-competitive.

The either/or fallacy indulged in by proponents of an exclusive reliance on neoclassical analysis is dictated by their assumption of perfect competition. While a particular figure in Euclidian geometry may be either a square or not a square because it can not be both things at once given the closed definitional system, the messy world of reality often presents us with situations of a dual character. This is particularly true of economic activity and its interaction with public policy where the meaning of rules shifts in light of the changes in what we call facts; where our words articulating rules to govern reality as we understand it evolve in light of changes in our ideology; and where the insights of different disciplines adds to or detracts from our understanding of reality. A legal process suffers from a dangerous hardening of the arteries when it permits itself to be captured by an "either/or" mentality and lets the meaning of the normative objectives of the law become frozen to serve the unexamined ideological preferences of a decision maker. *See supra* note 182.

235 *See* Comanor, *supra* note 204, at 1001-02 (discussing new entry); Levmore, *supra* note 231, at 982-83 (discussing safety and new entry).

236 *See, e.g.*, Polk Bros. v. Forest City Enters., Inc., 776 F.2d 185 (7th Cir. 1985); Roland Mach. Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984); General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978). *But see* Malley Duff & Assocs. v. Crown Life Ins. Co., 734 F.2d 133 (3d Cir.), *cert. denied*, Agency Holding Corp. v. Malley-Duff & Assocs., 469 U.S. 1072 (1984).

In Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), Judge Bork held that the plaintiff must prove a relevant market and power in that market in a § 1 horizontal restraint case analyzed under the rule of reason. *Id.* at 229. *Rothery* is likely to become the leading case advocating this position, as well as the position that group boycotts are not per se illegal. Although the court below, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 597 F. Supp. 217 (D.D.C. 1984), *aff'd*, 792 F.2d 210 (D.C. Cir. 1986), decided the case on other grounds, Judge Bork used the opportu-

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Supreme Court rule of reason cases do not mandate this approach.[237] Courts which require this showing implicitly assume the narrow antitrust policy goals of neoclassical economic analysis and consequently are captured by its rigid definition of "competition." In addition to the model's problems with congressional intent and its self-serving definition of competition, discussed above, this requirement converts a Sherman Act section 1 case into a Sherman Act section 2 case by focusing on structure rather than behavior in conflict with the statute's language and meaning.[238] The requirement thus makes impractical the effective litigation of cases where legitimate claims of unreasonableness should be evaluated by the courts.

The classic statement of the rule of reason in *Chicago Board of Trade v. United States*[239] contained no requirement that the plaintiff prove a relevant market and power or an injury in a defined relevant market. The "rule of reason" instead requires a court to examine several factors: the peculiarities of the trade or industry involved, the power of the participants to the restraint, the horizontal or vertical nature of the restraint, the purpose and effect of the restraint, the public and private benefits and detriments of the restraint, and the availability of less restrictive alternatives to avoid the plan's detriments and achieve its benefits.[240] Although an evaluation of the

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nity to assert his unsubstantiated position that the sole goal of antitrust is to insure economic "efficiency" as defined by the neoclassical model. Not surprisingly, Judge Bork therefore concluded a restraint must be shown to injure competition in a relevant market before it can be found unreasonable; likewise, proof of power in a relevant market is required in order to show an injury to competition. 792 F.2d at 229. The opinion thus blurs the distinction between § 1 and § 2 of the Sherman Act by converting § 1 analysis into a structural analysis rather than a conduct analysis. After *Rothery*, it is difficult to see what significance § 1 of the Sherman Act has as an antitrust prohibition distinct from § 2 of the Sherman Act and § 7 of the Clayton Act.

237 *See* FTC v. Indiana Fed'n of Dentists, 106 S. Ct. 2009 (1986); NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Regents of the Univ. of Cal. v. American Broadcasting Co., 747 F.2d 511 (1984).

238 *See supra* note 236.

239 246 U.S. 231 (1918).

240 *See generally* L. SCHWARTZ, J. FLYNN, & H. FIRST, *supra* note 176, at 351-54 (discussing rule of reason analysis). Such an analytic process is analogous to the balancing process followed in dormant commerce clause cases, where the courts examine benefits, detriments, purpose, effect, less restrictive alternatives, and other factors in assessing the state and federal interests involved. Both inquiries require a balancing process sensitive to the facts of specific cases and the normative values underlying the adoption of the commerce clause or the antitrust laws, as the case may be. Rigid formulae or labels masking the underlying reasons for the decision seldom work for long because they fail to identify the policies involved or to analyze all of the facts in light of the relevant policies. For a survey of the evolution of the Court's role in applying the dormant commerce clause from mechanical formulae through unexplained labels to a balancing process, see G. GUNTHER, CONSTITUTIONAL LAW 231-317 (11th ed. 1985). Antitrust analysis under § 1 of the Sherman Act appears to be stuck in the 19th century mode of mechani-

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relevant market and a party's power in that market may be relevant in some circumstances to evaluate adequately the restraint's effect or its benefits or detriments, such an evaluation is clearly not mandated in all cases by either Supreme Court precedent or antitrust legislation.

Furthermore, analysis of the relevant market and market power cannot form a necessary element in most vertical restraint cases. The issues in most cases involve a balancing of the property and contract rights and rationalities of plaintiff and defendant in light of the antitrust law's multiple goals, the benefits the public is entitled to receive from reliance upon a competitive process, the facts, and the insights of disciplines (including empirically based insights from economics) which may serve to inform the legal process. Requirements to the contrary, like those contained in the Department of Justice's "Vertical Restraints Guidelines,"[241] subvert the purposes of the antitrust laws, misconstrue the law applicable to vertical restraints and the reality in which they occur, and mislead the unwary as to the elements of a rule of reason case. The House of Representatives has gone to the trouble of expressly repudiating the so-called "Guidelines" because they are inconsistent with the congressional purpose in adopting the antitrust laws.[242] The courts should also repudiate the Guidelines as inconsistent with the function of a judicial process that must apply Congress's policies in enforcing the antitrust laws. Furthermore, they are inconsistent with the judicial process in that they impose a wooden methodology without regard for the normative values Congress established through the antitrust laws. Finally, the guidelines prevent proper consideration of the facts of individual cases by imposing a set of narrow, unrealistic, and frozen assumptions from another era.

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cal formulae and labels like "per se," "rule of reason," "efficiency," "relevant market," and so on.

241 50 Fed Reg. 6263 (Feb. 14, 1985); *see* 5 TRADE REG. REP. (CCH) 50,473 (analyzing guidelines); ANTITRUST & TRADE REG. REP. (BNA) No. 1199, at 193 (Jan. 24, 1985) (same). The National Association of Attorneys General has adopted vertical guidelines which depart siguificantly from those of the federal government. *See* State Attorneys General Vertical Restraints Guidelines, 5 TRADE REG. REP. (CCH) 50,478; *NAAG Adopts Alternative Guidelines to Govern Vertical Restraints of Trade,* [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1243, at 978, 996 (Dec. 5, 1985).

242 H.R. Res. 303, 99th Cong., 1st Sess, 131 CONG. REC. H11390, H11391 (daily ed. Dec. 9, 1985) (stating that Guidelines "(1) are not an accurate expression of the Federal antitrust laws or of congressional intent with regard to the application of such laws . . .; (2) shall not be accorded any force of law or be treated by the courts of the United States as binding or persuasive; and (3) should be recalled by the Attorney General"); *see also* H.R. REP. No. 399, 99th Cong., 1st Sess. (1985).

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CONCLUSION

One cannot survey the post-*Monsanto* litigation without concluding that the law is presently in a state of disarray. There is confusion with respect to the sufficiency of evidence to send a case to the jury on the issue of conspiracy, the proper elements of "price fixing," the distinction (and the purpose of drawing a distinction) between horizontal and vertical restraints, and whether courts should presume vertically imposed territorial and customer restraints lawful in most circumstances. At a more basic level, the courts are ideologically confused over the purpose and goals of antitrust laws. This state of affairs has not only generated uncertainty and excessive litigation, but has also spawned a widespread movement to regulate vertical market restraints through an array of complex federal and state franchising laws.[243] These laws attempt to respond to the perceived failure of antitrust policy to account for all the interests and values wrapped up in vertical market restraints through flexible and realistic analytical methodology. The laws thus reflect dissatisfaction with the courts' growing allegiance to a narrow ideology and methodology which offers a false coherence, predictability, and certainty.

Judicial reliance upon the neoclassical model provides a false coherence because it ignores the congressional goals of antitrust policy and the legal process's methodology and purpose. This reliance creates a false predictability because it depends exclusively upon an abstract model of a world which does not exist and precludes courts from grappling with the reality of the disputes antitrust policy is committed to resolve. Finally, this reliance creates a false certainty because it fails to account for the long-term consequences of its assumptions. The legal process and antitrust policy cannot escape a constant confrontation between the values underlying the assumptions behind their rules and methodology, evolving reality, and normative values. Sooner or later, reality and the logic

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243 The growing list of federal and state special franchise laws have been adopted in light of the failure of antitrust policy to deal constructively with the reality of franchise relationships generally, as well as characteristics of franchising not readily controlled by antitrust policy (e.g., fraud in the sale of franchises requiring disclosure regulation). Over the past 10 years there has been a gradual increase in special franchise legislation corresponding to the gradual decrease in the use of antitrust policy to regulate vertical market relationships. In some instances, special franchise regulation appears to be potentially injurious to competition and the competitive process. *See* L. SCHWARTZ, J. FLYNN & H. FIRST, *supra* note 176, at 782-97 (surveying federal and state franchise statutes apparently based on concern for protecting franchisees rather than competitive process); *see also* Braun, *Policy Issues of Franchising*, 14 SW. U.L. REV. 155 (1984) (general survey of growth of franchise regulation); Faruki, *The Defense of Terminated Dealer Litigation: A Survey of Legal and Strategic Considerations*, 46 OHIO ST. L.J. 925 (1985) (same).

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of legal analysis must be given their due. Courts and scholars pretending otherwise only postpone the reckoning and aggravate its price.

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