ECONOMIC FORMALISM IN ANTITRUST DECISIONMAKING

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I. INTRODUCTION

The Supreme Court's watershed decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*[1] had a dramatic effect on the legality of vertical territorial and customer restraints. Prior to the decision, the legality of such restraints imposed by a manufacturer on a dealer limiting where or to whom the dealer could resell depended upon the context in which the restraints arose.[2] If imposed on a dealer who purchased the goods, the restraints were a *per se* violation of the Sherman Act.[3] If imposed on a dealer who took the goods on consignment and held them for resale as agent for the manufacturer, they were subject to rule-of-reason analysis and were generally upheld as reasonable restraints that were not prohibited by the Act.[4]

The practical effect of the restraints on competition in the dealer's market did not depend upon whether title to the goods had passed from the manufacturer to the dealer. In *Sylvania*, the Court quite properly viewed the distinction between sales and consignments as irrelevant to antitrust analysis and therefore indefensible.[5] Rational analysis required that "the *per se* rule . . . be expanded to include" vertical restraints in the consignment context, or that it be

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1 433 U.S. 36 (1977).

2 *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 378 (1967), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 (1977).

3 *Id.* at 379, 382.

4 *See id.* at 380. In *Schwinn*, similar restraints were imposed on dealers who purchased their goods and on dealers who took goods on consignment. *Id.* at 370–71. The restraints were *per se* violations in the former context, and upheld under the rule of reason in the latter context. *Id.* at 379, 381.

5 *Sylvania*, 433 U.S. at 57.

withheld from such restraints in the context of a sale.[6] Recognizing that vertical territorial and customer restraints can serve legitimate business needs of the manufacturer, the Court overruled its earlier decision in *Schwinn* that had adopted the sale/consignment distinction, and held that all such restraints are subject to rule-of-reason analysis.[7]

What has made *Sylvania* a watershed decision was not its impact on the analysis of nonprice vertical restraints under the Sherman Act,[8] or even its overruling of *Schwinn*. Rather, it was the language by which the Court announced its decision that gave *Sylvania* that status. "[W]e do make clear," the Court stated, "that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing."[9] The distinction between sales and consignments was formalistic because it failed to address the core issue in every antitrust case: Does the challenged restraint adversely affect competition in the market?

The broad teaching of *Sylvania* is that all antitrust analysis, not merely application of the *per se* rule in a particular context, must be based upon demonstrable economic effect. Factual distinctions that tell us little about economic effect, such as distinctions between sales and consignments, are to be cast aside. Presumably, general principles based on economic theory that tell us nothing about the actual economic effect of a particular restraint in a particular case should also be cast aside. In other words, antitrust decision-making should be based primarily on what the facts indicate concerning economic effect in a specific case. It should not be based on abstract economic principles that describe how markets generally function, but that tell us nothing about the effect of a particular practice in a particular case. Nor should it be based exclusively on economic principles that might be relevant to a determination of economic effect, since abstract principles never provide an infallible guide to economic effect. A core assumption of economic theory is that producers and consumers are rational maximizers. Producers seek to maximize profits, whereas consumers seek to maximize utility. And, each acts rationally in doing so. However, anyone passing

[6] *Id.*

[7] *Id.* at 58–59.

[8] The *Sylvania* Court noted that it was "concerned here only with nonprice vertical restrictions," and that *per se* illegality of vertical price fixing "has been established firmly for many years and involves significantly different questions of analysis and policy." *Id.* at 51 n.18.

[9] *Id.* at 58–59.

through life with his eyes open knows that rational behavior is not universally practiced.[10] While relevant economic theory might be a useful tool in resolving factual issues, it should not displace fact analysis in the determination of economic effect. Economic effect is a slippery concept, not easily nailed down in an actual case. Thus, in determining the economic effect of a particular practice in a particular case, there is significant pressure to supplant analysis of facts with general economic principles.

Yielding to that pressure is not necessarily a bad thing. It is desirable for one to be able to know what the law is—what is permitted and what is not. General principles, whether derived from economic theory or from other sources, facilitate that knowledge. They make the law more predictable. For example, when the Supreme Court adopted the general rule that above-cost price cuts never violate the antitrust laws, it made the law of predatory pricing more predictable than it had previously been.[11] In doing so, the Court clarified that a reduction in price cannot be challenged on antitrust grounds, provided it does not go below cost.

Along with enhancing predictability, such a general rule constrains judicial discretion and makes it more likely that similar circumstances will be treated similarly. In short, general rules sometimes advance values that are important to any just law. But, that is not invariably true. As Justice Scalia has recognized, "[t]he trick is to carry general principle as far as it can go in substantial furtherance of the precise statutory or constitutional prescription."[12] And, one might add, the trick is to carry it no further. Once a general principle has surpassed that point, it loses its legitimacy as a tool of statutory construction. For example, if the general principle that above-cost price cuts never violate the antitrust laws conflicts with legislative history and congressional purpose, it cannot plausibly be viewed as advancing the prescription of the antitrust statutes. General principle then becomes a tool of statutory revision rather than a tool of statutory construction. The revised prescription fails to reflect the will of Congress. Since

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[10] Noted economist Ronald Coase has observed:

> The rational utility maximizer of economic theory bears no resemblance to the man on the Clapham bus or, indeed, to any man (or woman) on any bus. There is no reason to suppose that most human beings are engaged in maximizing anything unless it be unhappiness, and even this with incomplete success.

R.H. COASE, THE FIRM THE MARKET AND THE LAW 3–4 (1988).

[11] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–23 (1993).

[12] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989).

Congress is the branch of government most responsive to the people, the revised prescription fails to reflect the will of the people.

The main theme of this article is that in a number of post-*Sylvania* decisions, the Court has gone too far in determining economic effect by relying on abstract economic principles. While those decisions claim to emphasize economic effect, and are therefore purportedly faithful to the teaching of *Sylvania*, their reliance on abstract economic theory to resolve the issue of economic effect is, in fact, highly formalistic. Thus, rejection in *Sylvania* of formalistic line drawing in favor of demonstrable economic effect has been subverted. Like the distinction between sales and consignments rejected in *Sylvania*, these post-*Sylvania* decisions tell us little or nothing about the actual economic effect of a particular restraint in a particular case. Under the decisions, actual economic effect need not be determined on a case-by-case basis because generally applicable economic principles tell us what the effect of a particular practice is. Just as was true with the discredited sale/consignment distinction adopted in *Schwinn,* antitrust analysis turns on bright line rules that tell us little or nothing about the demonstrable economic effect of the challenged practice.

The concept of legal formalism, as it is generally understood, is also evident in the reasoning of the cases discussed below. Although legal formalism may take many forms,[13] *Lochner v. New York*[14] is frequently cited as a classic example of formalism.[15] In *Lochner*, the Court struck down a New York statute that limited employment hours.[16] "The general right to make a contract in relation to his business," the Court held, "is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[17] Justice Holmes famously dissented, stating that "[g]eneral propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."[18]

As Justice Holmes' comments suggest, the Court's reasoning was syllogistic. Its major premise was that one's liberty is protected by

[13] *See generally* Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57 (2003) (surveying various views of legal formalism).

[14] 198 U.S. 45 (1905).

[15] *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 511 & n.2 (1988) (recognizing that *Lochner* is often condemned as formalistic).

[16] *Lochner*, 198 U.S. at 64.

[17] *Id.* at 53.

[18] *Id.* at 76 (Holmes, J., dissenting).

the Federal Constitution and may not be infringed by a state statute.[19] Its minor premise was that New York's statute infringed upon the liberty of employers and employees.[20] Its conclusion was that the statute was therefore in violation of the Constitution and could not stand.[21] Justice Holmes' point was that the term "liberty" does not inexorably include entering into an employment contract of one's choice.[22] He continued:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[23]

As is always true with deductive reasoning, the validity of the Court's conclusion depended upon the validity of its premises. The validity of its minor premise depended upon the scope of its major premise. The minor premise was valid if, and only if, liberty necessarily included the freedom to choose the terms of one's employment. In Justice Holmes' judgment, the Court's minor premise was false because, as defined "by the traditions of our people and our law," liberty did not automatically include the right to contract for employment for more than ten hours a day.[24] The Court's reasoning was formalistic in that it viewed the term "liberty" as self-defining.[25] Justice Holmes, on the other hand, believed that its definition should have depended upon the persuasiveness of reasons for and against allowing states to legislate as New York had, in light of "the traditions of our people and our law."[26]

The antitrust opinions discussed below involve much the same kind of formalistic reasoning as was involved in *Lochner*. It is referred to here as economic formalism, rather than legal formalism, because its major premise is supplied by economic

[19] *Id.* at 53.
[20] *Id.* at 57.
[21] *Id.* at 64.
[22] *See id.* at 75 (Holmes, J., dissenting) (identifying various statutes that interfered with the freedom to contract but that were nonetheless upheld).
[23] *Id.* at 76 (Holmes, J., dissenting).
[24] *See id.* (Holmes, J., dissenting).
[25] *See id.* at 53 (stating that the term liberty in the Fourteenth Amendment includes "[t]he general right to make a contract").
[26] *Id.* at 76 (Holmes, J., dissenting).

theory, rather than—as in *Lochner*—by a legal rule such as that found in the liberty clause of the Fourteenth Amendment. Invariably, the economic theory holds that a particular practice that is arguably anticompetitive is, in fact, almost always either procompetitive or benign. The minor premise is that the practice in question fits the economic theory. The conclusion then follows that the effect of the practice is procompetitive or, at least, not anticompetitive. The practice is therefore lawful.

Indeed, the analytical process has much in common with *per se* analysis as traditionally applied in antitrust cases, and that has now been largely discredited.[27] The main difference is that instead of relying on a general rule derived from a statute, from legislative intent, or from some other source of law (e.g., all vertical restraints imposed on dealers who purchase their goods are unlawful because they infringe on the dealer's freedom to trade), reliance is on a general rule derived from an economic theory (e.g., all above-cost price cuts are lawful because economic theory tells us that they are never anticompetitive). Economic effect is determined without the need for a cumbersome evidentiary hearing.

For example, in a predatory pricing case, the major premise would be that economic theory teaches that above-cost price cuts are never anticompetitive. The minor premise would be that the challenged price cuts were above cost—that they fit the economic theory of the major premise. The conclusion would then follow that the price cuts were procompetitive or benign, and therefore lawful. As this article will demonstrate, such deductive reasoning is problematic in several respects.

First, the major premise might be subject to debate. It is well known that economists are seldom of one opinion. For example, the notion that above-cost price cuts cannot produce substantial competitive harm has been criticized as "simplistic and overly generous to predators and would-be monopolists."[28] So, when the Court relies on economic theory to resolve issues of competitive harm, it is not relying on universally accepted dogma. Rather, the Court is choosing between competing economic theories.

Second, even if the major premise is not debatable, it might be inconsistent with congressional purpose. For example, legislative

[27] *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977) ("[W]e do not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition . . . . But we do make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect . . . .").

[28] ROBERT PITOFSKY ET AL., TRADE REGULATION 868 (5th ed. 2003).

history might make clear that Congress intended the antitrust laws to prohibit above-cost price cuts under certain circumstances. If so, the major premise that above-cost price cuts can never be anticompetitive and therefore can never violate the antitrust law should be viewed as false, irrespective of its persuasiveness as an economic theory.[29] After all, Congress is not bound by economic theory, nor is it required to favor consumers over producers, or producers over consumers.

Finally, even if the major premise is valid, as in *Lochner*,[30] the minor premise might be false. In other words, the Court might err in its determination that the practice in question fits the economic theory.

[29] Those who would displace legislative intent as a guide to statutory interpretation with the predilections of economists and judges would, of course, disagree. *See, e.g.*, 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 59 (2d ed. 2000) ("Taking the legislative history of the antitrust laws as a whole, we would give it relatively little weight on the fundamental question whether economic efficiency, injury to competitors, or some alternative 'populist' goal should guide antitrust policy."); Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, Sumner Canary Lecture at Case Western Reserve University School of Law (Oct. 15, 1986), *in* 37 CASE W. RES. L. REV. 179, 209 (1986–87) ("Today the [Sherman] Act means, not what its framers may have thought, but what economists and economics-minded lawyers and judges think."). Earlier, Professor Hovenkamp took a different view. Criticizing a decision by the Court of Appeals for the Seventh Circuit as reflecting "impatien[ce] with Congress[]," he observed:

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

Herbert Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014, 1026. It is important to keep in mind that economic theory is not revealed truth. Predictions of economic conditions based on economic theory often are demonstrably wrong. It is unclear why predictions of competitive effect based on economic theory should enjoy the presumptive validity that underlies the inclination to supplant congressional intent with economic theory. It has also been argued that the theory holding that antitrust statutory texts lack content and were intended to operate as a delegation of policymaking authority to the courts is false. These statutory texts, it is persuasively argued, are far from "creat[ing] . . . blank check[s]." Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust* 20 (June 7, 2004), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=556380.

[30] No one doubted that the Federal Constitution protects one's liberty. *See generally* U.S. CONST. amend. XIV, § 1.

II. FORMALISM IN THE VERTICAL CONTEXT

A. Vertical Price Fixing

Since *Sylvania* involved vertical restraints,[31] one might very well think that, at least in that context, subsequent Supreme Court decisions would be true to its teaching and forswear formalism. As Justice Scalia's opinion for the Court in *Business Electronics Corp. v. Sharp Electronics Corp.*[32] demonstrates, however, that conclusion would be wrong. Indeed, the opinion exhibits a strong formalistic bent and provides an illustration of how courts sometimes invoke formalism to frustrate the will of Congress.

Sharp involved the scope of the nearly century-old *per se* rule against vertical price fixing.[33] Like much of the pre-*Sylvania* antitrust law, the *per se* rule against vertical price fixing has become controversial. However, no Supreme Court Justice has yet called for its repudiation,[34] perhaps because "Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions" on at least two occasions.[35]

In 1975, Congress repealed the Miller-Tydings and McGuire Acts, which shielded from the Sherman Act vertical price fixing agreements authorized by state fair trade laws.[36] In doing so, Congress dramatically expanded the scope of the *per se* rule against vertical price fixing. Again, in 1983, Congress demonstrated its approval of the rule when it forbade the Department of Justice from urging abandonment of the *per se* rule against vertical price fixing.[37]

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[31] *See* 433 U.S. 36, 38 (1977) (describing GTE Sylvania's franchising system that restricted the location in which its retailers were permitted to sell).

[32] 485 U.S. 717 (1988).

[33] *Id.* at 719–20. Vertical price fixing occurs when a supplier and its customer agree on the price at which the customer is to resell a product. BLACK'S LAW DICTIONARY 1228 (8th ed. 2004). *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), was the first case to hold vertical price fixing *per se* unlawful. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

[34] In *Monsanto*, the government urged the Court to reject the *per se* rule of *Dr. Miles*, arguing "that the economic effect of resale price maintenance is little different from agreements on nonprice restrictions[,]" which are not subject to *per se* illegality. *Monsanto*, 465 U.S. at 761 n.7. The Court declined the invitation. *Id.* at 762 n.7.

[35] *Sylvania*, 433 U.S. at 51 n.18.

[36] *See id.*

[37] After the Department of Justice filed an amicus brief in *Monsanto* urging the Court to reject the *per se* rule of *Dr. Miles*, Congress attached to an appropriations bill an amendment that prohibited the Justice Department from using any funds to overturn the *per se* rule. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Appropriations Act, Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102–03 (1983).

Whatever its standing among economic theorists,[38] there can be little doubt that Congress approves of this longstanding interpretation of the Sherman Act. Congressional approval of the *per se* rule against vertical price fixing, however, did not prevent the *Sharp* Court from applying it in a way that significantly curtails its effectiveness.

Sharp arose out of a decision by Sharp Electronics Corporation (Sharp), a manufacturer of electronic calculators, to terminate Business Electronics Corporation (BEC) as a retail dealer of Sharp products.[39] Hartwell, a competing retailer of BEC, had demanded the termination, and Sharp obliged. Although Sharp suggested retail prices, it took no steps to enforce them. Both retailers sold at prices below the suggested prices, but BEC's prices were usually lower than Hartwell's. Hartwell complained to Sharp about BEC's price cutting on a number of occasions and finally issued an ultimatum: Sharp must either terminate BEC or Hartwell would no longer handle Sharp products. BEC was terminated. The jury determined that the termination occurred pursuant to an agreement between Sharp and Hartwell to terminate BEC because of BEC's price cutting; and that it was Hartwell, not Sharp, that objected to the price cutting.[40]

So far as Sharp was concerned, both dealers were free to undercut its suggested prices before BEC's termination, and Hartwell was free to do so after BEC's termination. The termination occurred only because Hartwell wished to eliminate price competition from BEC. The issue before the Court was whether the agreement between Sharp and Hartwell, pursuant to which BEC was terminated, properly could be characterized as a vertical price fixing agreement subject to the *per se* rule despite Sharp's failure to specify a resale price or price level.[41] In holding that it could not, the Court focused on one of four reasons provided by its decision in *Sylvania* to support *per se* illegality of vertical price fixing, while vertical nonprice restraints are subject to rule-of-reason analysis.[42]

As noted above, the *Sylvania* Court held that vertical restraints

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[38] *See* David F. Shores, *Vertical Price-Fixing and the Contract Conundrum: Beyond* Monsanto, 54 FORDHAM L. REV. 377, 412 (1985) (supporting a *per se* analysis for vertical price fixing cases).

[39] Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 721 (1988).

[40] *Id*. at 721–22.

[41] *See id*. at 726–27.

[42] *Id*. at 724–27 (distinguishing between vertical price fixing restraints and vertical nonprice restraints because vertical price fixing restraints have a tendency to facilitate cartelization).

on where or to whom a dealer could resell his goods, or other nonprice vertical restraints, are not *per se* unlawful.[43] In doing so, it overruled its decision in *United States v. Arnold Schwinn & Co.*,[44] which for the first time had applied the *per se* rule to vertical territorial and customer restraints.[45] It also made clear that vertical price fixing remains *per se* unlawful.[46]

Of the four reasons offered by the *Sylvania* Court to support application of the *per se* rule to vertical price fixing, but not to nonprice vertical restraints, two were jurisprudential and two were economic. The two jurisprudential reasons focused on why revision of the *per se* rule against vertical price fixing should be adopted by Congress rather than by the courts. First, the *Sylvania* Court noted that the *per se* rule against vertical price fixing "has been established firmly for many years,"[47] suggesting that change should be for the legislature. In contrast, the *per se* rule against nonprice vertical restraints had been adopted for the first time by the Court in its *Schwinn* decision only ten years earlier. Second, the Court observed that "Congress recently ha[d] expressed its approval of a *per se* analysis of vertical price restrictions," but that "[n]o similar expression of congressional intent exist[ed] for nonprice restrictions."[48] Thus, two distinct jurisprudential considerations militated against judicial rejection of the *per se* rule against vertical price fixing.

Turning to economic justification for the distinction, the *Sylvania* Court observed that unlike nonprice vertical restraints, vertical price fixing "is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product [intrabrand competition], but quite as much *between* that product and competing brands [interbrand competition]."[49] The first economic justification focusing on the effect of price and nonprice vertical restraints on intrabrand price competition is quite clear. Nonexclusive territorial restraints, for example a restraint limiting two or more dealers to selling within a specified state, might have little or no effect on price competition, since each seller is free to

[43] *See Sylvania*, 433 U.S. at 58–59.
[44] 388 U.S. 365 (1967).
[45] *See id.* at 379.
[46] *See Sylvania*, 433 U.S. at 51 n.18.
[47] *Id.*
[48] *Id.*
[49] *Id.* (quoting White Motor Co. v. United States, 372 U.S. 253, 268 (1963) (Brennan, J., concurring)). While Justice Brennan cited to *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45–47 (1960), to support this quoted proposition, nothing in *Parke, Davis & Co.* explicitly refers to an adverse effect on interbrand competition.

price as he chooses. However, vertical price fixing always means the elimination of intrabrand price competition, since each seller must charge the specified price.

The second economic justification focusing on the effect of vertical price and nonprice restraints on interbrand price competition is less apparent. The Court justified its position by citing to several commentators as well as by quoting from a law review article written by Judge, then-Professor, Richard Posner: "'[I]ndustry-wide resale price maintenance might facilitate cartelizing.'"[50] For example, a horizontal price fixing cartel at the retail level might induce suppliers to enforce the fixed retail price through vertical price fixing arrangements and termination of noncomplying retailers. As put by Judge Posner, a vertical price fixing arrangement might serve as the "cat's paw" in enforcing a horizontal price fixing cartel at the retail level.[51]

Alternatively, a horizontal price fixing cartel at the supplier level might employ vertical price fixing arrangements to deter members of the cartel from undercutting the agreed-upon price. Wholesale prices are not plainly visible. If a supplier participating in a cartel wishes to increase sales and profits by charging less than the agreed upon wholesale price, it might be possible to conceal this cheating. However, sales will increase only if the reduced wholesale price is passed on to customers at the retail level. Retail prices are plainly visible. So, if suppliers agree not only on their wholesale price, but also on vertically imposed retail prices, deviations from the agreed-upon retail price will be difficult to conceal. If a member of the cartel charges less than the agreed-upon wholesale price and the price reduction is passed on to the retail level, the cheating likely will be detected by other members of the cartel, causing the cartel to disintegrate.

On the other hand, if the lower price is not passed on to customers at the retail level, sales will not increase, and only the retailer will benefit from the reduced wholesale price. Thus, vertical price fixing can reduce the incentive to cheat on a horizontal price fixing cartel at the supplier level. In other words, it can serve as a facilitating device for a supplier-level price fixing cartel.[52]

[50] *Sylvania*, 433 U.S. at 51 n.18 (quoting Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 294 (1975)).

[51] Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283 (1975).

[52] The cartel facilitation theory does not rest easily with the free rider theory, which is

Of the four justifications (longevity, congressional policy, effect on intrabrand competition, and effect on interbrand competition) set forth in *Sylvania* for applying the *per se* rule to vertical price fixing but not to nonprice vertical restraints,[53] the Court in *Sharp* chose to focus on a single distinction. The Court observed:

> [V]ertical price agreements might assist horizontal price fixing at the manufacturer level (by reducing the manufacturer's incentive to cheat on a cartel, since its retailers could not pass on lower prices to consumers) or might be used to organize cartels at the retailer level. Similar support for the cartel-facilitating effect of vertical nonprice restraints was and remains lacking.[54]

As viewed by the *Sharp* Court, the *Sylvania* Court's justification for applying the *per se* rule to vertical price fixing but not to nonprice vertical restraints rested on a single distinction—the former, but not the latter, could facilitate cartels and thereby adversely affect interbrand competition.[55]

As noted above, the issue in *Sharp* was whether an agreement between Sharp and one of its dealers to terminate a competing dealer because of its discount pricing should be characterized as a vertical price fixing agreement even though the agreement did not specify a resale price or price level.[56] With the purpose of the *per se* rule against vertical price fixing reduced to the single function of preventing the facilitation of cartels, resolution of that issue was easy. Cartel facilitation depends upon the visibility of a fixed resale price. The agreement in *Sharp* did not fix a price; it merely eliminated intrabrand price competition, leaving Hartwell free to price the product as it chose. Since it did not fix a price, it could not serve to facilitate a cartel. There was no reason to apply the *per se* rule to the case at hand since cartel facilitation was the only reason

often advanced as a reason for allowing vertical price fixing. *See infra* text accompanying note 67. Under the cartel facilitation theory, suppliers engaged in horizontal price fixing would not want to cheat by lowering their wholesale price unless the lower price was reflected in the resale price charged by dealers. Apparently, increasing the dealers' profit margin in the hope that dealers would invest some of their enhanced profits in promotional activities, and thereby increase sales more than sales would be increased by a lower retail price, is not viewed as a plausible motive for cheating. Yet, under the free rider theory, it is precisely such a hope—that dealers will invest some of the profit generated by high prices supported by vertical price fixing agreements in promotional activities—that is said to justify vertical price fixing. *See infra* note 67 and accompanying text.

[53] *See Sylvania*, 433 U.S. at 51 n.18.

[54] Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725–26 (1988) (citations omitted).

[55] *Id*. at 725.

[56] *See supra* text accompanying note 41.

it would be applied. The Court therefore held that in order for a vertical agreement to be characterized as a vertical price fixing agreement subject to the *per se* rule, it must specify a price or a price level.[57] The result is that after *Sharp*, the *per se* rule applies only to vertical agreements that specify a resale price or price level. The Court's decision in *Sylvania*, which eschewed "formalistic line drawing" in favor of "demonstrable economic effect,"[58] was twisted to support a supremely formalistic rule turning on whether a vertical agreement specified a price. The actual economic effect of the agreement on price competition in the retail market is now irrelevant.

It might be argued that this result is appropriate since a violation might be found without the aid of the *per se* rule if adverse economic effects can be demonstrated. That is a reasonable argument. However, as the *Sylvania* Court recognized, Congress approved of *per se* analysis for vertical price fixing because of its effect on intrabrand price competition as well as its possible effect on interbrand competition.[59] Indeed, neither the *Sylvania* Court nor the *Sharp* Court cited a case in which it was found that vertical price fixing was employed to facilitate a cartel. Whether such cartel facilitation has ever occurred or merely exists in the minds of commentators is unknown.[60] What is known is that Congress did not have in mind such a narrow purpose as the prevention of cartel facilitation when it approved of *per se* analysis of vertical price fixing.[61] Indeed, even if cartel facilitation is in fact a reason suppliers might choose to engage in vertical price fixing, it is a weak reason for retaining the *per se* rule against vertical price fixing. Horizontal price fixing cartels are *per se* unlawful whether or not associated with vertical price fixing. Their condemnation under the Sherman Act need not be supplemented with a *per se* rule against vertical price fixing on the theory that vertical price fixing might be

[57] *Sharp*, 485 U.S. at 735–36.

[58] 433 U.S. at 58–59.

[59] *See id*. at 51 n.18.

[60] Posner acknowledged that the cartel facilitation explanation for why suppliers might wish to engage in vertical price fixing has never "been tested empirically" and that "it is not entirely clear how one would go about doing so." RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 151 (1976).

[61] *See* H.R. REP. NO. 94-341 (1975) (making no mention of the prevention of cartel facilitation as a reason to support the *per se* rule against price fixing), *reprinted in* 1975 U.S.C.C.A.N. 1569; *see also Fair Trade: Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 94th Cong. 5 (1975) (statement of Lewis A. Engman, Chairman, Fed. Trade Comm'n) (listing benefits of repealing the Miller-Tydings and McGuire Acts as "encourag[ing] market innovation," "reduc[ing] prices," and "increas[ing] consumer choice").

used to facilitate an activity that is also *per se* unlawful.

The result in *Sharp* was particularly ironic in light of its purported support for *Sylvania*. The hallmark of *Sylvania* was that application of the *per se* rule should turn on "demonstrable economic effect rather than . . . formalistic line drawing."[62] As discussed by Justice Stevens in his dissent, the *Sharp* Court ignored the practical economic consequences of the agreement before it.[63] Justice Scalia, writing for the Court, acknowledged that the likely effect of the agreement would be to reduce price competition and to enable Hartwell to increase the retail price.[64] Relying on the Court's earlier analysis in *Sylvania* and *Monsanto*, he contended that the restraint may nonetheless be procompetitive because it would merely "reduce intrabrand price competition [and increase price] to the point where the dealer's profit margin [would] permit[] provision of [consumer-]desired services."[65] Quoting *Monsanto*, Justice Scalia noted that "'[t]he manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free-riders' do not interfere.'"[66]

This so-called free rider theory is often advanced by opponents of the *per se* illegality of vertical price fixing. Free riders, so the argument goes, inhibit the provision of dealer services.[67] Manufacturers will use vertical price fixing to prevent free riding when they believe that enhanced sales generated by dealer services will more than offset the loss of sales resulting from a higher retail price. Unless such a net gain in sales results, only the dealer would benefit from vertical price fixing. The manufacturer would have no interest in propping up the retail price merely to enhance dealer profit, which, from the manufacturer's perspective, is a cost of doing

[62] *Sylvania*, 433 U.S. at 58–59.
[63] *See Sharp*, 485 U.S. at 744–45 (Stevens, J., dissenting).
[64] *Id.* at 728.
[65] *Id.*
[66] *Id.* (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762–63 (1984)).
[67] Professor Telser, who originated the theory, described the free rider problem as follows:

> Sales are diverted from the retailers who do provide the special services at the higher price to the retailers who do not provide the special services and offer to sell the product at the lower price. The mechanism is simple. A customer, because of the special services provided by one retailer, is persuaded to buy the product. But he purchases the product from another paying the latter a lower price. In this way the retailers who do not provide the special services get a free ride at the expense of those who have convinced consumers to buy the product.

Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 91 (1960).

business.[68] By this theory, the purpose of vertical price fixing may be to increase output—it may be procompetitive and should not be *per se* unlawful. The Court, however, has rejected such an approach.[69]

Like the cartel facilitation theory discussed above, the free rider theory is just that—a theory, which has never been tested in a court of law or through empirical analysis. Both theories were discussed in the economic and legal literature long before Congress, in 1975 and again in 1983, signified its approval of the *per se* rule against vertical price fixing.[70] Whatever its validity, Justice Scalia's invocation of the free rider theory is fatally flawed. As the language he quoted from *Monsanto* makes clear, at most the theory provides a plausible procompetitive explanation for vertical price fixing only when the price restraint originates at the supplier or manufacturer level.[71] It rests on the self-evident assumption that the manufacturer has no interest in enhancing dealer profit; therefore, when a manufacturer imposes minimum resale prices, it does so to increase sales. The manufacturer believes that the diminution in demand for the product caused by a higher uniform price will be more than offset by the increased demand generated by dealer services. If the manufacturer is correct, the benefit to consumers in the form of dealer services exceeds the added cost attributable to vertical price fixing. In other words, consumers benefit. If the manufacturer is incorrect, sales and manufacturer profits will decline, and the manufacturer will abandon vertical price fixing. Since vertical price fixing will most likely benefit consumers, and at worst will harm consumers only temporarily, it should not be unlawful.

Obviously, the free rider theory does not provide a plausible procompetitive explanation for a vertical restraint on free pricing when the restraint originates at the dealer level, rather than at the supplier or manufacturer level. Only so long as the restraint

[68] Manufacturer profit is the difference between the wholesale price and the cost of producing and selling the product at wholesale. Dealer profit is the difference between the retail price and the wholesale cost plus other expenses of sale. For the manufacturer and the dealer to earn a profit the retail price must exceed their combined costs. In effect that excess is divided between them. Dealer profit thus reduces the share of the retail price available to the manufacturer, and can be viewed by the manufacturer as a cost of doing business.

[69] *See* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 n.7 (1984).

[70] *See supra* text accompanying notes 35–37. Both theories—cartel facilitation and free rider—were first advanced in 1960. *See* Telser, *supra* note 67, at 89–96, 96–99 (free rider and cartel facilitation, respectively).

[71] *See Sharp*, 485 U.S. at 728 (focusing on manufacturer attempts to induce dealer services).

originates with the manufacturer is it plausible to assume that its purpose is to *increase* output—and thus to increase the manufacturer's profit—rather than to increase dealer profit by raising price and *reducing* output, just as would a monopolist.

The restraint in *Sharp* originated at the dealer level. It was a bottom-up, not a top-down, restraint. For Justice Scalia's invocation of the free rider theory to make sense, one must make the unsound assumption that a dealer has no interest in enhancing its own profit by raising price and reducing output.

In criticizing the dissent, Justice Scalia stated:

> [T]he dissent's reasoning hinges upon its perception that the agreement between Sharp and Hartwell was a "naked" restraint—that is, it was not "ancillary" to any other agreement between Sharp and Hartwell. But that is not true, unless one assumes, contrary to GTE Sylvania and Monsanto, . . . that it is not a quite plausible purpose of the restriction to enable Hartwell to provide better services under the sales franchise agreement.[72]

Sylvania and *Monsanto* involved restraints originating with the manufacturer. *Sharp* involved a restraint originating with the dealer. It is plainly incorrect to treat these two types of restraints as indistinguishable for antitrust analysis purposes, and the free rider theory provides no basis for doing so. That theory views top-down restraints as driven by a desire to increase dealer services only because it would make no sense for a manufacturer to prop up the retail price for the purpose of enhancing dealer profits in the face of reduced output. Therefore, the manufacturer must hope to increase output through the inducement of dealer services, and a top-down restraint can plausibly be viewed as ancillary to the legitimate purpose of increasing output.

However, bottom-up restraints are much more likely to be driven by a desire to enhance profits by restricting output, rather than by a desire to provide better service. We assume in the horizontal context that price fixing is always driven by just such a purpose, even in the face of plausible procompetitive explanations.[73] There is

[72] *Id.* at 729 (citation omitted).

[73] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.").

> ([T]he thrust of the rule [against horizontal price fixing] is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no

no sound reason to abandon that assumption in the context of the bottom-up vertical restraint in *Sharp*, since the apparent purpose of the restraint was to increase dealer profit by raising price and reducing output.[74]

One might argue that whether the restraint originates at the dealer level or at the manufacturer level is irrelevant. In either event, it is the manufacturer that decides whether to terminate a dealer. This argument is not persuasive. In either case, the manufacturer reviews its dealer network and determines whether limiting intrabrand price competition at the retail level is in its best interest. With a top-down restraint, the manufacturer decides that limiting intrabrand price competition will increase sales and enhance its profits. With a bottom-up restraint, such as was involved in *Sharp,* the manufacturer was quite content with the level of intrabrand price competition but was coerced into curtailing it by a dealer ultimatum. In other words, the manufacturer's first choice was to retain both dealers because doing so would maximize sales and manufacturer profits. Due to the ultimatum, the manufacturer was forced to forgo its first choice and lose one of its dealers.

Presumably, the manufacturer chose to terminate the weaker dealer. Nonetheless, sales will likely decline due to the enhanced retail price, thereby diminishing manufacturer profits. Otherwise, the manufacturer would have terminated the weaker dealer without the pressure of an ultimatum. The purpose and effect of the bottom-up restraint is to reduce output and raise price, and that is not altered by the fact that the manufacturer was coerced into cooperating.

To be sure, had the manufacturer not cooperated with the stronger dealer, the stronger dealer might have exited the market. Then the manufacturer would have been left, at least temporarily, with only the weaker dealer, and output would have declined even more. On the other hand, the dealer who issued the ultimatum might have been bluffing. Or, if it had exited the market, another dealer might have been found to take its place. The precise long-run consequences of prohibiting a contract with the purpose and

> position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.).

Id. at 221.

[74] *See Sharp*, 485 U.S. at 721 (detailing BEC's price-cutting that led Hartwell first to complain, and later to issue an ultimatum to Sharp to discontinue BEC as a retailer).

effect of reducing output and raising price are often unclear. That does not provide a reason, however, for exempting the contract from the Sherman Act.

Justice Stevens was correct in his dissent. The bottom-up restraint in *Sharp* properly should have been viewed as a "naked restraint" on price competition with the purpose of enhancing dealer profit by restricting output and increasing retail price.[75] Therefore, the restraint should have been held to be *per se* unlawful.[76]

Instead, the Court engaged in the kind of formalistic line drawing eschewed in *Sylvania*. A bright line test that sheds no light on the actual economic effect of a bottom-up vertical restraint on intrabrand price competition was used to characterize the restraint as a nonprice restraint and shield it from the *per se* rule.[77] The bright line test applies to top-down restraints as well. After *Sharp*, manufacturers as well as dealers are free to take the initiative in contracting to terminate dealers that are a disruptive force in the market due to deep discounting, provided the contract does not specify a resale price or price level.[78] Of course, manufacturers could always terminate such dealers through unilateral action. After *Sharp*, however, they can also do so pursuant to an agreement with their dealers without fear of a *per se* violation. Such an agreement sends a powerful signal to dealers to refrain from deep discounting.

The *per se* rule as applied to vertical price fixing and approved by Congress survives; however, its effectiveness in preserving intrabrand price competition is sharply curtailed. The supreme

[75] *Id*. at 744–45 (Stevens, J., dissenting).

[76] *Id*. at 757–58 (Stevens, J., dissenting). Justice Stevens analogized the restraint in *Sharp* to the restraint in *United States v. General Motors Corp*., 384 U.S. 127 (1966). *Sharp*, 485 U.S. at 747 (Stevens, J., dissenting). In *General Motors*, numerous dealers pressured General Motors into preventing certain of its dealers from selling to discounters and a *per se* violation was found. *Gen. Motors*, 384 U.S. at 143, 145. If two or more dealers had agreed to pressure Sharp into terminating a deep discounter, the horizontal agreement would have been *per se* unlawful under *General Motors*. *See id*. at 145 (holding that concerted action aimed at eliminating competitors who discount "is a *per se* violation of the [Sherman] Act"). If a single dealer is in a position to exert the same pressure, the same harm occurs and the result ought to be the same. Achieving that result does not require one to characterize the agreement as horizontal, as Justice Stevens did. *See Sharp*, 485 U.S. at 736 (Stevens, J., dissenting). Justice Scalia was correct in noting that such a characterization "introduces needless confusion." *Id*. at 730. In light of its purpose and effect, the restraint should have been characterized as vertical price fixing. In the case of a bottom-up vertical restraint on price competition such as that involved in *Sharp*, no price or price level need be specified in order for the dealer to enhance its profits by restricting output. Therefore, the restraint fits within the category of *per se* restraints.

[77] *See Sharp*, 485 U.S. at 735–36.

[78] *See id*.

irony is that, according to the Court's reasoning, bottom-up restraints on intrabrand price competition that are likely to be driven by the anticompetitive purpose of restricting output are not *per se* unlawful, while top-down restraints on intrabrand price competition that happen to specify a price or price level are *per se* unlawful, despite their potential procompetitive purpose of increasing output by inducing dealer services. As a result, antitrust analysis turns not on demonstrable economic effect, but upon whether the agreement specifies a price or price level. A distinction which, like the sale/consignment distinction repudiated in *Sylvania*, has little or no economic significance.

B. Tying Agreements

Any arrangement that requires the purchase of one product in order to purchase another product may be viewed as a tying arrangement.[79] In many instances, such tying arrangements may be harmless because both products are readily available without a tie from other sources.[80] Suppose, however, that the seller has a monopoly on product *A* and requires a purchaser of product *A* to also purchase product *B*, which is available from other sources. The central concern of antitrust law is that market power for product *A* should not be used to gain an advantage in the market for product *B* where the seller does face competition.[81] Where such conditions exist the Court has noted that "competition on the merits with respect to the tied product is inevitably curbed."[82] This use of power in one market to gain a competitive advantage in another market is often referred to as leveraging. Of course, for such leveraging to occur, the seller need not have a monopoly in the tying product. Market power short of monopoly may be sufficient to provide the seller with a material advantage in the market for the tied product. On the other hand, some market power is essential to leveraging, and thus essential to the proper finding of an antitrust violation on a tying theory.

At least since the Supreme Court's 1947 decision in *International Salt Co. v. United States*,[83] tying arrangements have been subject to a modified, or conditional, *per se* rule. A seller who ties two products or services for sale in a single transaction and refuses to

[79] N. Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).
[80] *Id.* at 6–7.
[81] *See id.* at 5–6.
[82] *Id.* at 6.
[83] 332 U.S. 392 (1947).

sell them separately automatically violates the antitrust laws if he has power in the market for the tying product and the volume of business that has been transacted in the tied product is not insubstantial.[84] Although this conditional *per se* rule has remained intact, like the *per se* rule against vertical price fixing, it (and the leverage theory on which it is based) has become controversial and has been curbed by post-*Sylvania* decisions that have relied heavily on economic theory.[85]

In *Jefferson Parish Hospital District No. 2 v. Hyde,* the sale of hospital services was tied to the sale of anesthesiological services.[86] Anyone wishing to go to Jefferson Parish Hospital and also wishing to purchase anesthesiological services was required to purchase those services from an anesthesiologist designated by the hospital. A major issue on appeal was whether the hospital possessed sufficient power in the market for hospital services to trigger the *per se* rule.[87] The evidence showed that the hospital had a thirty percent share of the relevant market. In holding that a thirty percent market share was insufficient evidence of market power, the Court noted that "[t]he fact that a substantial majority" of patients chose other hospitals "means that the geographic data do not establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions."[88]

In an earlier tying case—in sharp contrast to the *Jefferson Parish* Court's requirement of market dominance—the Court announced, "Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the

[84] *See id.* at 395–96. In *Jefferson Parish Hospital District No. 2 v. Hyde*, the Court stated:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated…
>
> Thus, the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other.

446 U.S. 2, 12, 14 (1984). The tying of products may violate either section 1 of the Sherman Act or section 3 of the Clayton Act. A tying of services may violate the Sherman Act, but not the Clayton Act since the Clayton Act applies only to the sale of "commodities." *See* Clayton Act § 3, 15 U.S.C. § 14 (2000).

[85] *See* Victor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 MINN. L. REV. 1013, 1065–69 (1985); Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 2–6 (1997).

[86] 466 U.S. at 4–5.

[87] *Id.* at 26.

[88] *Id.* at 26–27.

power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market."[89] This shift by the Court requiring a stronger showing of market power to trigger the *per se* rule was not necessarily a bad thing. Earlier cases had indeed trivialized the market power requirement almost to the point of disappearance.[90] And, as noted above, absent market power there is no reason to condemn tying arrangements.

However, discontent among the Justices with the antitrust law of tying arrangements goes well beyond current standards governing application of the *per se* rule. Justice O'Connor's concurring opinion in *Jefferson Parish,* in which three other Justices joined, criticized conditional *per se* analysis of tying arrangements, and concluded that "[t]he time has therefore come to abandon the '*per se*' label . . . ."[91] Justice O'Connor first observed that "[t]he Court has never been willing to say of tying arrangements . . . that they are always illegal, without proof of market power or anticompetitive effect. The '*per se*' doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement."[92] Nonetheless, she concluded that *per se* analysis of tying arrangements should be abandoned in order to "refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have."[93] One is left to speculate as to why a method of analysis that required an elaborate economic inquiry should need refocusing in order to consider the adverse economic effects and potential economic benefits of a tie.

The truth is that economic inquiry, or the alleged lack thereof, had little to do with Justice O'Connor's discontent, or the discontent of those critics of tying law upon whom she relied. Rather, she viewed tying arrangements as being usually harmless, irrespective of whether the seller possessed power in the market for the tying product.[94] Indeed, the seller might have a monopoly in the tying product, but according to Justice O'Connor, the tie would be "harmful primarily in the rare cases where power in the market for the tying product is used to create *additional* market power in the

[89] Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 502–03 (1969).

[90] *See* Kramer, *supra* note 85, at 1062 (observing that earlier cases "came close to stating that all tying arrangements are unlawful if they affect a not insubstantial amount of interstate commerce").

[91] 466 U.S. at 35 (O'Connor, J., concurring).

[92] *Id*. at 34 (O'Connor, J., concurring).

[93] *Id*. at 35 (O'Connor, J., concurring).

[94] *See id*. at 36–41 (O'Connor, J., concurring) (laying out three prerequisites that must be met, after which the rule of reason would be applied to determine if a tying arrangement is unlawful).

market for the *tied* product."[95] It has been settled law for many years that no such showing of enhanced market power with respect to the tied product is required to establish a violation. But, Justice O'Connor probably was right about one thing. If such a showing were required, cases of unlawful tying would indeed be rare, perhaps nonexistent. However, when Congress adopted section 3 of the Clayton Act prohibiting the leveraging of sales through a tie where the "effect . . . may be to substantially lessen competition,"[96] it did not intend that the actual creation of additional market power should be a prerequisite to the finding of a violation; the effect Congress meant to prohibit is common, rather than rare.[97] In short, Justice O'Connor simply disagreed with Congress's judgment regarding the proper treatment of tying arrangements. She and three other Justices who joined her opinion were content to supplant Congress's notion of economic harm with their own.

Justice O'Connor's rejection of the tying doctrine derives from what some regard as an irrefutable premise grounded in economic theory. According to the theory, market power can be used only once. It is then exhausted and cannot be used again. Thus, if market power with respect to the tying product is used to set the profit maximizing price for the tying product, it cannot be used again to force a buyer to take a tied product that the buyer does not want, or would prefer to purchase elsewhere. As put by Justice O'Connor, it follows that:

> [t]he existence of a tied product normally [absent a probability of achieving monopoly power in the market for the tied product] does not increase the profit that the seller with market power can extract from sales of the *tying* product. A seller with a monopoly on flour, for example, cannot increase the profit it can extract from flour consumers simply by forcing them to buy sugar along with their flour.[98]

To illustrate Justice O'Connor's point, suppose that the profit maximizing price for a seller with a monopoly on flour is $1 per

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[95] *Id.* at 36 (O'Connor, J., concurring). Justice O'Connor indicated, in a footnote, that the harmful effects of tying might be evident in two other contexts as well. *Id.* at 36 n.4 (O'Connor, J., concurring).

[96] Clayton Act § 3, 15 U.S.C. § 14 (2000).

[97] For a brief overview of congressional policy with respect to tying arrangements, see *Jefferson Parish*, 466 U.S. at 10–11 & n.15. For support of the proposition that Congress did not intend that the actual creation of additional market power should be a prerequisite to the finding of a violation, see *infra* notes 104–06 and accompanying text (discussing Henry v. A.B. Dick Co., 224 U.S. 1 (1912)).

[98] *Jefferson Parish*, 466 U.S. at 36 (O'Connor, J., concurring).

pound. If the seller raises the price above $1, so many purchasers will stop buying the flour that the loss of revenues—which results from reduced sales—will exceed any increase in revenues that result from the price being higher to those who continue to buy. Similarly, purchasers of flour who are unwilling to pay more than $1 per pound will be unwilling to pay $1 for a pound of flour while being forced to also purchase sugar that they would prefer to purchase elsewhere. While the tying arrangement might increase sales of sugar, it will also decrease sales of flour, leaving the seller no better off than it was without the tie. Indeed, if a sufficient number of buyers decline the tying arrangement, the seller's combined profits on sales of flour and sugar may be lower than they would have been absent the tie. To successfully impose a burdensome tie, the seller would have to reduce the price of flour below the profit maximizing level—say to $0.95 per pound. Since the tying product would then be offered at a price below its profit maximizing price, some market power with respect to the tying product would be unused in selling the tying product and could be used to increase (or leverage) sales of the tied product. Under such circumstances, arguably the tie is harmless.

To the extent consumers are harmed by being forced to purchase a tied product they would prefer to purchase elsewhere, they benefit by being able to purchase the tying product at a lower price than they would have to pay absent the tie. Thus, consumers are indifferent to whether they must pay $1 for a pound of flour sold separately, or $0.95 for a pound of flour tied to the purchase of a pound of sugar. Since consumers are indifferent to the tie, it can raise no legitimate concern under the antitrust laws unless it is likely that the seller will acquire market power in the market for the tied product (sugar), thereby enabling it to extract a monopoly profit in two markets rather than one. Justice O'Connor considered such a circumstance to be so rare that the *per se* rule should not be invoked in any tying case, even where the evidence demonstrates market power with respect to the tying product and the consequent power to leverage sales of the tied product.

This entire analysis rests, of course, on the persuasiveness of the premise. Is it really true that market power can be used but once, and that a tie can never be used both to force a buyer to pay the profit maximizing price for the tying product and to take a tied product the buyer would prefer to purchase elsewhere? Acknowledging that the premise is "[c]ounterintuitive," Justice O'Connor nonetheless concluded that "it is easily demonstrated and widely accepted."[99] However, the demonstration offered by Justice O'Connor, like the premise itself, rests on abstract theory and logic rather than on evidence. She cited the work of Robert Bork.[100] Bork simply asserts that a seller charging the "full value" for the tying product "cannot then charge still more in the form of coercion" to force on the buyer a tied product the buyer would prefer to purchase elsewhere.[101] "That," Bork says, "is double counting of monopoly power."[102]

Double counting is indeed considered to be illegitimate. However, when the question arises as to whether monopoly power can be used more than once, the analysis is not advanced by simply saying that if it were used twice it would be counted twice and would, therefore, be considered double counting. The demonstration on which Justice O'Connor relied to prove the premise that market power can be used only once turns out to be nothing more than an assertion of the premise.

As noted, Justice O'Connor's demonstration of the premise rests on abstract circular logic. An actual demonstration of the premise would require empirical evidence of the seller's profit maximizing price for the tying product and evidence that the seller's actual price for the tying product was less than the profit maximizing price. It would also require evidence that if the seller had charged the profit maximizing price for the tying product, the seller would have been unable to sell the tied package. No defendant's lawyer would welcome the burden of proving these matters in a court of law—and if Justice O'Connor's view becomes law, no defendant's lawyer will be put to the task. Under her approach, the defense prevails simply by mouthing the magic words "market power only can be used once." If Justice Holmes' famous dictum that "a page of history is worth a volume of logic"[103] captures the essential difference between formalism and realism, Justice O'Connor's approach is classic

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[99] *Id.* (O'Connor, J., concurring)

[100] *See id.* (O'Connor, J., concurring) (citing ROBERT H. BORK, THE ANTITRUST PARADOX 372–74 (1978)).

[101] BORK, *supra* note 100, at 373.

[102] *Id.*

[103] N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). In holding that the federal estate tax is not a direct tax void for lack of apportionment, Justice Holmes noted that the issue is not resolved by:

> an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.' Upon this point a page of history is worth a volume of logic.

Id. (citation omitted).

formalism. She is content with relying on logic based on a speculative economic premise, rather than on facts, in uprooting the settled law of tying arrangements.

There is, however, another problem with her approach, having nothing to do with the distinction between formalism and realism. Let us assume that Justice O'Connor is correct in asserting that market power can be used only once. The question remains whether the antitrust laws should be concerned about a seller who chooses to forgo the full exercise of that power in the market for product *A* in order to gain an advantage in the market for product *B*. For Justice O'Connor, the answer is no. Since any harm to consumers of product *B* caused by tying product *B* to product *A* is offset by a benefit to consumers of product *A*, the antitrust laws have no legitimate concern with a seller using market power achieved in one market to gain an advantage in another market. In short, Justice O'Connor's analysis rests on the proposition that leveraging does not matter. Antitrust laws should be indifferent to whether the exercise of market power as to product *A* is confined to the market for product *A*, or is used to leverage the sale of product *B*.

Given the assumption that market power can be used only once, it is plausible to claim that antitrust laws ought not be concerned with leveraging. Any consumer purchasing the tied product will realize a benefit, in the form of a lower price on the tying product, that will offset the cost of being coerced into purchasing the tied product. However, it does not follow from that assumption that any concern about leveraging is irrational. For example, rational antitrust policy might be concerned not only with the impact of a practice upon consumers, but also with its impact upon competitors.

Permitting market power lawfully acquired in the market for product *A* to be used to gain an advantage in the market for product *B* might be considered unfair to competitors in the market for product *B*. Such an advantage might be considered unfair because it is not derived from superior efficiency in producing product *B*, and fair competition requires that competitive advantage in a given market be derived from superior efficiency in that market. Thus, it would be rational for Congress to decide that producers, having gained market power through superior efficiency in the production or sale of product *A*, may reap the benefit of that power in the market for product *A* but may not use it to gain an advantage over competitors in the market for product *B* over whom they have not achieved superior efficiency. In other words, it would be rational for Congress to decide that the reward for superior skill and efficiency in the production of product *A* ought to be derived from the market for product *A*—and ought to come at the expense of competitors in that market. The reward ought not to come at the expense of competitors in the market for product *B* who may be equally or more efficient in the production of product *B*.

There can be little doubt that such was the intent of Congress when it adopted section 3 of the Clayton Act specifically targeting tying arrangements.[104] The legislative history of that provision lends no support to Justice O'Connor's view that tying arrangements violate the law only when they create additional power in the market for the tied product. Indeed, an important objective of Congress in adopting section 3 was to overturn the Supreme Court's decision[105] in *Henry v. A.B. Dick Co.*, which upheld the right of a manufacturer to require purchasers of a patented duplicating machine to use only paper and ink offered by the manufacturer.[106] Clearly, Congress was not concerned that A.B. Dick might monopolize the markets for paper and ink, or even that it might gain power short of monopoly in those markets. Rather, it was concerned about A.B. Dick, or similarly situated sellers, gaining a competitive advantage in the markets for paper and ink, not because it produced superior paper and ink, but because it produced a superior duplicating machine. In modern terminology, A.B. Dick used the tying arrangement to gain a competitive advantage in the paper and ink markets without achieving superior efficiency in those markets. Gaining a competitive advantage in a market through means other than superior efficiency was viewed by Congress as illegitimate.[107] Nothing has occurred to suggest

[104] *See Jefferson Parish*, 466 U.S. at 10 (citation omitted) ("In enacting § 3 of the Clayton Act, Congress expressed great concern about the anticompetitive character of tying arrangements.").

[105] IBM Corp. v. United States, 298 U.S. 131, 137 (1936).

[106] Henry v. A.B. Dick Co., 224 U.S. 1, 49 (1912). A.B. Dick Company sold patented duplicating machines on condition that the purchaser use only paper and ink made by A.B. Dick Company. Henry sold ink not made by A.B. Dick for use in the duplicating machines. A.B. Dick sued Henry for contributory infringement of the patent. In holding that the patentee could lawfully impose such restrictions and that their violation constituted an infringement of the patent, the Court quoted its earlier decision in *Bement v. National Harrow Co.* for the proposition that the Sherman Act "does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used . . . ." *Henry*, 224 U.S. at 30 (quoting Bement v. Nat'l Harrow Co., 186 U.S. 70, 92 (1902)).

[107] As indicated by the following exchange in the House debate on section 3 of the Clayton Act, a substantial lessening of competition or a tendency toward monopoly was viewed by Congress as inherent to the competitive advantage in the ink and paper market gained by A.B. Dick through tying the sale of those products to the sale of a patented duplicating

Congress has changed its policy and is now indifferent to whether market power derived from superior efficiency in one market is used to gain a competitive advantage in another market. Some economists might favor such a change, but they have no power to implement it. Some judges might have both the inclination and the power to implement such a change, but that hardly makes their doing so legitimate.

III. FORMALISM IN THE ANALYSIS OF PREDATORY PRICING

In *United States v. Von's Grocery Co.*, the Court held unlawful, under section 7 of the Clayton Act, a merger of two grocery retailers that resulted in a combined market share of 7.5%.[108] Justice Stewart dissented. The "sole consistency" in the Court's merger cases, he noted, is that "the Government always wins."[109] Since the Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[110] it would be equally accurate to say

machine. The uniqueness of the duplicating machine gave rise to a presumption of market power, which could be used to leverage sales of paper and ink through a tying arrangement. Therefore, such a tie would automatically violate the Act.

> Mr. Stafford. Does the gentleman consider that section 3 as agreed upon by the conferees is as strong in its limitations and prohibitions as the Walsh amendment . . . ? [The Walsh amendment would have declared unlawful the tying of any product to a patented product.]
>
> Mr. Webb. Yes, sir; in civil remedies.
>
> Mr. Stafford. That it will . . . keep companies, for instance the Dick Co., from forbidding the use of their mimeograph machines with stationery and supplies not furnished by that company.
>
> Mr. Webb. I will say to my friend that, in my opinion, immediately after the President signs this bill with section 3 in it every such contract made by the United Shoe Machinery Co. will become unlawful, because they may not only lessen substantial competition, but they do it. They not only tend to create monopoly, but they do it.
>
> Mr. Stafford. And it is also the gentleman's opinion that it will correct the conditions referred to by Chief Justice White in the Dick case?
>
> Mr. Webb. I think so. It was intended to do it, and I believe it will.

51 CONG. REC. 16263, 16274 (1914).

Chief Justice White dissented in *Henry*, observing that under the Court's holding:

> a patentee in selling the machine covered by his patent has power by contract to extend the patent so as to cause it to embrace things which it does not include; in other words, to exercise legislative power of a far-reaching and dangerous character…
>
> My mind cannot shake off the dread of the vast extension of such practices which must come from the decision of the court now rendered.

224 U.S. at 51–52, 70 (White, C.J., dissenting). Congress agreed. It appears that Justice O'Connor does not.

[108] 384 U.S. 270, 272, 277–79 (1966).

[109] *Id.* at 301 (Stewart, J., dissenting). *Von's Grocery* has since been undermined. *See* United States v. Baker Hughes Inc., 908 F.2d 981, 990 (D.C. Cir. 1990) ("Although the Supreme Court has not overruled [*Von's Grocery* and other merger decisions of the 1960s], it has cut them back sharply.").

[110] 509 U.S. 209 (1993).

that under the Court's economic analysis of predatory pricing, the government never wins.[111] And, of course, private plaintiffs have fared no better.[112]

Competitive pricing is what free markets are about. Firms are expected to compete for customers by offering products of high quality at low prices. Free and independent pricing is critical to the competitive system, and for that reason antitrust has dealt harshly with price fixing. As stated by Justice Douglas: "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy."[113]

Just as price fixing is anathema to a competitive system, so free pricing is its darling. Free pricing means not only independent pricing free of the constraints inherent to concerted pricing, but also independent pricing free of legal constraints. It is appropriate that the courts and the government tread cautiously in limiting a firm's freedom to cut prices. Nonetheless, there is little doubt that while cutting price is normally procompetitive behavior, it can sometimes serve an anticompetitive, or predatory, purpose; and when it does, legal constraints under the antitrust laws can and should apply. The idea is not new. The House Report on the Clayton Act, which was adopted in 1914,[114] stated that section 2 of that Act was

> expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other

[111] The merger cases of the 1960s have much in common with the Court's analysis of predatory pricing. In both contexts, the Court relied on economic theory to resolve the factual issue of economic effect. Rather than merely informing factual analysis, as would be proper, economic theory dominated factual analysis. *See* David F. Shores, *Law, Facts and Market Realities in Antitrust Cases After* Brooke *and* Kodak, 48 SMU L. REV. 1835, 1876–77 (1995). After *Brooke*, the government rarely brings predatory pricing claims. When it does, the evidence of predation is very strong. Success has nonetheless eluded it. *See, e.g.*, United States v. AMR Corp., 335 F.3d 1109, 1120–21 (10th Cir. 2003) (holding that the government failed to establish the first of two necessary elements of a claim of predatory pricing).

[112] *See infra* note 133 and accompanying text.

[113] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940).

[114] Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 13 (2000)).

> places throughout the country. . . . In the past it has been a most common practice of great and powerful combinations engaged in commerce— notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities . . . where their commodities are sold below cost *or without a fair profit* by raising the price of this same class of commodities above their fair market value in other sections or communities. Such a system or practice is so manifestly unfair and unjust, not only to competitors who are directly injured thereby but to the general public, that your committee is strongly of the opinion that the present antitrust laws ought to be supplemented by making this particular form of discrimination a specific offense under the law . . . .[115]

The Senate Report concurred:

> [T]he general scope of the House measure is unchanged. . . . Broadly stated, the bill . . . seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the [Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. Among other of these trade practices which are denounced and made unlawful may be mentioned discrimination in prices for the purpose of wrongfully injuring or destroying the business of competitors . . . .[116]

The Robinson-Patman Act was adopted in 1936 to amend and strengthen section 2 of the Clayton Act.[117] The Senate Report

[115] H.R. REP. No. 63-627, at 8–9 (1914), *reprinted in* 2 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1090–91 (Earl W. Kintner ed., 1978) (emphasis added).

[116] S. REP. NO. 63-698, at 1 (1914), *reprinted in* 2 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1744 (Earl W. Kintner ed., 1978).

[117] Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936).

explained the need for change:

> The weakness of present section 2 lies principally in the fact that: (1) It places no limit upon differentials permissible on account of differences in quantity; and (2) it permits discriminations to meet competition, and thus tends to substitute the remedies of retaliation for those of law, with destructive consequences to the central object of the bill. Liberty to meet competition which can be met only by price cuts at the expense of customers elsewhere, is in its unmasked effect the liberty to destroy competition by selling locally below cost, a weapon progressively the more destructive in the hands of the more powerful, and most deadly to the competitor of limited resources, whatever his merit and efficiency. . .
>
> Discriminations in excess of sound economic differences involve generally an element of loss, *whether only of the necessary minimum of profits* or of actual costs, that must be recouped from the business of customers not granted them. . .
>
> [The present section 2] has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas *the more immediately important concern is in injury to the competitor victimized by the discrimination.* Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.[118]

Similarly, the House Report stated:

> The object of the bill briefly stated is to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them. . .
>
> Discriminations in excess of sound economic differences between the customers concerned, in the treatment accorded them, involve generally an element of loss, *whether only of the necessary minimum of profits or of actual costs*, that must be recouped from the business of customers not granted

[118] S. REP. NO. 74-1502, at 4 (1936), *reprinted in* 4 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3014–15 (Earl W. Kintner ed., 1980) (emphasis added).

them.[119]

The House and Senate Reports on both the original Clayton Act section 2 and the Robinson-Patman Act make unmistakably clear that Congress intended to prohibit price discrimination undertaken with an intent to discipline or to exclude a competitor. The House and Senate Reports on the Robinson-Patman Act make unmistakably clear that Congress meant for discriminatory price cuts to violate the Act even if they do not go below "actual costs," but merely eliminate the "necessary minimum of profits."[120] Thus, Congress contemplated that if a firm selling in two or more markets cut its price in one market with the intent of disciplining or excluding a competitor, while maintaining its price in another market, it would violate the Act. And—although pricing below cost would be stronger evidence of predation than would price cuts above cost—at least after the amendments of 1936, price cuts below cost were not to be critical to the finding of a violation.[121] Furthermore, Congress meant to prohibit not only price discrimination resulting in "general injury to competitive conditions," but also price discrimination that resulted in "injury to the competitor victimized by the discrimination."[122] Importantly, the legislative intent of the original Clayton Act indicated that Congress meant to punish such conduct even if it was fully consistent with the more generally applicable Sherman Act.[123] Thus, it is clear that Congress intended to single out price discrimination for special scrutiny under the antitrust laws.

Furthermore, legislative and judicial concern about predatory pricing preceded adoption of the Clayton Act. In the debates on the Sherman Act, it was stated that "the Standard Oil Company can sell

[119] H.R. REP. NO. 74-2287, at 7–8 (1936), *reprinted in* 4 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3187 (Earl W. Kintner ed., 1980) (emphasis added).

[120] *Id.*; *see also* S. REP. NO. 74-1502, at 4 (1936), *reprinted in* 4 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3014–15 (Earl W. Kintner ed., 1980).

[121] It seems unlikely that Congress intended to condition violation of the original Clayton Act section 2 *solely* on below-cost pricing. *See* H.R. REP. NO. 63-627, at 8–9 (1914) (noting that the evils to be addressed "oftentimes" involved pricing below cost), *reprinted in* 2 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1090–91 (Earl W. Kintner ed., 1978). However, the congressional reports were less clear on that point than were the reports on the Robinson-Patman Act, which was adopted in 1936 to amend section 2 of the Clayton Act.

[122] S. REP. NO. 74-1502, at 4 (1936), *reprinted in* 4 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3015 (Earl W. Kintner ed., 1980).

[123] S. REP. NO. 63-698, at 1 (1914), *reprinted in* 2 THE LEGISLATIVE HISTORY OF THE ANTITRUST LAWS AND RELATED STATUTES 1744 (Earl W. Kintner ed., 1978).

its product at just such prices as it pleases, but when it enters into a combination to drive out competition, by giving a sliding scale of prices, or anything of that sort, then the transaction falls within the terms of this bill."[124] Subsequently, when the Standard Oil Company was charged with violating the Sherman Act, the Supreme Court noted that among the claims asserted by the government was "local price cutting at the points where necessary to suppress competition."[125] Similarly, in *United States v. American Tobacco Co.*, the Court referred to American Tobacco as engaging in "ruinous competition, by lowering the price of plug [tobacco] below its cost."[126]

While these early references to predatory pricing in violation of the Sherman Act were admittedly vague, the Supreme Court's watershed decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* explicitly recognized that predatory pricing schemes are actionable under both the Robinson-Patman Act and the Sherman Act.[127] Section 2 of the Clayton Act was adopted in 1914—twenty-four years after the adoption of the Sherman Act—and was amended by the Robinson-Patman Act in 1936. It is obvious that Congress intended that the Robinson-Patman Act have a broader scope than the Sherman Act as applied to predatory pricing. In *Brooke Group*, the Court addressed the relationship of the two statutes:

> [W]e interpret § 2 of the Sherman Act to condemn predatory pricing when it poses "a dangerous probability of actual monopolization," whereas the Robinson-Patman Act requires only that there be "a reasonable possibility" of substantial injury to competition before its protections are triggered. But whatever additional flexibility the Robinson-Patman Act standard may imply, the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices

[124] 21 CONG. REC. 4088, 4090 (1890) (Statement of Rep. Culberson), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE ANTITRUST LAWS AND RELATED STATUTES 302 (Earl W. Kintner ed., 1978).

[125] Standard Oil Co. v. United States, 221 U.S. 1, 42–43 (1911).

[126] 221 U.S. 106, 160 (1911).

[127] 509 U.S. 209, 221–22 (1993). The Court stated that "it has become evident that primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act." *Id.* at 221.

in the relevant market.[128]

Since the essence of the claim under either statute was found to be the same, the Court set forth two prerequisites to recovery under either statute. First, in a dramatic break with precedent,[129] the Court announced that only price cuts below cost are actionable under either statute.[130] Second, in addition to proving that the defendant priced below cost, the plaintiff must demonstrate that the defendant "had a reasonable prospect" under the Robinson-Patman Act—or "a dangerous probability" under the Sherman Act—of "recouping its investment in below-cost prices,"[131] plus "the time value of the money invested."[132]

Meeting these requirements—proof of below-cost pricing and proof of a reasonable prospect of recoupment—does not assure recovery. Rather, they are threshold standards that merely open the door to a *possible* recovery. As discussed below, the Court's discussion of these standards and its application of the standards to the facts in *Brooke Group* have made it virtually impossible for a plaintiff to succeed in a predatory pricing case brought under either statute. In short, the practical effect of the *Brooke Group* decision has been to eliminate predatory pricing claims as plausible claims under the antitrust laws.[133]

The first prerequisite cannot be reconciled with the legislative history of the Robinson-Patman Act discussed above,[134] and it is at least arguably inconsistent with the legislative history of the Sherman Act as well.[135] Furthermore, the Court's own precedent had been generally understood as holding that while below-cost

[128] *Id*. at 222 (citations omitted).

[129] As the *Brooke Group* Court recognized, its earlier decision in *Utah Pie Co. v. Continental Baking Co*., 386 U.S. 685 (1967), "has often been interpreted to permit liability for primary-line price discrimination on a mere showing that the defendant intended to harm competition or produced a declining price structure." 509 U.S. at 221. Shortly before its *Brooke Group* decision, the Court declined to "consider whether recovery should *ever* be available on a [predatory pricing claim] when the pricing in question is above some measure of incremental cost." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 n.9 (1986); *see also* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117 n.12 (1986).

[130] *Brooke Group*, 509 U.S. at 222–23.

[131] *Id*. at 224.

[132] *Id*. at 225.

[133] Government and private plaintiffs alike always failed in predatory pricing cases decided after *Brooke Group*. *See* PITOFSKY ET AL., *supra* note 28, at 873 ("Please note that since *Brooke Group* was decided, no plaintiff has succeeded on the merits of a predatory pricing claim in federal court.").

[134] *See supra* notes 117–22 and accompanying text (discussing the legislative history behind the Robinson-Patman Act).

[135] *See supra* notes 123–24 and accompanying text (discussing the legislative history behind the Sherman Act).

pricing was powerful evidence of predatory intent, it was not critical to the plaintiff's case.[136] As for the second prerequisite, it is clear that Congress twice (first in 1914 and again in 1936) attempted to tighten the law against predatory pricing by adopting, and then amending, section 2 of the Clayton Act.[137] It is hardly plausible to claim that Congress intended to buttress the Sherman Act by codifying the attenuated distinction suggested by the "reasonable prospect" and "dangerous probability" standards adopted by the Court as the distinguishing feature between predatory pricing claims under the Clayton Act (as amended by the Robinson-Patman Act) and the Sherman Act. Furthermore, the recoupment requirement under the Robinson-Patman Act cannot be reconciled with Congress's concern for a competitor victimized by the discrimination. Clearly, the target of a discriminatory price cut can be harmed even if competition might not be harmed and there may not exist any likelihood of recoupment. In light of this congressional concern with predatory pricing, the question arises as to what prompted the Court to obliterate any practical distinction between the two statutes as applied to predatory pricing, and essentially to read predatory pricing claims out of the antitrust statutes.

The answer to this question is provided not by a source of law, but rather by economic theory. Indeed, it is provided by economic theory that was highly popular at the time *Brooke Group* was

[136] In *Utah Pie Co. v. Continental Baking Co.*, the Court held that each of the three defendants had violated the Robinson-Patman Act by selling below cost and engaging in other predatory behavior. 386 U.S. 685, 702–03 (1967). However, it did not hold, nor even suggest, that below-cost pricing was critical to a violation. *See id.* at 702 n.14 ("It might be argued that the respondents' conduct displayed only fierce competitive instincts. Actual intent to injure another competitor does not, however, fall into that category, and neither, when viewed in the context of the Robinson-Patman Act, do persistent sales below cost *and radical price cuts* themselves discriminatory.") (emphasis added); 1 AM. BAR ASS'N SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 474 (Debra J. Pearlstein et al. eds., 5th ed. 2002) ("In *Utah Pie*, the Court indicated that competitive injury in a Section 2(a) primary line case may be inferred from proof of predatory intent, and that predatory intent may be demonstrated through direct evidence of subjective intent or inferred from 'economic circumstances,' including 'persistent unprofitable sales below cost.'"). In *Moore v. Mead's Fine Bread Co.*, the Court, relying on the legislative history of the Robinson-Patman Act and quoting from the legislative debates, found a violation of section 2(a) in a primary line case without any consideration of whether the discriminatory low price was below cost. 348 U.S. 115, 120 (1954).

[137] *See supra* notes 114–22 and accompanying text. The Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination:

> where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

15 U.S.C. § 13(a) (2000).

decided, but that has since become highly suspect. Before considering this question, it will be helpful to examine the two prerequisites to recovery as explicated and applied by the Court in *Brooke Group*.

A. The Pricing Below Cost Standard

In adopting a cost-based standard, the *Brooke Group* Court relied heavily on commentary critical of the prior law, which permitted price cuts to be characterized as predatory if undertaken with the intent to exclude or discipline a competitor.[138] The watershed article favoring cost analysis as a more objective method of characterizing pricing behavior was published by Phillip Areeda and Donald F. Turner in 1975,[139] and was relied upon by the *Brooke Group* Court.[140] Early criticism of the Areeda-Turner approach focused on the difficulty inherent in proving cost in court.[141] Problems of proof depend on "the appropriate measure of cost," an issue the *Brooke Group* Court declined to address.[142] Thus, while the Court was clear in adopting a cost-based standard, it failed to define that standard. Some lower courts have adopted average variable cost as the appropriate standard, while others have chosen average total cost.[143] Furthermore, the courts are in disarray concerning the effect of various cost standards, often "placing different burdens on plaintiff and defendant when the price is above average variable cost but below average total cost."[144] The only certainty after *Brooke Group* is that for the plaintiff to prevail on a predatory pricing claim, it must prove that the defendant priced below whatever cost standard the court deciding the case has adopted. Indeed, some courts have yet to adopt a cost standard.[145]

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138 *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) (noting that early case law did not "set forth explicit, general standards for establishing a violation of the Robinson-Patman Act").

139 *See* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 732–33 (1975).

140 *Brooke Group*, 509 U.S. at 224.

141 *See, e.g.*, LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 110–11 (1977). Commenting on the Areeda-Turner approach, Professor Sullivan noted that "[a]s a way to get at predatoriness the analysis is a distinct contribution. As *the* way, it has deficiencies." *Id*. at 110. In other words, as the legislative history suggests, sales below cost are powerful evidence of predatory pricing, but should not be viewed as critical to predatory pricing. *See supra* note 121 and accompanying text.

142 *Brooke Group*, 509 U.S. at 222 n.1.

143 *See* Michael L. Denger & John A. Herfort, *Predatory Pricing Claims After* Brooke Group, 62 ANTITRUST L.J. 541, 548–49 (1994).

144 *Id*. at 549.

145 *See, e.g.*, Rebel Oil Co. v. Atl. Richfield Co., 146 F.3d 1088, 1092 (9th Cir. 1998)

B. The Recoupment Standard

While the cost standard presents its own problems of proof, they are relatively modest compared to those presented by the recoupment standard. First, and perhaps most importantly, it is not enough that the defendant believed that its below-cost pricing would be profitable in the long run. In *Brooke Group*, the jury found that the defendant priced below cost and the Supreme Court held that the finding was supported by the evidence.[146] Furthermore, the jury found that the defendant priced below cost with the purpose of disciplining the plaintiff for selling generic cigarettes at a low price and with the expectation that as a result of defendant's below cost pricing, the plaintiff "would raise its list prices on generics or acquiesce in price leadership" by the defendant.[147] Finally, the jury found that the defendant pursued this strategy in order to "shrink the percentage gap in retail price between generic and branded cigarettes," thereby facilitating the sale of defendant's branded cigarettes at supracompetitive prices.[148] Each of these findings, the Supreme Court held, was supported by sufficient evidence.[149] Nonetheless, the Court upheld the lower court's decision setting aside the jury's verdict in favor of the plaintiff because the evidence failed "to show that in pursuing this scheme, [the defendant] had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics."[150]

In short, the Court adopted an objective—rather than a subjective—standard in determining whether the recoupment standard was met. Indeed, the Court remarked that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws. . ."[151]

Thus, it is not enough that the defendant believed it had a reasonable prospect of recoupment. The factfinder must be

("Neither the Supreme Court nor this circuit has concluded what would be the appropriate measure of cost in a predatory pricing case.").

[146] *Brooke Group*, 509 U.S. at 231.

[147] *Id*. at 230–31.

[148] *Id*.

[149] *Id*. at 231.

[150] *Id*. at 231.

[151] *Id*. at 225. The Court continued by observing that the antitrust laws "do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" *Id*. While it is undoubtedly true that Congress was not concerned with providing a remedy for all business torts when it adopted the antitrust legislation, it is equally clear that it was concerned with providing a remedy for predatory pricing and that it viewed predatory pricing as pricing that was intended to discipline or exclude a competitor.

convinced that the prospect of recoupment was reasonable. Considering the multitude of factors that affect profitability in imperfect markets, it is astonishing that the Court adopted a rule requiring judges and juries to second-guess the defendant's business judgment concerning the likelihood of recoupment. The Court might have been influenced by the fact that the defendant was ranked third in a highly concentrated market and that it lacked the power to engage in unilateral supracompetitive pricing. Thus, price leadership depended upon the cooperation of its larger competitors. Under such circumstances, the Court noted that the "anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly."[152] However, as Justice Stevens pointed out in his dissent, one would suppose "that the professional performers who had danced the minuet for 40 to 50 years would be better able to predict whether their favorite partners would follow them in the future than would an outsider, who might not know the difference between Haydn and Mozart."[153]

The Court's rejection of the defendant's expectation of profitability is especially surprising in light of its recognition that "[t]he cigarette industry . . . has long been one of America's most profitable . . . . List prices for cigarettes increased in lockstep, twice a year, for a number of years, irrespective of the rate of inflation, changes in the costs of production, or shifts in consumer demand."[154] It is also in sharp contrast to the general reluctance of courts, regardless of the context, to second-guess business judgment. Moreover, it is inconsistent with the Supreme Court's recognition of its own lack of expertise in analyzing market behavior. For example, the Court has observed that "[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. And the result of the process in any given case may provide little

[152] *Id*. at 228.

[153] *Id*. at 257; *see also* Farber & McDonnell, *supra* note 29, at 38. Concerning *Brooke Group*, Farber and McDonnell note:

> So, Brown & Williamson, an experienced and successful company with many decades of intimate knowledge of this industry, apparently believed that it could better its profits by forcing Liggett back into line through a price war, but Justice Kennedy and his colleagues, armed with the best economic theory Chicago has to offer, know better—Brown & Williamson was just wasting its shareholders' money. How arrogant. How implausible. Note that in accepting a highly contestable and specific economic theory, the Court ignores a much more general and basic piece of wisdom from economics: we should generally presume that experienced actors within an industry are rationally pursuing their goals.

Id. (footnote omitted).

[154] *Brooke Group*, 509 U.S. at 213 (citations omitted).

certainty or guidance about the legality of a practice in another context."[155]

C. Economic Formalism in Predatory Pricing

What explains the Court's apparent hostility to predatory pricing theory? Surely the Court is correct in demanding that courts be cautious in finding antitrust violations based on price cuts. As the Court noted, "[i]t would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high."[156] In light of congressional concern for predatory pricing, however, it would be equally ironic for the standards to be so high that they virtually read predatory pricing theory out of the antitrust laws. *Brooke Group* has had just such an effect. It has been noted that "[t]he Supreme Court's observation in *Brooke Group* that predatory pricing claims are 'rarely successful' has proved to be prescient. In the years since that decision, primary line injury claims frequently have been defeated on motions to dismiss or for summary judgment."[157]

Considering the hurdles that must be cleared for a plaintiff to recover on a predatory pricing theory after *Brooke Group*, it did not require a great deal of prescience to see that predatory pricing claims would rarely be successful. However, the Court did not comment on the likelihood of a plaintiff successfully pressing a claim under the *Brooke Group* standards. Rather, it said that "'predatory pricing schemes are rarely tried, and even more rarely successful,' and the costs of an erroneous finding of liability are

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155 Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343 (1982) (citation omitted).

156 *Brooke Group*, 509 U.S. at 226–27.

157 1 AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 136, at 476. Predatory pricing can cause competitive injury in either of two markets. In a so-called primary line case, injury occurs in the market in which the defendant sells. *Brooke Group* was a primary line case. The defendant, Brown & Williamson Tobacco Corp., granted discriminatory below-cost prices to customers with the intent of depriving the plaintiff, Brooke Group (then Liggett), of the business from the favored customers, thereby disciplining Liggett and causing it to raise its price for generic cigarettes. Thus, the intended victim of the predatory pricing scheme was a competitor, with potential competitive injury in the market in which the predator sold, making it a primary line case. In a typical secondary line case, a supplier selling to customers who compete in reselling the goods grants a discriminatory low price to one competing customer to the disadvantage of the other competing customer. Competitive injury in a typical secondary line case potentially occurs in the market in which the customers sell. *See, e.g.*, Fed. Trade Comm'n v. Morton Salt Co., 334 U.S. 37, 40–42, 44 (1948) (holding that a manufacturer's pricing policy—in which large retail chains were charged less than wholesalers—violated the Clayton Act).

high."[158] So, the Court was not referring to the lack of success for predatory pricing claims as a legal matter, but to the lack of success for predatory pricing as an economic matter. Despite Congress's concern for predatory pricing, the Court believed that predatory pricing was not much of a problem since it is rarely tried and even more rarely successful in enhancing the long-run profits of the predator. Once convinced of this economic notion, the Court created a legal landscape in which predatory pricing claims have little or no chance of success. Of the few post-*Brooke Group* predatory pricing cases that have gone to trial, none have resulted in a judgment for the plaintiff.[159]

There can be no doubt that in adopting the Robinson-Patman Act, Congress intended to prohibit not only discriminatory sales below cost with a reasonable prospect for recoupment, but also discriminatory price cuts undertaken with the purpose of excluding or disciplining a competitor, irrespective of whether the price cuts were below cost and irrespective of the likelihood of recoupment. In other words, Congress intended to prohibit just the kind of malicious pricing behavior directed by one competitor against another for which *Brooke Group* created a safe harbor. The foundation of the *Brooke Group* decision was not drawn from sources of law such as statutory language or legislative history, but instead from economic theory. In short, *Brooke Group* stands for the proposition that economic theory trumps legislative history—a legislative history that clearly indicates that Congress viewed predatory pricing as a serious and common problem.

It is true, of course, that resolving the factual issue of whether price cuts were undertaken with the intent of disciplining or excluding a competitor is a difficult task. It is far easier to decide such a case on the assumption that economic theory correctly informs us that no harm can come from price cuts that are above cost, or, if below cost, pose little likelihood of recoupment. As has been noted by Professor Sullivan, however,

> [i]f there is one task that judges and juries, informed through the adversary system, may really be good at, it is identifying the pernicious in human affairs. To contend that the conventional formulation, which looks, in a sense, for evil,

[158] *Brooke Group*, 509 U.S. at 226 (citation omitted) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986)).

[159] *See* PITOFSKY ET AL., *supra* note 28, at 873 ("Please note that since *Brooke Group* was decided, no plaintiff has succeeded on the merits of a predatory pricing claim in federal court.").

> ought to be amended to one which looks solely to an effect validated by economic studies is to assume too much about the precision of applied economics and to assume too little about the value of more humanistic modes of inquiry.[160]

Brooke Group adopted just such an amendment.[161] And, as Professor Sullivan suggests, the problem it presents is not just one of judicial integrity concerning the propriety of such an amendment in the face of conflicting legislative history and congressional intent, but also one of validity. Is the economic theory universally accepted and therefore almost surely valid? Even if the theory is universally accepted and likely valid, it does not resolve the issue of judicial integrity.

Besides, in this case the economic theory is not universally accepted. There are, in fact, competing economic theories of predatory pricing, only some of which view it as harmful only when prices are reduced below cost. Professor Sullivan was an early critic of the Areeda-Turner approach; others have followed.[162] A leading casebook on antitrust law, the authors of which include former Federal Trade Commission Chairman Robert Pitofsky, notes that "[m]ore recent literature asserts that when strategic considerations are incorporated, and particularly in light of modern game theory, predatory pricing is a rational and often-used strategy."[163] It has also been noted that "there is no compelling reason to restrict predation cases to below-cost pricing, as above-cost pricing can also

[160] LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 110 (1977).

[161] *See Brooke Group*, 509 U.S. at 223 (cautioning that "the exclusionary effect of prices above . . . cost . . . is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting"). The Court obviously has less faith in the ability of judges and juries to apply an intent-based test than does Professor Sullivan. But, isn't it a strange system of justice that can deprive individuals of liberty and even life depending upon a jury's determination of intent, but cannot tolerate the characterization of price cuts depending upon such a determination?

[162] *See, e.g.*, Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 941–42 (2002) (arguing that "above-cost pricing can . . . hurt consumers by limiting competition"); Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2250–55, 2264 (2000) (detailing the various criticisms of the Areeda-Turner approach that surfaced shortly after the publication of Areeda and Turner's law review article, and proposing an alternative rule for use in analyzing predatory pricing claims); Patrick Bolton et al., *Predatory Pricing: Response to Critique and Further Elaboration*, 89 GEO. L.J. 2495, 2499 (2001) (advocating the use of factual evidence to buttress the use of economic theory in predatory pricing cases); Jonathan B. Baker, *Predatory Pricing After* Brooke Group*: An Economic Perspective*, 62 ANTITRUST L.J. 585, 591 (1994) (contending that price cuts that do not fall below some measure of cost may nonetheless injure competition). For a collection of articles critical of the Areeda-Turner approach and for a brief description of competing theories, see PITOFSKY ET AL., *supra* note 28, at 868–69.

[163] PITOFSKY ET AL., *supra* note 28, at 869.

hurt consumers by limiting competition."[164] Even Judge Posner, who generally takes a narrow view of antitrust law, considered the Areeda-Turner cost-based test for predatory pricing as overly generous to antitrust defendants.[165]

IV. CONCLUSION

Judge (then-Professor) Frank Easterbrook believes that in the entire history of American antitrust law, there have been fewer than ten cases that should have been allowed to go to trial.[166] It is well known that free market ideologues have waged war on antitrust for the past thirty or so years. The opening salvo was Robert Bork's book, THE ANTITRUST PARADOX, published in 1978. The main effort was directed not at Congress where success was unlikely, but at the courts. The main weapon has been economic theory. The main strategy has consisted of three components: a dogmatic view of economic theory, an attempt to demonstrate that many antitrust decisions grounded in legislative history and congressional intent cannot be reconciled with economic theory, and a claim that economic theory ought to trump congressional intent. This last component is particularly intriguing, since free marketers generally view themselves as judicial conservatives. Their judicial philosophy, however, has not deterred them from urging the courts to reject legislative history and congressional intent that conflicts with their economic ideology. It is simply implausible to claim, as

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[164] Edlin, *supra* note 162, at 941–42 (footnotes omitted).

[165] *See* RICHARD A. POSNER, ANTITRUST LAW 217–20 (2d ed. 2001). Judge Posner was not generally opposed to a cost-based test. However, he argued that the Areeda-Turner test enabled established firms without start-up costs to deter entry into the market by lowering price to a level that was above their average variable cost (the cost standard supported by Areeda and Turner), but below average variable cost of a new entrant facing start-up costs. Although the Areeda-Turner proposal for a cost-based test for predatory pricing has become the law of the land, the average variable cost standard they proposed has not been well received. In *McGahee v. Northern Propane Gas Co.*, the court noted:

> The Areeda and Turner test is like the Venus de Milo: it is much admired and often discussed, but rarely embraced. Perhaps this reluctance to embrace is due to the substance from which it is formed. The Areeda and Turner test is carved from economic assumptions, not from antitrust statutes and judicial precedents. Perhaps this reluctance is due to attacks upon it. The Areeda and Turner test has been criticized for being impractical, for using static short-run analysis, and for being too permissive of predatory activity; these criticisms break any notion that economists agree that the Areeda and Turner test is best.

858 F.2d 1487, 1495–96 (11th Cir. 1988).

[166] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 31 (1984). In proposing a series of filters to be applied by the courts to determine whether a case should be allowed to go to trial, then-Professor Easterbrook stated that "[i]t is hard to compile a list of ten cases in the history of antitrust that would proceed past this filter." *Id.*

Judge Easterbrook has, that fewer than ten antitrust cases should have been allowed to go to trial over the past 115 years of antitrust history, and at the same time to claim even the slightest degree of deference to the legislative process. Perhaps he is correct, given his view of economic theory. If so, it is clearly not the view that Congress had in mind in 1890 when it adopted the Sherman Act, or when it adopted the Clayton Act in 1914, or when it adopted various amendments to these bedrock statutes, which were designed to strengthen rather than weaken antitrust legislation. As Professor Hovenkamp has noted:

> Members of the Chicago School [such as Judge Easterbrook, Robert Bork, and others who have led the charge against antitrust] have visions, as do most of us, of the kinds of things that should obtain in a perfect world. . . . That fact justifies arguments, both theoretical and political. But it does not justify taking the matter into one's own hands, no matter how certain we may be that we are right.[167]

In each of the areas described above—vertical price fixing, tying arrangements, and predatory pricing—the Supreme Court has taken matters into its own hands. The practical impact has been dramatic. For example, predatory pricing claims under the antitrust laws are no longer viable.[168] And, the impact has not been limited to these three areas. The use of economic theory as an infallible guide rather than as a helpful tool in antitrust analysis has constrained the reach of antitrust legislation in virtually all areas; not only in the courts, but in the enforcement agencies as well.[169] The economic theory on which the Court has relied is often doubtful,[170] and the economic analysis flawed.[171] Yet, good faith

[167] Hovenkamp, *supra* note 29, at 1026.

[168] *See* Edlin, *supra* note 162, at 941.

[169] For example, the Supreme Court has not decided a merger case in thirty years. *See* ELEANOR M. FOX ET AL., U.S. ANTITRUST IN GLOBAL CONTEXT 300, 302 (2d ed. 2004) ("General Dynamics is still the latest horizontal merger case decided on its merits by the Supreme Court, and it remains good law. . . . *Marine Bancorporation* is the Supreme Court's last word on mergers that eliminate potential competition."). *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), and *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), were decided in the same year, more than thirty years ago.

[170] The cartel facilitation and free rider theories relied on in *Sharp* are mere abstractions about how markets might work, and have not been supported by empirical evidence. The notion that market power can be used once, relied on by Justice O'Connor's concurring opinion in *Jefferson Parish* with three other Justices joining, in calling for the abandonment of the conditional *per se* rule against tying arrangements is likewise not subject to proof. The notion relied on by the Court in *Brooke Group* that above cost price cuts can rarely—if ever—be anticompetitive, is highly controversial.

[171] *See, e.g.*, *supra* notes 62–78 and accompanying text (criticizing Justice Scalia's application of the free rider theory).

error is not the most problematic aspect of these decisions. What is deeply disturbing is the judicial arrogance that they betray.