Changing Configurations of Antitrust Law: Judge Posner's Applications of His Economic Analysis to Antitrust Doctrine

Jerry M. Santangelo

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol32/iss4/5

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
When Congress promulgated the Sherman Antitrust Act in 1890, the federal judiciary became the guardian of a major doctrine of American economic policy. The policy underlying the Sherman Act, and reaffirmed by subsequent antitrust statutes, is that the American economy shall remain distinctly competitive. Considering the pivotal role that competition assumes in antitrust law, it seems logical that a clear definition of the term should exist. Ironically, however, Congress failed to provide such a definition, and judicial interpretations of the Sherman Act remain devoid of any coherent

---

1. Sherman Antitrust Act, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)). This Comment focuses on sections 1 and 2 of the current statute, which provide in pertinent part:

   § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

   § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign states, shall be deemed guilty of a felony. . . .


2. See, e.g., Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966) (“[w]e have long recognized that the antitrust laws represent a fundamental national economic policy”). Because the § 1 prohibition of restraints in trade and the § 2 prohibition of monopolization are extremely broad, the “Sherman Act may be little more than a legislative command that the judiciary develop a common law of antitrust.” P. Areeda, ANTITRUST ANALYSIS ¶ 104, at 5 (3d ed. 1981).


4. See, e.g., Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) (“[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade”).

839
definition. Nevertheless, throughout the history of antitrust law, competition has served as the standard for resolving legal claims that are brought under the antitrust statutes.

The complexity posed by this judicial standard stems from the values associated with a competitive capitalist economy. The belief that competition will benefit both individuals and society is fundamental to American liberal thought. The ideological foundation for this belief is articulated in Adam Smith's profound intellectual achievement, *The Wealth of Nations.*

The cardinal tenet of this book's exposition on classical liberalism is that a free and unfettered market, consisting of a multitude of small competitors, will channel individual productive energies and resources toward their most valuable uses. Smith's reliance on market competition is based on the view that individual self-interest in producing for profit will lead to quality products designed to meet consumer needs. By achieving social welfare

5. For a development of the various themes of competition recognized by the Supreme Court, see infra notes 234-41 and accompanying text.

6. Because § 1 of the Sherman Act literally prohibits every agreement in restraint of trade, traditional antitrust doctrine contains two tests which are applied by the courts to determine if a particular restraint is in the interest of competition. The first test is the "rule of reason," which requires the court to determine "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); see also infra notes 157-61 and accompanying text. The second test is "per se illegality," under which the court classifies "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); see infra notes 153-58 and accompanying text.


8. In Smith's words, each producer intends only his own security; and by directing that industry in such a manner as its produce may be of greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was not part of it. By pursuing his own interest he frequently promotes that of society more effectively than when he really intends to promote it.

9. Smith wrote that "[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest." Id. at 14. The classical liberalist view of human nature is that man is a rational maximizer of his selfish interests. Jeremy Bentham, a philosopher in the classical mode, believed that all human actions were motivated by the desire to achieve pleasure and avoid pain. See J. Bentham, *An Introduction to the Principles of Morals and Legislation,* in ETHICAL THEORIES 341 (A.I. Melden ed. 1955). Although motives stem from pleasure and pain, rational assessment of a given situation determines which pleasures and pains are sought or avoided. For a discussion of individual rationalization as a behavioral presupposition in economic theory, see infra notes 228-29. For an analysis of Smith's philosophical views and how they relate to his economic perceptions, see Lerner, *Introduction to A. Smith,* supra note 7.

10. "Every individual . . . continually exert[s] himself to find out the most advantageous employment for whatever capital he can command." A. Smith, supra note 7, at 421. The political corollary of classical liberalism's economic creed is that a state which governs the
through the diffusion of economic power, Adam Smith's "invisible hand" of market competition "seemed to be the perfect counterpart of American democratic pluralism." The confidence Americans placed in the classical liberal ideology was shaken by the destructive consequences of the ruinous competition that occurred in the last quarter of the nineteenth century. As a result of relentless accumulations of industrial wealth by giant corporations and trusts, many small competitors disappeared from the marketplace. A feverish hostility toward these newly emerging giants became prevalent throughout American society. This public outcry was so predominant that by the 1888 presidential election every major political party had adopted an antitrust plank in its platform. The political impulse behind the passage of the Sherman Act—to preserve a climate of economic freedom—was definitive.

These political and economic realities of the late nineteenth and early twentieth centuries signified the apparent abandonment of classical liberal economic theory. Yet, reemerging under a new school of economic thought known as neoclassical economics, the theory has received further esoteric and highly elaborate analytical treatment by contemporary microeconomic price theorists. Under classical liberal economic theory, competition least, governs the best. For an inquiry into classical liberalism's opposition to governmental intervention in economic affairs, see H. Girvetz, The Evolution of Liberalism 50-81 (1963).


12. The exploitive nature of the industrial warfare of this era is documented in M. Josephson, The Robber Barons (1934) and A. Nevins, The Heroic Age of American Enterprise (1940).

13. See, e.g., J. Bain, Industrial Concentration and Anti-Trust Policy, in Growth of the American Economy 619 (H. Williamson 2d ed. 1951) ("The scope of the merger movement was so great that by 1904 . . . [300 large industrial combinations] controlled more than two-fifths of the manufacturing capital of the country and had affected about four-fifths of important American industries.")

14. See, e.g., W. Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act 54-71 (1965). After noting that the "pervasive antitrust sentiment did not spring up overnight," the author concludes that in the years immediately preceding the passage of the Sherman Act public sentiment demanded the dissipation of power held by the trusts. Id. at 445.

15. Antitrust planks appeared on the platforms of the Union Labor Party, the Prohibition Party, the Democratic Party, and the Republican Party. Also, since 1880 the Greenbacks and the Anti-Monopoly parties had campaigned against monopolies. In the 1888 election, the Republican candidate, Benjamin Harrison, won the presidency. He was nominated by the Republicans over Senator Sherman on the seventh ballot. See D. McKee, National Conventions and Platforms 192, 215, 224-53 (1901).

16. See, e.g., H. Thorelli, The Federal Antitrust Policy 227 (1955) (characterizing the Sherman Act as embodying an eminently "'social' purpose . . . [of] achieving freedom from corruption and maintaining freedom of independent thinking in political life"). But see Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & Econ. 7 (1966) (concluding that Congress had a uniform goal of promoting efficiency when it enacted the Sherman Act).

17. A major representative work of the neoclassicalists during the late nineteenth century is W. Jevons, The Theory of Political Economy (1871).

represents a state of perfection in which society's material needs are fulfilled at the lowest possible cost and without a centralized planning authority. Two models lie at the foundation of these theories: perfect competition and pure monopoly.

The basic premise of the perfect competition model is that no individual or entity possesses the ability to influence market conditions. The feasibility of this premise depends upon the following assumptions contained in the model: (1) the market features a large number of buyers and sellers; (2) products are presumed to be standardized and, therefore, cannot be differentiated from other similar products; (3) collusion to influence market conditions is absent; (4) perfect knowledge about market conditions is possessed by all competitors; and (5) freedom to enter into, and exit from, the market results in the optimum allocation of productive resources. Based upon these assumptions, firms must constantly reduce their costs in order to remain viable competitors. When consumers and producers interact in this competitive market, the supply reaches a state of equilibrium with the quantity demanded and, thus, provides consumers with the desired product at minimum expense.

The antithesis of the perfect competition model is the pure monopoly is the economics of individual enterprises, workers, and consumers. This is contrasted with macroeconomics, which concentrates on the operation of the whole economy.

According to microeconomic price theory, prices in a competitive market are determined by supply and demand. Demand is based on consumers' desires and incomes, while supply is based on the cost of production. When supply equals demand, the market is in a state of equilibrium. See R. Lipsey & P. Steiner, Economics '76 (3d ed. 1972). Such a process is efficient because it allocates scarce resources toward their most productive use. For an eloquent introduction into the concepts of price theory, see G. Stigler, The Theory of Price (3d ed. 1966).

The core of neoclassical economics, and most microeconomic texts, is the notion that consumer demand is determined by the utility derived from each product. E. Hunt & H. Sherman, Economics: An Introduction to Traditional and Radical Views 175 (1978). Utility is defined as the satisfaction received from consumption. Id. Marginal utility represents the effect each additional unit of the product has on the consumer, while the law of diminishing marginal utility states that a good's marginal utility diminishes with additional acquisitions of that product. Id. at 176. From this principle flows the notion that consumers spend in order to maximize their satisfaction. The consumer will "maximize satisfaction or utility when income is spent so that the marginal or additional utility derived from the last unit of each good purchased is exactly in proportion to the price paid for each good." Id. Similarly, the firm is presumed to be motivated towards maximizing its profits in choosing between which goods to produce and what raw materials to buy. P. Samuelson, supra note 18, at 88.


21. See Gellhorn, An Introduction to Antitrust Economics, 1975 Duke L.J. 1, 6. At the point of equilibrium, the successful firm has achieved its goal of profit maximization by producing the quantity that equates marginal cost and price.

22. J. Henderson & R. Quant, supra note 18, at 103.
model. Only one firm exists under the pure monopoly model; this firm faces neither the threat of competitors entering the market nor close substitutes for the goods it produces. Whereas a competitive firm faces a flat demand curve because it must accept the prevailing market price, the monopolist faces a downward sloping demand curve because it cannot sell all its output at the existing market price. Additional sales may be obtained by the monopolist only by lowering the price of its entire output. Consequently, the monopolist will opt for a higher selling price and the reduction of output below the competitive level in order to maintain excess profits.

A group of legal scholars and economists, classified as Chicago school theorists, advocate resolving antitrust disputes according to the economic implications that are derived from the foregoing models of the challenged practices. The apparent appeal of this approach stems from the perceived ability of microeconomics to provide an objectively quantifiable and value-neutral benchmark for the law. Chicago school theorists have sharply criticized legal decisions that apply noneconomic values to competition.


24. The scope of this analysis is beyond the introductory comments presented here. For a review of these economic principles, see generally E. Hunt & H. Sherman, supra note 18, at 252-68 (an analysis of profit maximization, assumed to be the goal of all firms, is given for competitive and monopolistic industries).

25. See R. Lipsy & P. Steiner, ECONOMICS 25-53 (3d ed. 1972) (due to the fact that marginal revenue is less than price, a monopolist must lower its price on all units sold in order to sell an extra one; this will maximize profits by restricting output and setting price above marginal cost).


28. See generally Symposium on Efficiency as a Legal Concern, 8 HOFSTRA L. REV. 485 (1980) (some of the articles in the symposium consider efficiency to be a true guide to certainty in antitrust law, while other articles find efficiency to be a value-based standard utilized only to justify the status quo).

29. See, e.g., Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt. 2), 75 YALE L.J. 373 (1966) (critical of per se rule against vertical restraints); Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution,
According to these theorists, the application of such values has been the major cause of incoherence in antitrust doctrine and has often prompted courts to proscribe economically procompetitive practices.30

The appointment of Professor Richard A. Posner to the United States Court of Appeals for Seventh Circuit brought to the bench a leading advocate of the Chicago school approach to antitrust law.31 This Comment will address some of the antitrust policies expressed in Seventh Circuit opinions in which Judge Posner either wrote for, or served as a member of, the majority.32 These opinions are noteworthy for their positive correlation with Judge Posner's previously articulated propositions on antitrust law. Moreover, they indicate a possible progression by the Seventh Circuit toward adopting the Chicago school approach.

Part one of this Comment develops the theme that the Seventh Circuit is rapidly diminishing the scope of protection provided by section 1 of the Sherman Act. Three decisions serve as the backdrop for this theme. In the first case, In re Industrial Gas Antitrust Litigation,33 the court addressed the fundamental question of whether the plaintiff had standing to sue under the antitrust laws. In construing a broadly worded statutory grant of standing,34 the Seventh Circuit held that the Sherman Act applied only to

---


32. The cases evaluated in which Judge Posner wrote the majority opinion include the following: Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982); Omega Satellite Prosds. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); Marrese v. American Academy of Orthopaedic Surgeons, 692 F.2d 1083 (7th Cir. 1982); Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Co., 682 F.2d 660 (7th Cir. 1980); Valley Liqueurs, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982). The case evaluated in which Judge Posner was a member of the majority is the antitrust standing case of In re Industrial Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982), cert. denied, 103 S. Ct. 1261 (1983). Each of these cases was decided by a three-judge panel.

33. 681 F.2d 514 (7th Cir. 1982), cert. denied, 103 S. Ct. 1261 (1983).

consumers or competitors within the area of the economy affected by the alleged violation. The court further held that only those plaintiffs classified as efficient enforcers of the law could claim its protection. As this Comment will demonstrate, this constriction is inconsistent with Supreme Court decisions emphasizing a liberal interpretation of the antitrust standing provisions.

In the second case, Marrese v. American Academy of Orthopaedic Surgeons, the issue before the court was whether the district court had violated its discretionary powers by holding the defendant in criminal contempt for failing to comply with a protective discovery order. The order required the defendant to provide the plaintiffs with information relating to denials of membership in the professional organization. Suing under section I of the Sherman Act, the plaintiffs alleged that the requested information was necessary for the effective preparation of their claim that they were denied membership as a result of an illegal group boycott. The Seventh Circuit overturned the contempt citation and held that the district court should have ordered discovery to ascertain the anticompetitive effect before allowing discovery on the issue of whether an illegal group boycott existed. The Marrese court speculated that by employing this sequence of discovery, the case could have been dismissed for lack of anticompetitive effect. This Comment will criticize Marrese on two grounds: (1) the ruling improperly displaced the district court's broad discretionary powers to oversee discovery procedures; and (2) the decision conjecturally disposed of the substantive merits of the plaintiff's antitrust claims.

In the third case, Valley Liquors, Inc. v. Renfield Importers, Ltd., the Seventh Circuit disregarded the established standard of review for preliminary injunctions. Furthermore, as this Comment will illustrate, the Valley Liquors court's implicit approval of the proposition that nonprice vertical market restraints are presumptively legal is symbolic of Judge Posner's influence on the court in the field of antitrust law. Part two of this Comment examines the definition of competition in antitrust law. Judge Posner's pronouncements regarding what constitutes anticompetitive effect are shown to be deeply immersed in Chicago school theory. This section also highlights the manner in which Judge Posner distinguishes contrary Supreme Court declarations in order to promote his economic presuppositions. The Seventh Circuit's reliance on a purely economic definition of competition indicates an ideological shift by the court toward embracing the Chicago school approach. In applying this definition to antitrust

---

35. 681 F.2d at 519.
36. Id. at 516, 519-20.
37. 692 F.2d 1083 (7th Cir. 1982).
38. Id. at 1087.
39. Id. at 1096.
40. Id. at 1095.
41. 678 F.2d 742 (7th Cir. 1982).
doctrine, the court ignores deeply entrenched political and social values that give the antitrust statutes their dynamic character.

THE DEMISE OF SECTION 1 OF THE SHERMAN ACT

A. Judicial Restrictions of Private Antitrust Suits

1. The Background of Antitrust Standing

Section 4 of the Clayton Act is a remedial provision which allows "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws" to sue and, if successful, to recover treble damages and attorneys' fees. Because this statutory provision is broadly worded, courts have struggled to limit its scope without impairing the compensatory and deterrent objectives of private antitrust actions. To accomplish

42. The standing issue involves whether the claimant is the proper party to maintain a private antitrust suit and, thus, whether she will be allowed access to a federal forum to present her case. Before a court will entertain a claimant's suit, two requirements must be met. First, it must be shown that a federal court has jurisdiction over the claim as required by the "case or controversy" mandate of article III of the United States Constitution. See 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3531, at 175 (1975). Second, a discretionary determination must be made as to whether, for reasons of judicial economy, federal judicial resources should be devoted to the case. See Tyler, Private Antitrust Litigation: The Problem of Standing, 49 U. COLO. L. REV. 269, 272-73 (1978).


44. Id. Originally, the private right to recover treble damages was provided in § 7 of the Sherman Act, 26 Stat. 210 (1890). This treble damage provision remains unchanged under § 4 of the Clayton Act. For an historical perspective of the standing doctrine in antitrust law, see M. FORKOSCH, ANTITRUST AND THE CONSUMER 265-333 (1956); Letwin, Congress and the Sherman Antitrust Law: 1867-1890, 23 U. CHI. L. REV. 221 (1956); Comment, Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit, 61 YALE L.J. 1010 (1952).

45. For comprehensive reviews of judicial decisions limiting § 4 of the Clayton Act, see Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 YALE L.J. 809, 813-45 (1977); Sherman, Antitrust Standing: From Loeb to Malamud, 51 N.Y.U. L. REV. 374, 375-91 (1976). The reason generally recognized for restricting private antitrust litigation is the classic "floodgate" argument: courts would be overburdened with suits that conceivably could be brought by any person who suffered, however remotely, an injury due to an antitrust violation. This would "result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress." Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972).

46. For congressional recognition of the compensatory and deterrent objectives of § 4, see 51 CONG. REC. 9,090 (1914) (remarks of Rep. Mitchell); id. at 9,185 (remarks of Rep. Hefling); id. at 9,239 (remarks of Sen. Reed). The Department of Justice and the Federal Trade Commission are the primary enforcement agencies of the antitrust laws. Yet, these agencies are understaffed and receive insufficient funding. See, e.g., M. GREEN, B. MOORE, JR. & B. WASSERSTEIN, THE CLOSED ENTERPRISE SYSTEM 122-30 (1972) (lack of resources decreases the effectiveness of government antitrust enforcement). Furthermore, these agencies' prosecutorial discretion leads to selective enforcement, thereby minimizing the range of antitrust violations pursued. Tyler, supra note 42, at 277-80 (arguing that based upon the inability of government agencies to prosecute most antitrust violations, the social deterrence function of private suits should be recognized as the major objective of § 4). For additional discussion of the objectives of private antitrust suits, see infra notes 63, 92 & 152.
this result, the federal courts have devised several tests that restrict the expansive liability that would flow from a literal interpretation of the statute.48

One test requires the plaintiff to prove that a "direct injury" resulted from the alleged antitrust violation.49 A major shortcoming of the direct injury approach is that it denies a claimant standing if another victim of the antitrust violation has a more direct relationship with the alleged violator.50 Rather than determining standing based upon the relationship between the named parties, many courts have adopted the "target area" test. This approach focuses on the relationship between the claimant and the area of the economy that has been affected by the alleged violation.51 Never-

47. Commentators have recognized that these various tests have been applied inconsistently among, and within, the federal circuits. As a result, antitrust standing decisions are rather unpredictable. See generally Beane, Antitrust: Standing and Passing On, 26 BAYLOR L. REV. 331, 331-35 (1974); Berger & Bernstein, supra note 45, at 820-35; Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review, 71 COLUM. L. REV. 1, 27 (1971).

48. Four policy considerations are generally recognized for limiting the application of § 4: (1) avoidance of duplicative and potentially ruinous recoveries; (2) reduction of speculative recoveries; (3) elimination of windfall recoveries; and (4) limiting the burdens placed upon the federal courts by antitrust suits. Berger & Bernstein, supra note 45, at 845-50. Arguments against according these policy considerations decisive, or even compelling, weight are found in Tyler, supra note 42, at 286-95. See also infra notes 63, 88, 92 and accompanying text.

49. This direct injury rule was first enunciated in the seminal standing case of Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). The district court in Loeb dismissed a stockholder-creditor's suit alleging that the defendant's illicit use of its monopolistic power bankrupted the corporation he was associated with, thereby diminishing the value of his stock and making his claims against the company worthless. In affirming the district court's decision, the Third Circuit concluded that the plaintiff did not receive any direct injury from the alleged illegal acts of the defendant. . . . The injury complained of was directed at the corporation, and not the individual stockholder. Hence any injury which he, as a stockholder, received was indirect, remote and inconsequential. . . . There must exist some barrier which will effectively prevent such a multiplicity of suits as the plaintiff's position suggests. . . .

Id. at 709 (emphasis added). Some commentators have suggested that this test could have been narrowly construed to disallow recovery of damages actually sustained by another, such as the corporation. Thus, if the corporation brought suit its damage awards would adequately compensate its shareholders and creditors. See Berger & Bernstein, supra note 45, at 814-15; Sherman, supra note 45, at 381-82.

50. The line of demarcation between direct and indirect injury is difficult to establish. Consequently, in applying this test courts have tended to focus on the relationship between the alleged antitrust violator and the plaintiff. See Beane, supra note 47, at 33. For judicial recognition of the inherent difficulties of the direct injury test, see In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 125 (9th Cir.) (no hard and fast rule on directness of injury can be formulated), cert. denied sub nom. Morgan v. Automobile Mfg. Assoc., 414 U.S. 1045 (1973).

The test has also been described as conclusory in nature because it tends to obscure the purpose of the antitrust standing requirement, which is to determine whether the claimant, based on the alleged violation and injury, is protected by § 4 of the Clayton Act. Id. at 127; see also Sherman, supra note 45, at 380-82 (reviewing cases applying the direct injury test that failed to provide a clear formulation of the test).

51. The target area test was devised by the Ninth Circuit in Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951) (plaintiff "must show that he is within
theless, the target area test has not been applied in a clear and consistent manner. Unfortunately, both tests lack an analytical framework and, instead, rely on tort notions of proximate cause in determining the directness of the injury. The area of the economy which is endangered by a breakdown of competitive conditions in the particular industry). The term "target area" was coined by the same court in Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955). For more recent expressions of the target area test, see In re Industrial Gas Antitrust Litig., 681 F.2d 514, 517 (7th Cir. 1982), cert. denied, 103 S. Ct. 1261 (1983); Weit v. Continental Ill. Nat'l Bank & Trust Co., 641 F.2d 457, 469 (7th Cir. 1981), cert. denied, 445 U.S. 988 (1982); Schwimmer v. Sony Corp. of Am., 637 F.2d 41 (2d Cir. 1980); Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546 (5th Cir. 1980); Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 18-19 (2d Cir. 1979); Sanitary Milk Producers v. Bergians Farm Dairy, Inc., 368 F.2d 679, 688-89 (8th Cir. 1966); Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 417 (4th Cir.), cert. denied, 385 U.S. 934 (1966).

The Seventh Circuit seems to apply the target area test as its standard for determining whether a plaintiff can maintain a cause of action. See In re Industrial Gas Antitrust Litig., 681 F.2d 514, 517, 518 (7th Cir. 1982) (circuit follows the target area test), cert. denied, 103 S. Ct. 1261 (1983). After reviewing the Seventh Circuit's decisions, the Ninth Circuit concluded that the Seventh Circuit probably applies the target area test. See In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 127 n.7 (9th Cir.), cert. denied sub nom. Morgan v. Automobile Mfg. Assoc., 414 U.S. 1045 (1973).

In In re Industrial Gas, the Seventh Circuit declared that its decision in Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979), was the court's leading case applying the target area test. 681 F.2d 514, 518 (7th Cir. 1982). The Lupia court, however, explicitly refused to adopt either the direct injury or target area approach to antitrust standing. 586 F.2d at 1163. The Seventh Circuit recognized that the district court had applied the target area test but concluded that the "plaintiff could not prevail under [either of the tests]." Id. at 1169. The Lupia court then expanded on why the plaintiff did not fall within the target area test. Id. For a commentary on the Lupia court's failure to adopt the target area test, see Rodipis, Antitrust: Criminal Intent in Antitrust Prosecutions, Collateral Estoppel and § 5(a) of the Clayton Act, and the Relationship of Standing and Injury in Private Antitrust Suits, 56 CHI.-KENT L. REV. 45, 63-65 (1980). This Comment assumes, arguendo, that the target area test is the approach followed by the Seventh Circuit.

52. See In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 127 n.6 (9th Cir.), cert. denied sub nom. Morgan v. Automobile Mfg. Assoc., 414 U.S. 1045 (1973). Compare Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970) (plaintiff must be within area of the economy affected by the violation), cert. denied, 402 U.S. 923 (1971) with Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971) (plaintiff must be a target, or within the target area, of the alleged conspiracy). Some cases employing the target area test embrace the notion of foreseeability. See Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir. 1964). Yet, other target area decisions reject this notion. See In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 129 (9th Cir.), cert. denied sub nom. Morgan v. Automobile Mfg. Assoc., 414 U.S. 1045 (1973); see also Berger & Bernstein, supra note 45, at 830-32 (target area test described as "riddled with inconsistencies" while "not reduc[ing] the level of contradiction in the law of antitrust").

53. Tyler, supra note 42, at 273.

54. After recognizing that some courts have employed the tort concept of proximate cause in determining whether a plaintiff can bring suit, Professor Tyler sharply criticizes application of this concept to antitrust standing by noting:

Although a doctrine comparable to proximate cause may be necessary in antitrust law, it has no place in the rules for standing. Even in tort law the question of
These apparent contraventions of the clear statutory language of section 4 have not been resolved by the Supreme Court. Recently, however, the Court clarified, to a limited extent, the analysis required under the rubric of antitrust standing. In *Blue Shield v. McCready,* the Court stated that a party seeking to recover under section 4 must satisfy two preliminary requirements. First, the plaintiff must show that a sufficient nexus existed between the alleged violation and the harm it caused. Second, the plaintiff must show that the alleged injury is of the type Congress sought to recompense under the antitrust laws. Applying this bifurcated approach, the *McCready* Court held that an employee who was denied reimbursement for clinical psychological expenses under her employer's medical plan, allegedly because of an illicit conspiracy between the health insurer, Blue Shield, and the Neuropsychiatric Society of Virginia, had standing to bring suit.

2. An Inappropriate Decision

Four days after the *McCready* Court announced its broad interpretation of section 4, the Seventh Circuit issued its opinion in *In re Industrial Gas Antitrust Litigation.* Applying the target area test, the court of appeals held that the plaintiff, a corporate executive who claimed he was dismissed... proximate cause rarely enters into the determination of a plaintiff's standing to bring suit... The additional standing requirements imposed by lower courts are unwarranted judicial accretions to the standing requirements imposed by Congress; they add nothing but uncertainty and inequity to the law.

_id._ at 270-71 (footnotes omitted).

Some courts have begun applying a third test, identified as the "zone of interest" approach. For example, in *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975), the court criticized the direct injury and target area tests as inappropriately requiring a "determination on the merits of a claim under the guise of assessing the standing of the claimant." _Id._ at 1150 (emphasis in original) (footnotes omitted). Rather than placing a demanding burden on the plaintiff during the pleading stage, the *Malamud* court reasoned that justice would be better served if the plaintiff were merely required to show that she suffered an injury as a result of the defendant's alleged illegality. Additionally, the court would determine if "the interest sought to be protected by the complainant is arguably within the zone of interests to be regulated by the statute." _Id._ at 1151 (quoting *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 157 (1970)). For later dictum approving the zone of interest approach, see *California State Council v. Associated Gen. Contractors*, 648 F.2d 527, 537-38 & n.18 (9th Cir. 1980).

55. See, e.g., *Blue Shield v. McCready*, 457 U.S. 465, 467 n.12 (1982) (Court refused to rule on the viability of any of the "possibly conflicting" tests adopted by the circuits).

56. _Id._ at 465.

57. _Id._ at 478.

58. _Id._

59. The *McCready* Court based its liberal grant of standing on a naturally expansive reading of the words which comprise § 4. _Id._ at 472-73. This interpretation was consistent with the Court's prior applications of that section. _Id._ For an appraisal of this rationale, see infra note 85 and accompanying text.

60. 681 F.2d 514 (7th Cir. 1982), cert. denied, 103 S. Ct. 1261 (1983). *McCready* was decided on June 21, 1982. *In re Industrial Gas* was decided on June 25, 1982.

61. See _supra_ note 51.
by his employer for refusing to participate in an alleged industry-wide price-fixing conspiracy, lacked standing to sue under the federal antitrust laws. The Seventh Circuit concluded that the alleged conspiracy was "aimed at restraining competition in the industrial gas market"; it did not seek to limit competition in the labor market for industrial gas executives. Consequently, the court held that Bichan, the plaintiff, was not within the area affected by the alleged antitrust violation, and, thus, he could not have suffered an antitrust injury.

The Seventh Circuit, in *In re Industrial Gas*, construed two Supreme Court decisions as mandating the result that Bichan did not suffer an antitrust injury. First, the court read *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* as holding that private actions were designed solely to protect those injured as consumers or competitors within the area of the economy affected by the alleged antitrust violation. Because Bichan was an ex-employee, he could

62. 681 F.2d at 517.
63. *Id.* In reaching this conclusion, the Seventh Circuit rejected a Ninth Circuit holding that granted standing to a plaintiff who similarly was denied employment opportunities after revealing an antitrust violation. See *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982). In *Ostrofe*, the Ninth Circuit balanced the competing policy interests of private antitrust enforcement. According to the Ninth Circuit, the major reason for granting a plaintiff standing was to effectuate the enforcement purposes of § 4. Weighed against this consideration was the need to avoid "vexatious litigation and excessive liability." *Id.* at 1383. The *Ostrofe* court concluded that the interests of enforcement clearly predominated all other concerns. The court recognized that "[a]ffording discharged employees standing to sue for treble damages contributes to the enforcement of the antitrust laws by enhancing potential liability for a kind of conduct each business conspirator must engage in if it is to perform its role in the conspiracy." *Id.* at 1384. Due to the small number of employees discharged for refusing to participate in an illegal scheme, the concern with vexatious litigation or destructive liability was minimal. *Id.* at 1385.

The Seventh Circuit also distinguished its holding in *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967). *Nichols* involved a suit brought by a sales supervisor of the defendant's encyclopedia and reference book division. The suit alleged that an industry-wide "no switching" agreement, forbidding industry members from hiring a competitor's ex-employee until six months after the employee's discharge, was violative of the antitrust laws. The defendant contended that the plaintiff lacked standing to sue because his failure to find comparable employment was not an injury to his "business or property." Disagreeing, the court stated that one who has been damaged by loss of employment as a result of violation of the antitrust laws is "injured in his business or property" and thus entitled to recovery.

*Id.* at 334.

The *Nichols* court concluded that in order to recover under the antitrust laws, a plaintiff "need not . . . carry on a business in competition with violators of the antitrust laws, and suffer injury in such business as a result. 'Business . . . denotes the employment or occupation in which a person is engaged to produce a living.' " *Id.* at 335 (quoting *Roseland v. Phister Mfg. Co.*, 125 F.2d 417, 419 (7th Cir 1942)). The *In re Industrial Gas* court classified the violation in *Nichols* as "intended to restrict competitive conditions in the labor market." 681 F.2d at 517.

64. 429 U.S. 477 (1977).
65. 681 F.2d at 519. *Brunswick* involved an action brought by competitors of bowling alleys acquired by *Brunswick*, a major bowling equipment manufacturer. These competitors claimed
not be classified as either a consumer or a competitor. Second, the court interpreted Brunswick in conjunction with the Supreme Court decision in Illinois Brick Co. v. Illinois as implying that section 4 applies "only where the injury is directly related to the scheme's anticompetitive effect. . . ." According to the Seventh Circuit, Bichan also failed to meet this criterion since the alleged conspiracy affected only those engaged in the buying and selling of industrial gas; it did not affect corporate presidents of industrial gas producers. These Seventh Circuit constructions of precedent conflict with the Supreme Court ruling in McCready.

Whereas the Seventh Circuit read Brunswick as limiting recovery to damages caused by direct injuries inflicted on consumers and competitors, the McCready Court interpreted Brunswick much less restrictively. In McCready, the Court rejected the claim that only injuries resulting directly from the alleged conspiracy's anticompetitive effect could be redressed under Brunswick. Reasoning that McCready sought to recover damages for injuries inflicted on her as a consequence of the alleged violation, the Court found Brunswick's requirement of an antitrust injury fulfilled because "the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." Under this reasoning, Bichan's injury could be similarly redressed because his dismissal for refusing to participate in the conspiracy was "inextricably in-

---

66. 431 U.S. 720 (1977). In Illinois Brick, the Supreme Court addressed the issue of whether an indirect purchaser, claiming damages as a result of a single overcharge by the antitrust defendant, was injured under § 4 of the Clayton Act as a result of the pass-on charge. Id. at 731-32. The Court was concerned with the impracticalities and judicial burdens of applying a rule that would apportion the impact of an overcharge between direct and indirect purchasers. Id. at 745-47. As a result, the Court concluded that indirect purchasers were not within the class of persons that the § 4 remedy was designed to protect. Id. at 735. Significantly, the Illinois Brick decision failed to articulate any principles to guide courts in making standing determinations. Id. at 735 n.7. Illinois Brick is not without its critics. See, e.g., Berger & Bernstein, supra note 45, at 828-35, 872-78 (suggesting that the rule against indirect purchasers suing under § 4 further establishes arbitrary disparities in antitrust standing).

67. 681 F.2d at 519.

68. 457 U.S. at 483 n.19.
tertwined" with the conspirators' attempts to effectuate their illegal price-fixing scheme. The McCready Court also rejected the claim that section 4 is limited to certain types of plaintiffs by declaring, "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practice by whomever they may be perpetuated." The Seventh Circuit's decision to erect a complete barrier to recovery by any plaintiff who is neither a consumer nor a competitor of the defendant is in contradiction with Supreme Court precedent.

Additionally, the Seventh Circuit seemingly failed to recognize the significant distinctions between the facts presented in In re Industrial Gas and those existing in Brunswick and Illinois Brick. In Brunswick, the plaintiffs' asserted loss resulted from an increase in competition in the market. Yet, increased competition could not be a defense in In re Industrial Gas because Bichan alleged that an industry-wide price-fixing conspiracy existed among producers of industrial gas. If the price-fixing charge were proven, it would be per se illegal; accordingly, it would be presumed that competition was not advanced. Therefore, the alleged antitrust violation in Brunswick was dissimilar to the illegality asserted in In re Industrial Gas. Furthermore, the reliance on Illinois Brick was misplaced because, unlike the plaintiff in that case, Bichan was not suing as an indirect purchaser.

A more sublime reason for finding that Bichan's injury could be redressed under the antitrust laws is that those statutes serve to regulate the conduct of business performance. This purpose is exemplified by the statutorily imposed criminal sanctions against individuals who are responsible for antitrust violations. By providing criminal sanctions as an available penalty

69. Id. at 472 (quoting Mandeville Island Farms, Inc. v American Crystal Sugar Co., 334 U.S. 219, 236 (1948)).
70. See supra note 65 and accompanying text.
71. In re Industrial Gas Antitrust Litig., 681 F.2d 514, 515 (7th Cir. 1982). Bichan further alleged that the conspiracy was aimed at allocating customers among the conspirators. Id. This allegation also constituted a per se illegal claim. See, e.g., Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (division of markets is per se illegal).
72. Price fixing is per se illegal under the Sherman Act. See, e.g., Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951) (maximum price fixing is illegal per se); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (there is no justification for the argument that a fixed price is legal and, therefore, reasonable); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (because price fixing directly restrains competition, it is per se illegal). Consequently, the fact that price fixing promotes competition is no defense.
73. The Supreme Court has consistently held that the decision to apply a per se illegality standard to price-fixing practices conclusively precludes any defense that such practices are beneficial because price fixing is repugnant to the notion of competition. See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977) (per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive).
74. See supra note 66.
75. See, e.g., W. LETWIN, supra note 14 at 3-4 ("[t]he specific effects of the Act are produced in the first place by citizens who trim their behavior so as to conform to its commands").
for antitrust violations, Congress sought to discourage culpable behavior evidenced by an individual's willingness to violate federal statutes.77 Thus, if Bichan had participated in the alleged price-fixing conspiracy, the antitrust laws conceivably could have served as the basis for a criminal prosecution against him.78 Even if Bichan merely carried out the duties of his employment by participating in the conspiracy, he nonetheless could have been criminally liable.79 Therefore, his refusal to participate in the alleged conspiracy constituted legal compliance with the mandates of the antitrust statutes. Because Bichan's honorable conduct resulted in damaging his professional career,80 the injury he suffered should be recognized as falling within the ambit of section 4 of the Clayton Act.

In addition to the In re Industrial Gas court's inappropriate ruling that only consumers or competitors directly injured by the alleged violation can maintain an antitrust cause of action, the Seventh Circuit also held that to bring suit, the plaintiff must be the "most efficient enforcer" of the antitrust laws.81 The Seventh Circuit deemed this requirement essential because of the countervailing policies that support the restriction of private treble damage actions. Although the court recognized that private actions deter antitrust violations,82 it concluded that the potential for excessive damage recoveries justified limiting the right to bring a federal antitrust suit to only those persons who have suffered "immediate injuries with respect to their business or property."83

Restricting the grant of standing to this select class of efficient enforcers

78. In a criminal prosecution for conspiracy to violate the antitrust laws, the defendant's intent to engage in the illegal conspiracy must be proven. See generally United States v. United States Gypsum Co., 438 U.S. 422, 440 (1978) ("the same basic concerns which are manifest in our general requirement of mens rea in criminal statutes . . . are at least equally salient in the antitrust context"). When a per se violation is found, however, no intent is necessary for a criminal conviction. See, e.g., United States v. Foley, 598 F.2d 1323 (4th Cir. 1979) (specific intent need not be shown in criminal prosecutions under antitrust laws when offense is a per se violation); United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979) (per se rules are substantive rules of law which define illegal conduct).
79. As the Supreme Court adamantly stated:
[A] corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—he who authorizes, orders, or helps perpetrate the crime—regardless of whether he is acting in a representative capacity.
80. Bichan was fired as executive president of Chemetron's industrial market division and allegedly blacklisted throughout the industry. Consequently, he was unable to find comparable employment. In re Industrial Gas Antitrust Litig., 581 F.2d 514, 515 (7th Cir. 1982); see also Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1387-88 (9th Cir. 1982) (granting standing to an employee who was dismissed because he refused to comply with an alleged antitrust conspiracy).
81. 681 F.2d at 516, 520.
82. Id. at 520. The court also gave lip service to the compensatory objectives of private antitrust damage awards. Id.
83. Id.
is repugnant to the express congressional intent of section 4: to vest a cause of action in "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." There is no statutory requirement that the plaintiff be an efficient enforcer, as measured by the directness of her injury. Moreover, the Supreme Court has consistently asserted that section 4 of the Clayton Act is to be accorded its broad meaning without resort to artificial limitations that effectively deny standing to deserving plaintiffs. Against this clear judicial mandate for a liberal construction of section 4, the Seventh Circuit's requirement that the plaintiff must prove she is an efficient enforcer of the antitrust laws seems unjustifiably restrictive.

The In re Industrial Gas court's attempt to create a barrier to standing, which can be overcome only by those who are found to be the most efficient enforcers of the antitrust laws, confuses the legal issue of who may sue under section 4 of the Clayton Act with the substantive issue of what constitutes an antitrust violation. The court's manipulation of the standing requirement necessitates factual determinations at a preliminary stage of the litigation before the factual issues have been developed. Requiring the plaintiff to prove the substantive issues of a complex antitrust claim, merely to establish a right to sue, frustrates Congress's intent that anyone injured as

85. See, e.g., Blue Shield v. McCready, 457 U.S. 465 (1982) ("[c]onsistent with the congressional purpose, we have refused to engrat artificial limitations on the § 4 remedy"); Reiter v. Sonotone Corp., 442 U.S. 330, 338 (1979) (Court gave the term business or property of § 4 its "nationally broad and inclusive meaning," which enabled a consumer to bring suit claiming that she had to pay a higher price for a hearing aid as a result of an illegal conspiracy; it then reversed the Fifth Circuit's holding that only injuries sustained in a commercial context can be recovered); Pfizer, Inc. v. India, 434 U.S. 308, 312 (1978) (Court interpreted the words any person of § 4 to be inclusive and allowed a foreign government to bring an antitrust suit); Illinois Brick Co. v. Illinois, 431 U.S. 720, 748 (1977) (treble damage action is provided to deter violations of antitrust statutes); Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) ("Congress chose to permit all persons to sue" under § 4); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138-39 (1968) (Congress did not want to make the doctrine of in pari delicto a defense to § 4 actions); Radovich v. National Football League, 352 U.S. 445, 454 (1957) (because Congress viewed private enforcement most favorably, "this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws").
86. The suggestion that a plaintiff is the proper party to sue because his injury flowed directly from an antitrust violation implies that the trial court must determine whether the party is protected by the antitrust statutes. Essentially, without the benefit of a factual record the trial court must make an inquiry, either objectively or subjectively, into how the substantive laws of antitrust protect the plaintiff. After this is accomplished, the court must then proceed to analyze the plaintiff's efficiency in presenting those claims, possibly by comparing the plaintiff with hypothetical plaintiffs not before the court. For a severe criticism of the confusion raised by the courts' treatment of standing and the scope of the substantive law, see Berger & Bernstein, supra note 45, at 835-40 (arguing that such confusion may lead to improper distortions of the substantive law).
87. See Flynn, Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos, 49 ANTITRUST L.J. 1593, 1603, 1608 (1980).
a result of an antitrust violation should have a federal cause of action.84

Even assuming that efficiency in enforcement is a requirement of standing, Bichan arguably served this function by uncovering the illegality before the social costs inflicted by the price-fixing conspiracy materialized. The price-fixing conspiracy that Bichan sought to detect was necessarily covert.89 Encouraging unwilling participants to the scheme, who are privy to the nature and extent of a conspiracy, to come forward and expose the illegal activity would further the objective of uncovering anticompetitive practices. Unfortunately, by refusing to grant standing to an employee who was discharged by his employer for refusing to engage in illegality, the Seventh Circuit effectively discourages the detection of antitrust conspiracies.90 Competitors cannot be relied upon for deterrence when the conspiracy is industry wide, as it was in In re Industrial Gas.91 Moreover, allowing a plaintiff in Bichan's position to bring suit and expose the price-fixing scheme at its inception could prevent injury to consumers who would be the ultimate victims of the illegality. Viewed in this light, consumer actions are inefficient because a conspiracy would be fully developed by the time a consumer could detect the antitrust violation. Consequently, the court improvidently failed to accord proper weight to the deterrence function of section 4, which has been recognized as an overriding objective of private enforcement.92

88. Although it is not meritless, the Seventh Circuit's concern with excessive treble damage suits is nonetheless exaggerated. See In re Industrial Gas Antitrust Litig., 681 F.2d 514, 520 (7th Cir. 1982), cert. denied, 103 S. Ct. 1261 (1983). The large litigation costs incurred by a plaintiff necessarily restrict the number of claims filed and pursued. See Wheeler, Antitrust Treble Damage Actions: Do They Work?, 61 CALIF. L. REV. 1319, 1329-34 (1973). Furthermore, the time commitment involved is considerable. Professor Posner wrote that the average length of an antitrust proceeding is 44 months. Posner, A Statistical Study of Antitrust Enforcement, 13 J.L. & ECON. 365, 381 (1970). Additionally, procedural devices, such as motions for directed verdict, enable the court to dismiss summarily those claims that are shown to be meritless. Finally, the overwhelming majority of plaintiffs in antitrust actions lose. One commentator has noted that only 20% of such plaintiffs receive a favorable judgment. Wheeler, supra, at 1323-24 n.22.

89. See Berger & Bernstein, supra note 45, at 847 n.12 (conspiracies in restraint of trade are inherently covert).

90. The Ninth Circuit succinctly summed up the importance of providing wrongfully discharged employees a federal forum when it stated, "Affording discharged employees standing to sue for treble damages contributes to the enforcement of the antitrust laws by enhancing potential liability for a kind of conduct each business conspirator must engage in if it's to perform its role in the conspiracy." Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1384 (9th Cir. 1982).

91. Bichan alleged that the price-fixing and customer allocation scheme was industry wide. 681 F.2d at 515.

92. For Supreme Court recognition that private antitrust actions serve as a major deterrent to antitrust violations, see Illinois Brick Co. v. Illinois, 431 U.S. 720, 748 (1977); Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946). Professor Tyler has argued vehemently against subordinating the deterrence function through application of restrictive standing tests. Tyler, supra note 42, at 277-85. The deterrence function is paramount because public enforcement agencies lack the resources and incentives necessary...
The *In re Industrial Gas* decision presents a curious approach to antitrust standing. The broad wording of section 4 of the Clayton Act,93 numerous Supreme Court decisions mandating a liberal construction of that section,94 and the strong deterrent objectives of private actions,95 inescapably lead to the conclusion that *In re Industrial Gas* was decided incorrectly.96 Its under-

- to assure social deterrence of antitrust violations. *Id.* at 277-80. Although the compensatory role of treble damages may be important in providing a plaintiff with financial incentives to pursue costly and uncertain litigation, this compensatory role may be overstated. *Id.* at 277; see also supra note 46.

During its debate on the Antitrust Improvements Act of 1976, Congress reiterated the compensatory and deterrent policies underlying § 4 by declaring, "The antitrust laws clearly reflect the national policy of encouraging private parties to help enforce the antitrust laws in order to protect competition through compensation of antitrust victims, through punishment of antitrust violators, and through deterrence of antitrust violations." S. REP. No. 803, 94th Cong., 2d Sess. 2, 38, 165 (1976); H.R. REP. No. 499, 94th Cong., 1st Sess. 19 (1976).

93. See supra notes 43, 85 and accompanying text.  
94. See supra note 85.  
95. See supra notes 46, 63, 92 and accompanying text.  
96. Apparently, however, the Seventh Circuit will continue to follow its decision in *In re Industrial Gas*. In *Grip-Pak*, Inc. v. Illinois Tool Works, 694 F.2d 466 (7th Cir. 1982), the court cited *In re Industrial Gas* for the proposition that not everyone who is injured by anticompetitive conduct has standing to sue. *Id.* at 473. The issue in *Grip-Pak* was whether the plaintiff, who had not yet begun business operations, could recover under § 4 for potential lost profits and costs incurred while defending prior litigation which was instigated to deter competition. Judge Posner, writing for the majority, found that the plaintiff had sufficiently alleged antitrust injuries. *Id.* Interestingly, Judge Posner did not cite *McCready*, in which the Supreme Court most recently construed § 4 of the Clayton Act. Rather, Posner relied on several tort cases that held that the remoteness of a plaintiff's injury is established if it is not foreseeable. This approach conflicts with the *McCready* standard for analyzing antitrust injuries. See supra text accompanying notes 56-58. Foreseeability may be an appropriate means to restrict tort claims based on negligence. Antitrust violations and their resultant injuries, however, are imposed intentionally, rather than negligently. Berger & Bernstein, supra note 45, at 835. Furthermore, notions of foreseeability are susceptible to inconsistent application leading to contradictory judicial results. See Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 28-31 (1971). If Judge Posner continues to rely on tort principles to determine the existence of an antitrust injury, he should at least employ the broader scope of liability recognized for intentional torts rather than the negligence concept of foreseeability. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 3, 8 (4th ed. 1971).

Another disturbing feature of Judge Posner's analysis is his application of a socioeconomic benefits standard to an antitrust provision designed to compensate the individual. He states that if the losses caused to one party are offset by gains made elsewhere in the economic system, then the party who suffered the loss cannot recover. *Grip-Pak*, 647 F.2d at 474. This interpretation of § 4 contravenes its deterrent purpose by precluding private persons from collecting treble damages for antitrust violations. By focusing on the net economic effect of the harm, Judge Posner belittles the personal harm that initially triggered an individual or small firm to bring an expensive antitrust action. By determining the existence of an injury through an evaluation of the adverse effects upon society, the purpose of private antitrust litigation is usurped; under such an evaluation, all antitrust actions become public in their nature. The probable justification for such a procedure is to protect defendants from ruinous duplicative treble damage awards. These policy concerns, however, are adequately protected by the *McCready* test of probable cause. See supra notes 56-58 and accompanying text. For a discussion of techni-
lying proposition, that allowing private treble damage actions might be counterproductive because of the potentially excessive number of suits, should not decide the legal issue of who can maintain a federal antitrust cause of action. By granting standing only to competitors or consumers who, because of the directness of their injury, are deemed the most efficient enforcers, the Seventh Circuit has restricted the scope of section 4. This construction of the statute serves to reject, at the courthouse door, persons bringing antitrust actions who fail to meet this difficult test. The Seventh Circuit's interpretation of section 4 standing requirements highlights the court's urge to restrict private antitrust suits. Although the framework for analyzing standing in *In re Industrial Gas* is consistent with the Chicago school theorists' position that private treble damage actions should be restricted,97 this standard impermissibly contravenes well-established Supreme Court precedent. The temporal proximity of *McCready* and *In re Industrial Gas*, and their disparate approaches to antitrust standing analysis, dramatize the irresponsible effort of the Seventh Circuit to restrict private enforcement of the antitrust laws.

B. Reversal of Criminal Contempt Order for Failure to Comply with Discovery Request—Burdening the Plaintiff

In *Marrese v. American Academy of Orthopaedic Surgeons,*99 the Seventh Circuit reviewed the validity of a criminal contempt citation issued against the defendant after it refused to comply with a protective discovery order.99

---


98. 692 F.2d 1083 (7th Cir. 1982).

99. Id. at 1087. After the Academy, defendant, refused on the grounds of confidentiality to comply with the plaintiffs' discovery request, the district court issued a protective order limiting access to the documents to the plaintiffs and their counsel. Id. The discovery order was issued pursuant to Federal Rule of Civil Procedure 26(c), which empowers the court "to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Fed. R. Civ. P. 26(c). Yet, the
That order required the Academy to furnish the plaintiff-surgeons with documents relating both to the denial of their application for membership and to the denial of all other applicants between 1970 and 1980. This information allegedly was essential to the plaintiffs' claim that their denial of membership was the result of a group boycott prohibited under section 1 of the Sherman Act.

The Marrese court ruled that the contempt citation was improper. Writing for the majority, Judge Posner stated that in considering the interests of both parties, the court must find the least burdensome method of discovery. Judge Posner reasoned that the underlying merits of the plaintiffs' antitrust claims should be evaluated to determine the requested information's "value" to the party seeking discovery. Determining that the substantive antitrust claims were probably groundless, Judge Posner ruled that the district court should have postponed discovery of the documents until after discovery was

Academy refused to comply with the protective order. Consequently, pursuant to Rule 37(b)(2)(d), which provides for sanctions against parties who refuse to comply with discovery requests, the court fined the Academy $10,000 for its contempt. Fed. R. Civ. P. 37(b)(2)(d). For an example of the use of criminal contempt to compel discovery, see Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968).

100. 692 F.2d at 1087. Although they satisfied the membership requirements, the plaintiffs were denied membership without a hearing and without cause. Id. at 1086. The plaintiffs claimed direct damage to their professional status as surgeons due to the Academy's alleged illegal boycott under § 1 of the Sherman Act. The Academy was characterized as "a monopoly in its field, possessed of substantial power to control the market for orthopaedic services, especially by denying access to any of the various subspecialty organizations of the practice." Plaintiffs' Complaint at App. A, Marrese v. Academy of Orthopaedic Surgeons, 496 F. Supp. 236, 242 (N.D. Ill. 1980).

101. See infra note 109-10.

102. Judge Posner, substituting for the late Judge Sprecher, and Judge Pell were in the majority. Judge Posner wrote the majority opinion, from which retired Supreme Court Justice Stewart forcefully dissented.

103. Judge Posner cites the Academy's interest in preserving the confidentiality of its application process. Although not of constitutional magnitude, this interest nonetheless implicates some first amendment concerns. 692 F.2d at 1088. Judge Posner does not explicitly state any interest on the part of the plaintiffs in the information, although it can be gleaned from the nature of the case that such information was necessary to establish their cause of action. See infra notes 109-10.

104. 692 F.2d at 1089. It appears that Judge Posner obliquely determined that the cost to the Academy of complying with the disputed discovery request was not justifiable, and that the solicitation of such discovery was largely a predatory tactic by the plaintiffs' attorneys. In 1973, Judge Posner theorized that litigants can inflict severe financial damage upon the opposing party by demanding the production of costly information. He explained:

Pretrial discovery provides a somewhat different example of the possibility of predatory conduct in litigation. In principle, a litigant could impose heavy costs on an opponent, at little cost to himself, by demanding information in an amount and form very costly for the other party to supply.

Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399, 433 (1973). In that article, however, Judge Posner concluded that such predatory pretrial conduct was "rare." Id.
concluded on the issue of probable anticompetitive effect. According to Judge Posner, by utilizing this procedure the district court might have been able to dispose of the entire case, thereby rendering the requested discovery unnecessary.

The Seventh Circuit's application of this rationale to justify its review of the merits of the underlying antitrust claims constitutes an objectionable departure from the proper standard of appellate review of contempt rulings issued to compel discovery. It is within the broad discretion of the district court to impose sanctions for failure to comply with a discovery order. Furthermore, appellate court reversal of an order requiring a party to comply with a discovery request is appropriate only if there is a clear showing of abuse of discretion by the district court. In *Marrese*, district court Judge

105. 692 F.2d at 1095. Judge Posner ruled that under Rule 26(d), the district court should have allowed discovery on the issue of anticompetitive effect before discovery occurred on the Academy's denial of membership. This ruling can be criticized for circumventing the intent of Rule 26(d). See *infra* notes 114-18 and accompanying text.

106. 692 F.2d at 1095. The Seventh Circuit stated, "It should have been apparent to the district court, as it is to us, that the present case is likely to wash out over the issue of effect on competition." *Id.* Judge Posner's opinion asserted that to recover on their antitrust claim, the plaintiffs must prove that an anticompetitive market effect resulted from their exclusion from the Academy. *Id.* at 1094. According to Judge Posner, anticompetitive effect could not have resulted from the plaintiffs' exclusion from the Academy because competition "is designed for the ultimate benefit of consumers rather than individual competitors." *Id.* at 1095. Due to the large number of orthopaedic surgeons available to the consuming public, the harm inflicted on the plaintiffs could have no appreciable effect on competitive conditions. This analysis of competition, which is reflected in several of Judge Posner's opinions, is critiqued *infra* notes 212-43 and accompanying text.

107. See, e.g., Pabst Brewing Co. v. Brewery Workers Local Union No. 27, 555 F.2d 146, 150 (7th Cir. 1977) ("[t]he merits of the underlying [concept order] . . . cannot be challenged in the appeal from the contempt sentence for violations of that order") (citing Howat v. Kansas, 258 U.S. 181, 189 (1922)).

108. See, e.g., Insurance Corp. of Ir. v. Compagnie Des Bauxitis, 456 U.S. 694, 707 (1982) ("[t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have [applied the sanction]; it is whether the District Court abused its discretion in so doing") (quoting National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642 (1976)); Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964) (deposition discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants); Hintman v. National-Ben Franklin Life Ins. Corp., 677 F.2d 617, 620 (7th Cir. 1982) (imposing discovery sanction is within the responsibility of the district court and will not be reversed absent abuse of discretion); Belcher v. Bassett Furniture, Inc., 588 F.2d 904, 907 (4th Cir. 1978) (district court's motion for discovery reversed only if the action was "improper and affected substantial rights") (quoting Tiedman v. American Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958)); Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir. 1977) (district court's order under Rule 26(c) is reversible only upon showing of abuse of discretion); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1211 (8th Cir. 1972) (sanctions under Rule 37 are available to district court at its discretion and will be reversed on a showing of abuse of that discretionary power); Montecatini Edison S.P.A. v. E.I. du Pont de Nemours & Co., 43 F.2d 70, 72 (3d Cir. 1970) (review of discovery matters is confined to determining whether district court abused its discretion); see also Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 991 (1961) (nearly all discovery sanction cases allude to the discretionary power of the district court).
Shadur carefully assessed the needs and interests of both parties before issuing his restricted protective discovery order. That order was designed both to protect the confidentiality of the Academy's admissions procedures and to provide the plaintiffs with information necessary to pursue their action. Consequently, by ensuring that all evidence relevant to the alleged antitrust violation would be uncovered, the order assured the just adjudication of the controversy.

The Marrese court did not hold that the district court abused its discretionary powers in assessing the parties' interests in the discovery request. Instead, the Seventh Circuit ruled that discovery on the issue of anticompetitive effect should have been conducted prior to discovery of the Academy's denials of membership application. This ruling was improper for two reasons. First, it was based on a misconception of Federal Rule of Civil Procedure 26(d). Judge Posner determined that Rule 26(d) vested the district


[w]ithout access to the documents Drs. Marrese and Treister are effectively prevented from continuing this litigation. . . . Just disposition of plaintiffs' claims . . . would be rendered impossible should they be denied access to the requested information. Proof of the claimed group boycott would require demonstration of the real reasons for Academy's denial of admission to candidates, information obtainable solely through the materials Academy seeks to protect. Id. at 6 (quoted in Marrese, 692 F.2d at 1097 (Stewart, J., dissenting)). The restrictions on access imposed by the protective order insured that "the confidentiality of the Academy's admission process was largely preserved." Id. at 5.

110. As Justice Stewart's opinion noted, the district court's discovery order was consistent with the Seventh Circuit's reasoning in Memorial Hosp. v. Shadur, 644 F.2d 1058 (7th Cir. 1981) (per curiam). Marrese, 692 F.2d 1083 at 1097-98 (Stewart, J., dissenting). In Memorial Hospital, Judge Shadur ordered the defendant hospital in an antitrust action to disclose its documents pertaining to all proceedings involving applications for admittance on the hospital staff. 644 F.2d at 1060. After Judge Shadur issued a protective order compelling disclosure, the hospital sought a writ of mandamus or, in the alternative, an order vacating the district court's order. The hospital asserted that such information was privileged and confidential. Id. at 1060-61. The court denied the petition for mandamus, stating that the plaintiff's need for the information to substantiate his antitrust allegation overrode any claim of privilege by the hospital. "The public interest in private enforcement of federal antitrust law in this context is simply too strong to permit the exclusion of relevant and possibly crucial evidence by application of the Hospital's privilege." Id. at 1063.

111. See supra note 109.

112. The Supreme Court has recognized that a major purpose of discovery is to equalize the parties' knowledge of the facts underlying the controversy. See Hickman v. Taylor, 329 U.S. 495, 507 (1947).

113. See generally Koster v. Chase Manhattan Bank, 93 F.R.D. 471 (S.D.N.Y. 1982) (purposes of discovery are to narrow the issues for trial, to obtain evidence for use at trial, and to obtain information that will lead to relevant evidence).

114. Rule 26(d) provides:

Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

FED. R. CIV. P. 26(d).
court with the authority to establish the sequence in which issues will be investigated during discovery. Yet, Rule 26(d) was designed only to eliminate the priority rule which allowed the party who first served notice of discovery requests to complete discovery pursuant to those requests before her opponent could obtain discovery. Thus, Rule 26(d) rests on the principle that "one party's initiation of discovery should not await upon the other's completion." Second, by reviewing the merits of the antitrust claim, the Seventh Circuit disregarded the district court's denial of the Academy's motion to dismiss for failure to state a claim under the Sherman Act. In that denial, the district court explicitly found that an anticompetitive effect was sufficiently alleged in the complaint. Because the district court did not certify this holding, the appellate court lacked the authority to review the underlying merits of the plaintiffs' claim.

The Seventh Circuit's decision to overturn the contempt citation was premised on the notion that no anticompetitive effect could be shown. This reasoning was based solely on inferences drawn from the complaint.

115. 692 F.2d at 1095.
118. Fed. R. Civ. P. 26(d) advisory committee note. The use of the word sequence in Rule 26(d) was "intended only to make it clear that defendant is not to be given any inherent preference. . . ." Id. Prior to 1970, the year Rule 26(d) was enacted, a plaintiff was required to wait 20 days after filing his complaint before serving notice of discovery requests. See Fed. R. Civ. P. 26(a) (1969). As a result, applying the priority rule ensured that the defendant would be given an advantage during the discovery stage. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2045, at 313-14 (1970).
120. Id. at 240-41.
121. Certification allows a party to appeal from a district court's order when the order "involves a controlling question of law to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (1970). See generally Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351, 379 (1969) (reviewing the purpose of interlocutory relief).
122. Marrese, 692 F.2d at 1099 (Stewart, J., dissenting). Justice Stewart described the decision to review the merits of the antitrust claim as a "novel analysis of the validity of the contempt citation," which "disregards long-settled principles of civil procedure [by allowing the Academy] to secure immediate, appellate review of the merits of a lawsuit, prior to any discovery, trial, or judgment, simply by disobeying a discovery order and subjecting [itself] to the fine imposed for violating the order." Id. at 1098 (Stewart, J., dissenting).
123. See supra note 106 and accompanying text.
124. 692 F.2d at 1100 (Stewart, J., dissenting).
it lacked any factual support because it was deduced in the complete absence of any lower court record.\textsuperscript{125} Speculation of this kind should not be employed to reverse a district court's sensitive application of its discretionary powers in ordering discovery.

\textbf{C. Improper Application of Appellate Review Standards—Preliminary Injunctions}

Section 16 of the Clayton Act allows a plaintiff in an antitrust action to request preliminary injunctive relief.\textsuperscript{126} Although the standard for reviewing the disposition of a preliminary injunction motion varies among the circuits,\textsuperscript{127} the Seventh Circuit has established a standard that identifies the following four factors that must be balanced equally in order to determine the propriety of preliminary relief: (1) the plaintiff's likelihood of success on the merits; (2) the threat of irreparable harm to the plaintiff if preliminary relief is denied; (3) the potential harm to the defendant if preliminary relief is granted; and (4) the public interest implicated by the decision.\textsuperscript{128} When the disposition of a motion for a preliminary injunction is appealed, the

\textsuperscript{125} Id. (Stewart, J., dissenting).

\textsuperscript{126} This section provides for preliminary injunctive relief "against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by the courts of equity." 15 U.S.C. § 26 (1976). The Supreme Court has stated that the purpose of preliminary injunctive relief is to preserve the relative positions of the parties until a trial on the merits can be held. University of Tex. v. Camenisch, 451 U.S. 390, 395 (1980). For a list of cases that support the proposition that preliminary injunctions are issued solely to preserve the status quo of the parties, see cases cited in 2 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948, at 463 n.81 (1973). One commentator has criticized the emphasis placed on maintaining the status quo as "a habit without a reason." Leubsdorf, The Standard for Preliminary Injunctions, 91 HARV. L. REV. 525, 546 (1978).

\textsuperscript{127} See Note, Granting Preliminary Injunctions Against Dealership Terminations in Antitrust Actions, 67 VA. L. REV. 1395, 1395-98 (1981) (arguing that a definitive standard is necessary in order to preserve the rights of antitrust defendants).

\textsuperscript{128} For examples of cases applying the quadrifid test, see Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1349 (7th Cir. 1982) (district court's grant of a preliminary injunction in an antitrust action overturned); Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 614 (7th Cir. 1982) (district court's denial of preliminary injunction reversed because district judge only considered one factor—the likelihood of success on the merits); Machlett Laboratories v. Techny Indus., Inc., 665 F.2d 795, 796-97 (7th Cir. 1981) (district court's grant of preliminary injunction in an allegedly unlawful contract dispute was reversed because the plaintiff failed to prove three of the four factors); Menominee Rubber Co. v. Gould, Inc., 657 F.2d 164, 166 (7th Cir. 1981) (affirming district court's grant of a preliminary injunction that prohibited defendant from terminating plaintiff as its distributor notwithstanding the fact that the defendant might ultimately have prevailed on the merits); Reinders Bros., Inc. v. Rain Bird E. Sales Corp., 627 F.2d 44, 48-49 (7th Cir. 1980) (affirming district court's grant of preliminary injunction that enjoined defendant from discontinuing plaintiff as a dealer under the Wisconsin Fair Dealership Law); Fox Valley Harvestore v. A.O. Smith Harvestore Prod., Inc., 545 F.2d 1096, 1097 (7th Cir. 1976) (affirming denial of preliminary injunction in dealer termination case); Burns v. Paddock, 503 F.2d 18, 28 (7th Cir. 1974) (buyers of minority interest in close corporation properly denied preliminary injunctive relief in their claim
appellate court’s inquiry is limited to whether the district court abused its discretion in applying this quadrifid standard.129

In *Valley Liquors, Inc. v. Renfield Importers, Ltd.*,130 the plaintiff in an antitrust suit requested preliminary injunctive relief. For over thirty-five years, the plaintiff, Valley, had served as a wholesale distributor of alcoholic beverages supplied by the defendant, Renfield.131 This harmonious relationship ended when Renfield abruptly notified Valley that it was discontinuing Valley’s distributorship in the northern counties of Illinois.132 After being notified of the termination, Valley filed a complaint in federal district court alleging that the termination was a violation of section 1 of the Sherman Act.133 Valley sought to temporarily enjoin Renfield from cancelling the distributorship.134 Stating that Valley had insufficiently demonstrated a likelihood of prevailing on the merits of its antitrust claim, the district court denied the preliminary injunction.135 The Seventh Circuit affirmed this denial after considering only one of the four factors necessary to the quadrifid...
test. Writing for the court, Judge Posner declared that if the district court correctly assumed that Valley would not prevail on the merits at trial, then the denial was proper "regardless of other considerations." Judge Posner then engaged in a lengthy discussion of the merits of Valley's antitrust claims and concluded that Valley had failed to substantiate them.

The Seventh Circuit's reliance solely upon the likelihood of success on the merits in *Valley Liquors* is oppugnant to the court's holding in *Atari, Inc. v. North American Philips Consumer Electronics Corp.* In *Atari*, the appellate court reversed the denial of a preliminary injunction in a copyright infringement suit and reprimanded the lower court for considering only one of the four factors of the established standard: the threshold requirement of likelihood of success on the merits. Like the district court in *Atari*, the Seventh Circuit in *Valley Liquors* failed to consider the remaining factors when it affirmed the denial of the preliminary injunction. Furthermore, the court of appeals did not acknowledge its previous decision in *Atari*; nor did it indicate whether it was abandoning its traditional four-factor analysis.

If *Valley Liquors* stands for the proposition that the likelihood of success on the merits of substantive antitrust claims determines whether a preliminary injunction will be granted, then it presents the plaintiff and the court with a nearly insurmountable task. Because preliminary injunction motions arise before the parties have commenced extensive discovery, the evidence

---

136. 678 F.2d at 743. The opinion does not expressly state the other considerations; presumably, the three other factors of the quadrifid test are the "other considerations."

137. Id. at 743-45. For an analysis of Judge Posner's review of the antitrust claims presented in *Valley Liquors*, see infra notes 172-84 and accompanying text.

138. 672 F.2d 607 (7th Cir. 1982).

139. Id. at 613-14.

140. Id. at 614. After reversing the district court's denial of the preliminary injunction, the Seventh Circuit concluded that it could grant preliminary injunctive relief if it found "from the record that plaintiffs as a matter of law made the requisite showing as to the remaining elements" in the standard. Id. The court of appeals held that the plaintiff had made the requisite showing as to the remaining factors. Id. at 614-20. The Seventh Circuit then proceeded to analyze the merits of the copyright infringement claim after noting that "the determination . . . is predicated upon an ocular comparison of the works themselves and does not involve any material credibility issues." Id. at 614. Thus, the court of appeals was in as good a position as the district judge to review the merits of the substantive claim. Holding that the "plaintiffs clearly showed likelihood of success," id. at 619, the *Valley Liquors* court found the district judge's estimation of the merits to be erroneous. Id. at 620.

In *Valley Liquors*, Judge Posner evaluated the merits of the plaintiff's claim without making the determination of whether the court was in the proper position to do so. In fact, he should never have made this determination because antitrust claims involve definite questions of "material credibility" which cannot be evaluated by mere "ocular comparisons."

141. For cases applying the four-factor test, see supra note 128.

142. See University of Tex. v. Camenisch, 451 U.S. 390, 394-95 (1981). "[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." Id. at 395. In *Camenisch*, a unanimous Court held that when the injunctive aspects of a case become moot on appeal from a preliminary injunction, any issue generally preserved by an injunction bond cannot be resolved on appeal,
necessary to establish the legal issues is inadequate; in complex antitrust proceedings, only limited information is available at this point in the litigation. Consequently, Valley Liquors requires the trial court to determine the merits of antitrust claims on the basis of a rudimentary hearing in which "the facts are not clear enough to crystallize [the] question of law." Recognizing the impropriety of this result, appellate courts, including the Seventh Circuit, often have eased the preliminary injunction requirement of showing a likelihood of success on the merits in antitrust actions. Moreover, the balancing approach reduces the necessity of fulfilling this requirement, because it directs the court not to accord any single factor dispositive weight. By considering only Valley's chance of prevailing on the merits at full trial, however, Judge Posner's opinion undermines the purpose of the balancing approach.

Although it is unclear, it does not appear that the Valley Liquors court intended to abandon the four-factor standard completely because the court neither distinguished precedent embracing the balancing approach, nor articulated an alternative standard for measuring the propriety of preliminary injunctive relief. Furthermore, the Seventh Circuit has reiterated its commitment to the quadrifid test in a decision rendered subsequent to Valley Liquors. Thus, the conclusion gleaned from the Valley Liquors treatment...
of preliminary injunctive relief is that under the influence of Judge Posner, the court determined that Valley's antitrust claims were without legal significance. This conclusion is based on the appellate court's extensive analysis and refutation of the plaintiff's theories supporting its antitrust claims.\textsuperscript{148} Although the discussion of these antitrust theories is purely advisory,\textsuperscript{149} the implications generated from the court's critique will have significant repercussions for plaintiffs who bring actions alleging that their suppliers violated section 1 of the Sherman Act.

\section*{D. Nonprice Vertical Market Restraints}

\subsection*{1. Background}

Valley's termination as a Renfield distributor exemplifies a nonprice vertical restraint because it restricted the manner in which Valley could resell plaintiff's services. The district court enjoined enforcement of the contract, ordered the hospital to "abolish and dismantle all vestiges" of the exclusive contract, and demanded each member of the department of anesthesiology to compete for service positions. \textit{Id.} at 1348. After reviewing each of the four factors, the Seventh Circuit concluded that the preliminary order was far too broad and constituted an abuse of the district court's discretionary powers. \textit{Id.} at 1351.\textsuperscript{150}

\textit{But cf.} Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982).\textit{Omega} involved an appeal from a denial of preliminary relief in an antitrust action. The plaintiff sought to temporarily enjoin the City of Indianapolis from enforcing an ordinance that prescribed grants of cable television franchises. \textit{Id.} at 120-21. The plaintiff claimed that the ordinance was being used by the city to exclude competition in the cable television market in violation of §§ 1 and 2 of the Sherman Act. \textit{Id.}

Judge Posner, again writing for the majority, affirmed the district court's ruling. He declared that in ruling on a preliminary injunction request, a court must compare the probabilities and consequences of two potential errors: the error in "granting an injunction to an undeserving plaintiff," and the error in "denying an injunction to a deserving plaintiff." \textit{Id.} at 123. Judge Posner distinguished between the two plaintiffs by defining a deserving plaintiff as one who will ultimately prevail at trial. \textit{Id.}

Once again, Judge Posner completely ignored prior Seventh Circuit decisions that applied the quadrifid standard. Also, he never alluded to his opinion in \textit{Valley Liquors}. While in \textit{Valley Liquors} he found the factor of likelihood of success on the merits to be dispositive, in \textit{Omega} the lack of injury to the plaintiff was determined to be conclusive. \textit{Id.} at 124-25. Although Judge Posner attempted to formulate a standard for preliminary injunctions in \textit{Omega}, the inconsistencies between his decisions in that case and \textit{Valley Liquors} make it extremely difficult to identify what standard, if any, is being applied.

148. See infra notes 166-68 and accompanying text.

149. See, \textit{e.g.}, University of Tex. v. Camenisch, 451 U.S. 390, 395 (1982) (when injunctive aspects of a case become moot on appeal of preliminary relief, remaining issues must be resolved by the trial court); Brown v. Chote, 411 U.S. 451 (1973) (Court refused to review constitutionality of statutory filing fee for candidates in congressional elections because the ultimate merits of appellee's claim were not an issue before a court considering the validity of a preliminary injunction); Machlett Laboratories v. Techny Indus., 665 F.2d 795, 797 (7th Cir. 1981) (preliminary injunction determinations do not bind the trial court on the merits); Menominee Rubber Co. v. Gould, Inc., 657 F.2d 164, 167 (7th Cir. 1981) (same); Reinders Bros., Inc. v. Rain Bird E. Sales Corp., 627 F.2d 44 (7th Cir. 1980) (preliminary injunction does not involve a final determination of the merits of plaintiff's claim); Industrial Bank v. Tobriner, 405 F.2d 1321, 1324 (D.C. Cir. 1968) (same); Hunter v. Atchison, Topeka & Santa Fe Ry., 188 F.2d 294, 298-99 (7th Cir. 1951) (same).
Renfield's products. Nonprice vertical market restraints are conditions imposed by a manufacturer or supplier on its distributors; these conditions limit the distributors' freedom to redistribute goods.\(^{150}\) Such restraints are motivated by a manufacturer's desire to gain control over the distribution of its products without having to generate its own distribution system—which integration requires.\(^{151}\) By imposing these nonprice restraints, a manufacturer-supplier is provided with an effective method of establishing and maintaining a secure system of distribution.\(^{152}\) Yet, the benefits derived by the manufacturer necessarily entail limiting the restrained firm's freedom

---

150. Generally, there are three categories of nonprice vertical market restraints. Territorial restraints identify the geographic regions in which goods may be resold. Customer restraints limit those customers, or classes of customers, to whom the goods may be sold. Location clauses prohibit dealers from opening other outlets without the prior approval of the manufacturer. For an analysis of these three types of restraints, see Strasser, \emph{Vertical Territorial Restraints After Sylvania: A Policy Analysis and Proposed New Rule}, 1977 Duke L.J. 775, 785-94; Note, \emph{Restricted Channels of Distribution Under the Sherman Act}, 75 Harv. L. Rev. 795, 796 (1962) [hereinafter cited as Note, \emph{Restricted Channels of Distribution}]. There are a host of other ways a manufacturer-supplier can influence competitive conditions through vertical restraints. For example, the manufacturer-supplier may employ primary responsibility clauses which require dealers to concentrate sales efforts in a particular locality. See Note, \emph{Area of Primary Responsibility Clauses and the Antitrust Laws}, 35 U. Pitt. L. Rev. 671 (1974). The manufacturer-supplier also may utilize profit pass-over clauses which require dealers to reimburse each other for sales made in another's particular territory. See Note, \emph{Restricted Channels of Distribution, supra}, at 814. Finally, the manufacturer-supplier may rely on exclusive dealership arrangements which "denote a promise by the seller of goods to the buyer not to sell to other outlets within the buyer's 'exclusive territory' and not to sell directly to consumers within that area." \emph{Id.}; see also Louis, \emph{Vertical Distribution Restraints Under Schwinn and Sylvania: An Argument for the Continuing Use of a Partial Per Se Approach}, 75 Mich. L. Rev. 275, 277-79 (1976); Pitofsky, \emph{The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions}, 78 Colum. L. Rev. 1, 4 (1978).

Since 1911, vertical price fixing has been held to be per se illegal. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 406-07 (1911). This type of price fixing has consistently been held to violate § 1; moreover, the scope of vertical price fixing has been expanded to include maximum resale price maintenance agreements. Albrecht v. Herald Co., 390 U.S. 145, 153-54 (1968).

151. Integration is the process whereby a firm involved in one level of business subsumes another level's functions. For example, forward integration occurs when a firm at the manufacturing level assumes the distribution process of its product. For a succinct definition of integration, see Adelman, \emph{Integration and Antitrust Policy}, 63 Harv. L. Rev. 27, 27 (1949). The determination of whether to integrate entails consideration of the acquisition and operating costs involved, the benefits perceived, and whether the firm has, or can acquire, the expertise necessary to operate effectively at the integrated level. For a discussion of the implications of integration, see Coase, \emph{The Nature of the Firm}, in \emph{4 Economica} 386 (1937); Williamson, \emph{The Vertical Integration of Production: Market Failure Considerations}, 61 Am. Econ. Rev. 112 (1971). For a discussion of the benefits and drawbacks of substituting vertical restraints for integration, see Kellman, \emph{Vertical Territorial Restrictions and the Limits of Planning}, 46 Antitrust L.J. 1107 (1978).

152. Most manufacturers reach ultimate buyers through intermediaries. Although there are several layers of intermediaries in many industries, the analysis of vertical market restraints in this Comment will assume a simplified two-tier distribution system: a manufacturer sells to a dealer or distributor who, in turn, sells to the ultimate purchaser.
to make business decisions. Sometimes this result is beneficial because both parties achieve independent business objectives. For example, the distributor may gain an exclusive territory or a reduction in the number of competitors of similar products, while the manufacturer receives assurances that the distributor will provide promotional and service-oriented activities. In other situations, however, the restraints may be overly oppressive if they are used to compel certain actions that are beneficial to the manufacturer-supplier, but are only of marginal utility or disadvantageous to the distributor.

The Supreme Court's vacillation over nonprice vertical market restraints reflects the controversy surrounding their legality. In 1963, the Court refused to apply a per se illegality standard to such restraints; the Court reasoned that it lacked sufficient justification for applying a per se standard. Four years later, however, the Court apparently found sufficient justification because it held that nonprice vertical market restraints are per se illegal when they are imposed by a supplier who has parted with dominion over the restrained goods. Nevertheless, a decade later, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, the Supreme Court abandoned its per se approach and opted to analyze nonprice vertical restraints under the "rule of reason."

154. Some commentators argue that vertical restraints that completely confine the distributor's freedom are economically inferior to less restrictive methods. Louis, *supra* note 150; see also Pitofsky, *supra* note 150 (arguing that the per se illegality standard should apply to airtight customer and territorial restrictions). Other commentators, such as Posner, argue that both price and nonprice vertical restrictions promote competition and, therefore, should be presumptively legal. Posner, *Reflections on Sylvania, supra* note 31, at 1; Posner, *Antitrust Policy and the Supreme Court, supra* note 31, at 283-99. Still other commentators argue that only in limited circumstances will vertical restrictions reduce competition. See, e.g., Meecham & Larner, *A Proposed Rule of Reason for Vertical Restraints on Competition*, 26 *ANTITRUST BULL.* 195 (1981) (vertical restraints are undesirable when they are used as part of a price-fixing scheme or to foreclose entry into the market); Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 *U. PA. L. REV.* 953 (1979) (vertical restraints can be used to create interdependence when a homogeneous product is involved).
155. White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (reversing a summary judgment that held territorial and customer restraints illegal per se, because the judicial experience necessary to apply per se rule to nonprice vertical restraints was lacking).
158. See *infra* note 159 and accompanying text. The *Sylvania* Court addressed the legality of a location clause that restricted the plaintiff from selling the defendant's television sets in
As its name suggests, the rule of reason requires the fact finder, considering all of the circumstances of the particular case, to determine whether the restrictive practice unreasonably restrains competition.159 The Sylvania Court, however, failed to provide concrete guidelines for applying the rule of reason to nonprice vertical restraints.160 Rather, the Court endorsed a case-by-case

certain retail outlets. Continental TV was terminated as a dealer after it willfully violated the location restraint. The Court held that although intrabrand competition (competition among distributors of the same manufacturer) was reduced, interbrand competition (competition among sellers of the same generic product) may have been enhanced. 443 U.S. at 54-55. Given the possible efficiencies and procompetitive interbrand effects of some nonprice vertical restrictions, the Court overruled Schwinn's per se illegality rule. The Court reviewed the per se illegality test articulated in North Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958), which declared that per se rules are "appropriate only when they relate to competition that is manifestly anticompetitive," and it found that the location clause in Sylvania did not meet these demanding standards. The Court noted that any "departure from the rule of reason standard must be based upon demonstrable economic effect rather than—as in Schwinn—upon formalistic line drawing." 443 U.S. at 58-59. On this note, the Court overruled the Schwinn per se standard. Id. 159. In 1918, Justice Brandeis provided the classic statement of the rule of reason:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). By adopting this standard, the Sylvania Court required that a variety of factors be assessed by the fact finder in determining whether particular practices were unreasonable. 433 U.S. at 49-50 n.15. Interestingly, Justice Brandeis's formulation of the rule of reason did not consider the parties' market power. Due to the requirement that a variety of factors must be considered under the rule of reason, protracted and complex litigation often occurs. See, e.g., Louis, supra note 150, at 277-78 (a per se approach to certain restraints should be maintained because the rule of reason analysis generates substantial administrative burdens).

Criticism of the rule of reason is prevalent among commentators. See, e.g., McLaren, Territorial and Customer Restrictions, Consignments, Suggested Resale Prices and Refusals to Deal, 37 ANTITRUST L.J. 137, 144 (1967) (bulky and protracted proceedings are required under the rule of reason); Pitofsky, supra note 150, at 2 (the rule's vagueness renders it ineffective for judicial analysis and offers little in the way of a deterrent effect).

160. 443 U.S. at 49 ("the factfinder weighs all of the circumstances of a case"). Ten months after Sylvania, the Supreme Court clarified the rule of reason in National Society of Professional Engineers v. United States, 435 U.S. 679 (1978). The Court held that the Society's canon of professional ethics, which prohibited the submission of competitive bids by its members, was unlawful. Furthermore, the Court stated that the rule of reason doctrine did not mean that competition itself was unreasonable and possibly dangerous to human safety. Rather, "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." Id. at 691. After restating Justice Brandeis's formulation of the rule of reason, supra note 159, the Court highlighted the significant aspects of that formulation: "Competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." Id. at 692.
balancing of the restraint's intrabrand anticompetitive effects against its interbrand procompetitive effects.\footnote{161} The Court concluded that although nonprice vertical market restraints reduce intrabrand competition,\footnote{162} manufacturers have an economic interest in preserving as much intrabrand competition as is necessary to remain competitive at the interbrand level.\footnote{163} Consequently, the Sylvania Court held that nonprice vertical market restraints had sufficient redeeming competitive benefits to remove them from the per se "pernicious effect" classification.\footnote{164}

Since the Sylvania decision, federal courts of appeals have determined the legality of nonprice vertical restraints by undertaking wide-ranging inquiries into the competitive effects of these restraints.\footnote{165} In Valley Liquors, however,
the Seventh Circuit expressed a different view of Sylvania's rule of reason standard for such restraints. To reach this novel view, the court transformed several economic theories into antitrust norms that were inconsistent with the limited factual record before the court.

2. The Decision in Valley Liquors

Valley claimed that because intrabrand price competition would be lessened, the termination of its wholesale distributorship in the northern counties of Illinois was the product of an unreasonable restraint of trade under section 1 of the Sherman Act.\(^\text{166}\) In appealing the denial for preliminary injunctive relief, Valley alleged that the district court erred in holding that a plaintiff who demonstrates an impairment of intrabrand competition has the additional burden of demonstrating an impairment of interbrand competition.\(^\text{167}\) Valley

---

\(^{166}\) Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 743, 744 (7th Cir. 1982).

\(^{167}\) Brief for Appellant at 24-32, Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982). Valley further alleged that the district judge erred in requiring direct proof that a covert conspiracy to increase the wholesale prices of Renfield products existed between Renfield and two of Valley's competitors. \textit{Id.} at 32-42. Under this claim, Valley contended that its termination was the result of a "horizontal conspiracy," a conspiracy among firms to exclude one of the competitors of a conspirator. Such conspiracies are per se illegal under § 1 of the Sherman Act. See \textit{Battle v. Lubrizol Corp.}, 673 F.2d 984, 991 (8th Cir. 1982); \textit{Contractor Util. Sales Co. v. Certain-Teed Prods. Corp.}, 638 F.2d 1061, 1074-75 (7th Cir. 1981); \textit{Alloy Int'l Co. v. Hoover-NSK Bearing Co.}, 635 F.2d 1222, 1225-26 (7th Cir. 1980); \textit{Cernuto, Inc. v. United Cabinet Corp.}, 595 F.2d 164, 170 (3d Cir. 1979). In order to establish the inference of an illicit horizontal conspiracy, Valley presented unrebutted evidence that its termination came after separate meetings between Renfield and each of Valley's competing distributors. At these meetings, the distributors expressed to Renfield their disfavor with the proposed distributorship realignment program that Renfield was considering. 678 F.2d at 743. Valley asserted that these distributors, who were two of the largest sales volume distributors in Illinois, accepted the realignment after learning that Valley, their price competitor, was no longer going to be present in the northern Illinois market. Brief for Appellee at 7, Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982). This assertion was supported by evidence indicating that retailers of Renfield's products heard rumors of Valley's termination even before Valley was notified of the termination. Brief for Appellant at 20-22, Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982).

Judge Posner rejected the inference of a conspiracy and speculated that Renfield may have had other legitimate reasons, such as eliminating a free rider, for terminating Valley's distributorship. 678 F.2d at 744. For arguments against classifying Valley as a free rider, see \textit{infra} notes 175-79 and accompanying text. Furthermore, Judge Posner stated that in order to establish the claim of an illicit conspiracy, there must be evidence that Renfield assented to its distributors' desires when it terminated Valley. 678 F.2d at 744. This statement suggests that a requirement of direct evidence is necessary to establish a conspiracy in restraint of trade; such a proposition is contrary to most authority. See, e.g., \textit{Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.}, 394 U.S. 700, 703-04 (1969) (per curiam) (rejecting the requirement of direct evidence as essential in antitrust conspiracy cases); \textit{Theatre Enter., Inc. v. Paramount Film Distrib. Corp.}, 346 U.S. 537, 540-41 (1954) (recognizing that circumstantial evidence is often the only means to uncover the covertness inherent in conspiracies in restraint of trade); \textit{Interstate Circuit, Inc. v. United States}, 306 U.S. 208, 211 (1939) (direct evidence to show § 1 conspiracy in restraint of trade not necessary); \textit{Contractor Util. Sales Co. v. Certain-Teed Prods.}, 638 F.2d 1061, 1074-75 (7th Cir. 1981) (preposterous to require a "smoking gun" in order to establish § 1 claim of conspiracy in restraint of trade). Courts have long recognized that antitrust conspiracies
DEPAUL LAW REVIEW

contended that under the rule of reason, the plaintiff has the initial burden of showing anticompetitive impact in the intrabrand market. If this burden is met, the defendant then has the burden of showing that its restraint achieves competitive results.168

Writing for the majority, Judge Posner rejected Valley's claim that its termination was unreasonable. This rejection was based on the following theoretical paradigm: a supplier's decision to terminate a distributor enhances efficiency because the decision is motivated by a desire to establish a proper relationship between price and nonprice competition among its distributors.169 Therefore, under this model, the termination of the distributorship was pro-competitive. This conclusion was necessarily premised on the notion that vertical market restraints are presumptively procompetitive because they increase the sales of the supplier's product.170 Judge Posner used these theoretical

may be inferred from the parties' actions. See Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939) ("It is an unrealistic proposition that a defendant will provide the plaintiff with direct evidence of an explicit agreement between the supplier and the plaintiff's competitors which is specifically aimed at the plaintiff."); see also Eiger, Antitrust Decisions Concerning Supplier-Dealer Relations and the Rule of Reason, 58 CHI.[-]KENT L. REV. 251, 254 (1982).

Furthermore, although Judge Posner recognized that the Seventh Circuit had adopted the legal position that it is unlawful per se for a supplier to terminate a distributor at the request of competing distributors who want to reduce price competition, he questioned the viability of that position. 678 F.2d at 744. His questioning was understandable, however, in light of the fact that his academic writings clearly conflict with the Seventh Circuit's position. See, e.g., Posner, Reflections on Sylvania, supra note 31, at 19-20 (dealers should be allowed collectively to persuade their suppliers to restrict competition if the restriction would increase sales to the supplier; mere joint action is immaterial because a supplier's dealers have the incentive to identify those who fail to compete in nonprice activities while engaging in effective price competition).

168. 678 F.2d at 744.
169. Id. at 743-44. For an identical argument presented by Judge Posner in his academic writings, see Posner, Per Se Legality, supra note 31, at 23-24.
170. 678 F.2d at 742-43. Judge Posner stated that Valley's termination resulted from a decision to emphasize nonprice competition over price competition; presumably this decision was made in an effort to achieve greater sales. Id. Under the perfect competition model, the attainment of greater sales is the means by which a firm maximizes its profits. See supra notes 20-22 and accompanying text. A firm will continue to produce until the point at which its marginal revenue equals its marginal costs. Marginal revenue is defined as the change in the total revenue the firm receives as a result of selling one additional unit: Marginal Revenue (MR) = change in total revenue/change in quantity sold. Marginal cost is defined as the change in cost attributable to producing one more unit of output: Marginal Cost (MC) = change in total cost/change in quantity. See Gellhorn, An Introduction to Antitrust Economics, 1975 DUKE L.J. 1, 22-23.

An important point to remember is that under economic theory, costs include a normal rate of return for the capital invested and a normal imputed wage for owner-managers. Thus, both explicit and implicit costs are recognized. Firms like to maximize the number of units sold because implicit in each product is a normal rate of profit. Underlying this theme is the idea that the capitalist deserves to receive an average profit for providing the necessary capital for production. Socialist economists, however, argue that the productivity of capital goods does not imply that the person supplying the capital is productive nor does such productivity imply that the individual deserves to retain a profit. Rather, profits should be dispersed among members
presuppositions both to justify his finding that the restraint was reasonable and to reject Valley's contention that a shift in burdens of proof was required under the rule of reason.\textsuperscript{171} Hence, it is necessary to consider whether these presuppositions were applicable to the facts presented in Valley Liquors.

Consistent with his previous academic writings, Judge Posner equated Renfield's decision to adopt a restricted distribution system with the desire to emphasize nonprice over price competition.\textsuperscript{172} Judge Posner concluded that in order to counter its relatively poor sales performance in Illinois,\textsuperscript{173} Renfield terminated Valley's distributorship, thereby ensuring that necessary levels of promotional and service activities—nonprice competition—would be provided by its other distributors.\textsuperscript{174} This conclusion was premised on Judge Posner's speculation that Valley was "free riding" on the promotional efforts of the other two distributors in the market;\textsuperscript{175} however, the only evidence

\begin{footnotesize}
\begin{enumerate}
\item The competitive firm is a price taker because, by definition, it lacks the ability to affect the market price. Consequently, its selling price is already determined by the market. F. Scherer, Industrial Market and Economic Performance 12-13 (3d ed. 1973). Its production costs are also assumed to be constant, at least in the short run. Thus, the only variable cost recognized under this model is the cost of distribution. Kellman, supra note 151, at 1114.
\item As a price taker, the competitive firm seeks to maximize the number of goods sold at the lowest cost. Since its output at the given price is determined by cost, the firm hopes to minimize the amount of distribution costs required to sell at a point where MR = MC. At that point, the firm will achieve productive efficiency, or the lowest cost of resources (i.e., plant and raw materials) for the unit of goods sold. Thus, with all of these assumptions about a competitive market, Chicago school theorists, employing microeconomic principles, argue that a supplier will not impose a restraint that leads to a decrease in the number of goods sold because it will not achieve its objective of maximizing profit. See Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt. 2), 75 Yale L.J. 373, 415-16 (1966). For a critique of these assumptions, especially the fact that the mere ability to impose a restraint implies that the firm has some market power, see infra notes 197-99.
\item 678 F.2d at 743-44. For previous writings expressing this viewpoint, see R. Posner, Economic Perspective, supra note 31, at 147-66; Posner, Reflections on Sylvania, supra note 31, at 5-10.
\item Renfield's sales had grown nationally for four consecutive years. In contrast, no sales growth occurred in Illinois. Brief for the Appellee at 7, Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982).
\item 678 F.2d at 743-44.
\item Id. This is the so-called free-rider problem which, according to Chicago school theorists, supports the economic benefits of manufacturer-imposed vertical restraints. The basis of the Chicago school view is that one distributor may provide certain services (e.g., advertising, point-of-purchase sales, displays, informational services, product services) and then discover that the consumer, after benefiting from these services, bought the product from a second distributor who failed to invest in these services and therefore could afford to sell at a lower price. Imposing vertical restraints on its distributors, the supplier could achieve effective nonprice competition between them by, for example, granting an exclusive territory with the stipulation that it would be revoked if a distributor failed to provide promotional and servicing activities. By eliminating intrabrand competition, the restraints ensure that a supplier will invest in the optimum level of customer services. The argument supporting the use of vertical restraints to combat free riders originated in Telser, Why Should Manufacturers Want Fair Trade?, 3 J.L. & Econ. 86 (1960). For Judge Posner's thoughts on this subject, see R. Posner, Economic Perspective, supra note 31, at 145-66.
\end{enumerate}
\end{footnotesize}
to support this inference was that Valley sold Renfield's products at prices that were five percent below those charged by Renfield's other distributors.\(^{176}\) The premise that Valley was a free rider was not factually corroborated.\(^{177}\) Valley was the most effective distributor in terms of providing retailers with the lowest priced product. Furthermore, the inference that Valley was a free rider was explicitly rejected by the testimony of Renfield's national account manager.\(^{178}\) Moreover, Judge Posner ignored the fact that there may be reasons other than a desire to emphasize nonprice competition that encourage a manufacturer to restrict its distribution system.\(^{179}\) For example, a manufac-

\(^{176}\) 678 F.2d at 743. In *Sylvania*, the Supreme Court partly justified its decision to overturn *Schwinn*'s per se rule against vertical restraints by noting that a manufacturer-supplier may use such restrictions to ensure that its distributor will provide the necessary levels of promotional activities and service. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55 (1977) (citing Posner, *Antitrust Policy and the Supreme Court*, supra note 31, at 285).

\(^{177}\) Evidence introduced at trial showed that Valley was an aggressive and successful promoter of Renfield products. Valley sold 50-60% of all Renfield products in the area from which it was terminated. Brief for Appellant at 7, Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982). Additionally, it is questionable whether a free-rider problem even exists in the wholesale liquor industry. Such problems generally arise when substantial expenditures are required to obtain maximum sales. Posner, *Antitrust Policy and the Supreme Court*, supra note 31, at 284 (a free rider's prices are lower because he does not invest in substantial promotional and service expenditures). The wholesale liquor industry apparently does not require distributors to invest in customer services such as a service department or an elaborate showroom. Furthermore, none of the evidence introduced showed that Renfield required its distributors to provide a minimum level of customer services or that Valley failed to provide a reasonable amount of promotional expenditures.

\(^{178}\) Mr. Sussman, Renfield's National Accounts Manager, testified that Valley generated "a tremendous amount of on-sale business," serviced retail outlets properly, and was Renfield's "best distributor" in the counties in which it was terminated. Brief for Appellant at 7, Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982). There also was testimony that Valley was both the most aggressive distributor in its sales efforts and the lowest priced distributor. Its prices were not set by the standard mark-up procedures employed by its competition; rather, they were set according to what would sell the most at what price (an example of classic competitive pricing). *Id.* at 12. Furthermore, Valley's service did not suffer because it provided the lowest priced product. Uncontested testimony demonstrated that while "Valley deliver[ed] to every customer every day any amount of merchandise that they would like," the others required specified minimum quantities for delivery on a limited number of days. *Id.* at 13.

\(^{179}\) A manufacturer might be motivated to restrict its distribution system in an effort to minimize costs or to terminate a price-cutter who upset a cartel at the manufacturers' level. Bork, *supra* note 170, at 411 (emphasizing that a manufacturers' cartel arises when only one brand is carried by retailers). Furthermore, the manufacturer may be forced to terminate the price-cutter at the insistence of powerful retailers. Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis, and Sylvania*, 64 IOWA L. REV. 461, 505-06 (1979) (suggesting that in many cases large national retailers have sufficient bargaining power to influence the decisions of their suppliers). A single retailer or distributor can exert pressure on its supplier in the same way that a cartel of dealers can. The existence
turer may seek to differentiate its product by eliminating price competitive distributors in an effort to make its product more exclusive. Through differentiation, a manufacturer can achieve some degree of control over the price of its product, thereby dismissing the assumption under the perfect competition model that sellers lack the ability to control price. Consequently, by deciding to accept nonprice competition as the guiding force behind the termination of Valley’s distributorship, the Seventh Circuit arguably usurped the role of the fact finder and drew legal conclusions that were not based upon the factual record. The classification of Valley as a free rider was clearly a device used by Judge Posner, writing for the majority, to achieve the predetermined ideological result that vertical restraints are per se legal.

In addressing the burden of proof issue, Judge Posner disagreed with Valley’s claim that the rule of reason requires a shifting of burdens and, accordingly, held that the plaintiff initially must show an anticompetitive effect in both the intrabrand and interbrand market. Nevertheless, he reasoned that requiring the plaintiff to prove anticompetitive effects by weighing all of the criteria in both the intrabrand and interbrand markets would impose an undue hardship. To avoid this hardship, Judge Posner adopted a “shortcut” in which the initial burden is satisfied if the plaintiff can prove an adverse effect on intrabrand competition coupled with a showing that the defendant possesses significant power in the interbrand market.

of powerful retailers in this country is evident in many industries. See Strasser, Vertical Territorial Restraints After Sylvania: A Policy Analysis and Proposed New Rule, 1977 DUKE L.J. 775, 789, 817. The two distributors in competition with Valley were the largest liquor distributors in the state. See supra note 167. This fact makes the foregoing rationale viable in the Valley Liquors case.

180. Product differentiation, whether real or imaginary, enables a firm to achieve a less elastic demand for its product based on a perception that the product lacks an adequate substitute. Consequently, a higher price may result. See, e.g., Comanor, Vertical, Territorial and Customer Restrictions: White Motor and Its Aftermath, 81 HARV. L. REV. 1419, 1422-27 (1968) (product differentiation often results in reduced interbrand price competition). Some commentators argue that competitive evils such as increased prices, market power, concentrated markets, and potential monopoly profits arise from product differentiation. See Scherer, The Posnerian Harvest: Separating Wheat from Chaff, 86, YALE L.J. 974, 998-99 (1977). Others argue that product differentiation, with its necessary advertising expenditures, provides consumers with well-defined choices and promotes informed decision making. See R. Posner, Economic Perspective, supra note 31, at 113-25 (identifying the importance of information exchanges). For a discussion of advertising and its role in fostering market power, see infra note 232. For an elaboration on product differentiation, see infra notes 232-33 and accompanying text.

181. See supra notes 20-22 and accompanying text.
182. See infra notes 208-09 and accompanying text.
183. 678 F.2d at 745.
184. Id. The court provided a theoretical argument for requiring the plaintiff to show that the defendant holds significant market power. This argument presupposes that a firm lacking market power cannot adversely affect the price level because even if the firm adopts practices that are harmful to consumers, “market retribution will be swift.” Id. The competitive process will not allow these uncompetitive practices to go unabated because the market will provide the consumer with other products to purchase. For a development of this argument, see Posner, Per Se Legality, supra note 31, at 16.
Imposing this initial evidentiary burden on the plaintiff to prove an unreasonable nonprice vertical market restraint is unprecedented. Before a defendant's nonprice vertical restraint can be considered unreasonable, the plaintiff must make a preliminary showing that the defendant has significant market power. This evidentiary burden negates the underlying value of section 1 of the Sherman Act: to insure that competition, not collusive restraints, determines success in the marketplace.

Before Valley Liquors, the Seventh Circuit had not indicated what evidence was required by the plaintiff in a dealer termination case to show adverse impact on competition under the rule of reason. See Eiger, supra note 167, at 258-63. In Valley Liquors, the court relied on two cases which supposedly required a showing of market power in order to find anticompetitive effect. The first case was Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292 (5th Cir. 1981). The Muenster Butane court determined that, (1) the record indicated that interbrand competition increased; and (2) because the plaintiff found another supplier of the same product that the defendant distributed, intrabrand competition was not adversely affected. Id. at 296-98. Consequently, termination of the plaintiff for continual violations of a local clause agreement was reasonable.

Muenster Butane can be distinguished factually from Valley Liquors. In Valley Liquors, the plaintiff's termination was not due to its persistent violation of contract clauses. This alone is enough to conclude that the case is inapplicable because under the rule of reason "conclusions reached by courts in one context are not necessarily applicable in another." Harold Friedman, Inc. v. Thorofare Mkt., Inc., 587 F.2d 127, 143 (3d Cir. 1978) (citing United States v. First Nat'l Bank, 376 U.S. 665, 667-68 (1964)); see also Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 124 (1948); L. Sullivan, Antitrust Law 186-92 (1977); 1 von Kalinowski, Antitrust Laws and Trade Regulations §§ 6-02[1], 6-02[4] (1978).

In dictum, the Muenster Butane court noted that had the plaintiff been required to show that the defendant possessed market power, the case may have been disposed of with less time and expense. 651 F.2d at 298. Because the court found that the restraint was reasonable, however, it never adopted this standard. Furthermore, the court noted that cases within its circuit had not actually established this requirement. Id.

The second case cited by Judge Posner was Cowley v. Braden Indus., 613 F.2d 751 (9th Cir. 1980). Cowley involved a suit by a retailer against its ex-supplier of windmills. The court rejected the plaintiff's claim that when a defendant with substantial market power restrains its distributors, the defendant has the burden of proving that the vertical restraint is unreasonable. Id. at 754-55. The Cowley court found that the defendant controlled 70 to 80% of the windmill market. This evidence was necessary to substantiate the plaintiff's additional claim of a violation of § 2 of the Sherman Act. For a discussion of § 2 of the Sherman Act, see infra notes 189-90 and accompanying text. The court, however, did not apply the "shortcut" tests of requiring the plaintiff to show that the defendant possessed market power in order recover under § 1. Thus, it is unclear how Cowley supports Judge Posner's position.

186. In Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), the Supreme Court held that the defendant's preferential routing clauses, which compelled its lessees to ship all of their commodities over the defendant's railroad lines, were unreasonable per se under § 1 of the Sherman Act. Justice Black enunciated the classic definition of the purposes of the antitrust laws, specifically § 1 of the Sherman Act:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.

Id. at 4.
under section 1 of the Sherman Act even if it is imposed by a firm with
less than substantial market power. The objective of section 1 is to curtail
unnecessarily restrictive practices among competitors that could not be
eliminated unilaterally. Consequently, an inquiry under section 1 focuses
on agreements in restraint of competitive conditions, while an inquiry under
section 2 involves an analysis of the structural condition in the market.
Although both sections seek to eradicate practices that can lead to unjustified
market control, only section 2 is limited by a threshold requirement of market
power. Accordingly, the “shortcut” proposed by the Valley Liquors court

187. In United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), the Supreme Court
held that a § 1 violation occurred when the defendant oil producers conspired to purchase
excess oil to stabilize the price of gasoline. The Court found that even though the defendants
did not have control of the market, their acts were illegal since they directly interfered with
the market’s price setting function. Id. at 221. Even though it was established that the defen-
dants actually did affect the price of gasoline, the Court noted, in dictum, that they would
still be guilty of a § 1 violation even if they lacked the power to fix prices. Id. at 224-26
n.59. In this suggestive footnote, the Court reaffirmed the established principle that § 1 con-
demns an illicit conspiracy regardless of whether the participants had the ability to accomplish
the conspiracy’s ends.

It is useful to quote the Court on its distinction between a § 1 and a § 2 offense:
The existence or exertion of power to accomplish the desired objective . . . becomes
important only in cases where the offense charged is the actual monopolizing of
any part of trade or commerce in violation of § 2 of the Act. An intent and power
to produce the result which the law condemns are then necessary. . . . Only a
confusion between the nature of the offenses under those two sections . . . would
lead to the conclusion that power to fix prices was necessary for proof of a price-
fixing conspiracy under § 1.

Id. at 226. Consequently, § 1 is concerned with culpable behavior, not with power in the market.
Section 2 of the Sherman Act is concerned with market power. See infra notes 189-90 and
accompanying text.

(maximum price schedules by which defendant’s distributors could sell its papers violate the
Sherman Act).

189. Section 2 of the Sherman Act provides in pertinent part: “Every person who shall
monopolize, or attempt to monopolize, or combine or conspire with any other person or per-
a violation of § 2, the plaintiff must prove that the defendant had market power plus an intent
to exert monopoly pressures on the market. United States v. Grinnell Corp., 384 U.S. 563,

Section 2 is beyond the scope of this Comment. It is mentioned merely to show that market
power is not a requirement under § 1; rather, it is a threshold requirement under § 2. For
an extensive analysis of monopolization cases and their governing doctrines, see III P. AREEDA
& D. TURNER, ANTITRUST LAWS, ch. 6-7 (1978); see also P. ASCH, ECONOMIC THEORY AND
THE ANTITRUST DILEMMA 240 (1970) (the Sherman Act does not prohibit monopoly power but
rather deems those acts that create or continue monopoly power to be illegal). A thorough
review of attempts to monopolize and illegal use of monopoly power is provided in Cooper,
Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of
Section Two, 72 Mich. L. Rev. 373 (1974). For an historical review on the development of
monopoly law under § 2 and its relationship to other antitrust laws, see Rostow, Monopoly

190. See supra note 189.
superimposes upon section 1 a previously nonexistent requirement to prove substantial market power.\footnote{191}

The consequence of Valley Liquors's evidentiary standard is that it greatly restricts the application of antitrust laws to nonprice vertical restraints. If a manufacturer lacks the "power to raise [its] prices significantly above the competitive level,"\footnote{192} it can impose any nonprice restraint on its distributors without fear of being prosecuted under the antitrust laws.\footnote{193} If a distributor seeks protection under the Sherman Act from the coercive pressures created by a supplier's restraint, the distributor must be able to prove that the restraint unreasonably affects both the intrabrand and interbrand market.\footnote{194} This initial burden is enough to discourage most potential litigants, even if their independence is severely curtailed by such restraints.

By requiring the plaintiff to demonstrate the restraint's adverse impact on both the intrabrand and interbrand market,\footnote{195} the Seventh Circuit circumvented the rule of reason's mandate that the precise facts of each case must be analyzed before determining the restraint's competitive effect.\footnote{196} Such facts arguably include the relationship between the distributor and the supplier.\footnote{197}

\begin{footnotes}
\footnote{191} Judge Posner demonstrated his distaste for § 2 when he proposed that it be discarded. R. Posner, Economic Perspective, \textit{supra} note 31, at 7, 217. According to Judge Posner, § 2-type violations can be adequately protected against under § 1 because ""[i]f a firm has engaged in a practice which is unreasonably restrictive of competition, it has violated Section 1 regardless of whether monopoly has been achieved."" \textit{Id.} at 216. Although abandoning § 2 of the Sherman Act would require statutory reform, Judge Posner believes that much of the antitrust doctrine could be ""changed by the courts within the very broad limits set by statutory language and what we know of the intent behind it."" \textit{Id.} at 7. This opinion would lead to the elimination of § 2 offenses by incorporating them into § 1. \textit{Id.} at 212-17. His judicial approach in Valley Liquors, which merges § 1 and § 2 by requiring the plaintiff to show market power, is reminiscent of Judge Posner's expressed belief that the courts should begin restricting the antitrust law's scope. For a criticism of how Judge Posner would implement judicial changes in antitrust law, see \textit{infra} notes 274-89 and accompanying text.

\footnote{192} 678 F.2d at 745 (Judge Posner's definition of market power).

\footnote{193} \textit{Id.} ""Even if there is some possibility that the distribution practices of a powerless firm will have a substantial anticompetitive effect, it is too small a possibility to warrant trundling out the great machinery of antitrust enforcement."" \textit{Id.}

\footnote{194} \textit{Id.}

\footnote{195} \textit{Id.}

\footnote{196} The rule of reason formulation offered by Justice Brandeis in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918), provided a broad statement of the facts to be analyzed. See \textit{supra} note 159. This view has also been explicitly adopted in the Court's subsequent opinions. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-92 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977).

\footnote{197} Vertical restraints imply that a supplier has achieved some control over distribution through a contractual relationship. In evaluating this relationship, it may be revealed that the supplier imposed restraints upon distributors by exerting its unequal bargaining position. The supplier's power to control distribution could be the result of its entrenchment in the national market, or its insulation from potential competitors because of protective entry barriers, while the distributor remains forced to compete in a generally localized market with a greater potential for new competitors due to less stringent entry barriers. Kellman, \textit{supra} note 151, at 1120 (""distributor who lacks bargaining power cannot be expected to resist the manufacturer's insistence on the restriction"" since he knows that another distributor can be found if he declines
the severity of the restraint on the distributor's independence, the structure of the industry affected, the type of restraints used by competitors at the inter-brand level, and the availability of less restrictive alternatives that can meet the needs of the supplier. In light of Sylvania's recognition that vertical restraints generally promote interbrand competition at the expense of intrabrand competition, a lower level of presumptive illegality may be appropriate for non-price vertical market restraints. Nonetheless, it should be noted that the Sylvania Court did not impose a rule of presumptive, or per se, legality for such restraints.

Although Judge Posner does not explicitly declare that nonprice vertical market restraints are per se legal, his analysis in Valley Liquors exhorts such a standard. He completely eliminates distributors' antitrust actions against suppliers lacking market power at the interbrand level. Judge Posner's proclamation of the inherent benefits of restrictions on distribution, coupled

...
with the ease with which he characterizes Valley as a free rider, implies a willingness to validate nonprice vertical restraints even if the supplier has substantial market power. This implication is strengthened by the requirement that a plaintiff alleging an unreasonable nonprice vertical market restraint must initially prove anticompetitive effects in both the intrabrand and interbrand market.

An examination of Judge Posner's academic writings reveals his perception that nonprice vertical market restraints are procompetitive and should be per se legal under the antitrust laws. Judge Posner's deeply entrenched viewpoint on the validity of nonprice vertical market restraints makes it difficult to imagine that he would apply any standard other than per se legality. Similarly, Judge Posner's previous writings insist that vertical price restraints should also be presumptively legal. Yet, the Supreme Court's animosity toward any practice that interferes directly with the price mechanism, and the Court's insistence that nonprice vertical market

206. For an examination of Judge Posner's declaration that Valley was a free rider, see supra notes 175-79 and accompanying text.

207. 678 F.2d at 745.


209. Posner previously argued that a per se legality standard was justified for all vertical restraints. See Posner, Per Se Legality, supra note 31, at 9-14. The claim is that price restraints are no more inhibitory than exclusive territories. Id. at 9. Thus, price restraints can be motivated by similar desires of manufacturers to rid themselves of free riders, see supra note 174, and to achieve greater efficiencies by keeping down their distributive costs. See also Liebeler, Intrabrand "Cartels" Under GTE Sylvania, 30 U.C.L.A. L. REV. 1 (1982) (all intrabrand restrictions should be per se legal regardless of their form or genesis).

Since 1911, the Supreme Court has held that minimum resale prices are per se illegal under the Sherman Act. Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373, 407-08 (1911). The Court subsequently extended the per se rule to encompass vertical agreements that establish a maximum resale price. Albrecht v. Herald Co., 390 U.S. 145 (1968).

Several economic reasons have been presented in justification of the per se rule. One of the original reasons was that such practices had the effect, if not the purpose, of horizontally fixing the price of goals. Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373, 408 (1911). Additionally, such practices may be employed at the insistence of a distributor cartel. See Bowman, The Prerequisites and Effects of Resale Price Maintenance, 72 U. CHI. L. REV. 825, 830-31 (1955). It has also been noted that price restraints "reduce not only intrabrand, but also interbrand price competition by eliminating a dealer's flexibility in its pricing arrangements." White Motor Co. v. United States, 372 U.S. 253, 268 (1963) (Brennan, J., concurring). Finally, there exists the impracticality of placing the courts in the position of determining what is a reasonable price. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

Recently, the Supreme Court reaffirmed its commitment against all practices that are explicitly directed at the "central nervous system" of competitive market pricing. See Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (applying per se rule to a maximum fee setting arrangement among member doctors, even though the express purpose was to compete more effectively with existing health insurance plans).

210. See, e.g., Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (reversing Ninth Circuit holding that a horizontal agreement to fix credit terms does not contravene the anti-trust laws); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18 (1977) (vertical
restraints are to be analyzed under the rule of reason standard,\textsuperscript{211} prevent Judge Posner from judicially proclaiming a per se legality standard. Nevertheless, in his future rulings on vertical restraints, it can be expected that Judge Posner will continue to apply the methodical, restrictive delineation of section 1 of the Sherman Act as outlined in \textit{Valley Liquors}.

\textbf{COMPETITION UNDER THE ANTITRUST LAWS:}
\textbf{THE IMPLICATIONS OF JUDGE POSNER'S DEFINITION}

\textbf{A. A Posnerian Definition}

Relying on the Supreme Court's declaration that "[t]he essence of the antitrust laws is to ensure fair price competition in an open market,"\textsuperscript{212} Judge Posner has repeatedly emphasized that the sole objective of the antitrust statutes is to protect consumer welfare through preserving competition.\textsuperscript{213} Judge Posner's definition of competition is purely economic. In \textit{Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Co.},\textsuperscript{214} the plaintiff claimed that his products liability insurance brokerage business for ladder manufacturers was terminated as a result of an illicit conspiracy between his ex-employer insurance agency and its underwriter.\textsuperscript{215} In affirming summary judgment for the defendant, Judge Posner reached the following conclusions: (1) no conspiracy was proven; and (2) even if a conspiracy could be found, there was no showing of any anticompetitive effects.\textsuperscript{216} This

\textsuperscript{211.} Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977). The Court explicitly stated that under the rule of reason, "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited." \textit{Id.} at 49.


\textsuperscript{213.} See Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982); Marrese v. American Academy of Orthopaedic Surgeons, 692 F.2d 1083, 1095 (7th Cir. 1982); Products Liab. Ins. Co. v. Crum & Forster Ins. Co., 682 F.2d 660, 663-64 (7th Cir. 1982); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982).

Judge Posner's reliance on Reiter v. Sontone Corp., 442 U.S. 330 (1979), is misplaced. In that case, a unanimous Supreme Court reversed the Fifth Circuit's ruling that only those injuries sustained in a commercial context can be redressed. The Court liberally interpreted § 4 of the Clayton Act and allowed standing to a consumer who was forced to pay a higher price for a hearing aid as the result of an allegedly illegal price-fixing conspiracy. Rather than limiting § 4's requirement of an injury to the "business or property" of those engaged in commercial enterprises, the Reiter Court concluded that Congress intended to provide consumers with the right to sue for deprivations of competitive processes. \textit{Id.} at 342-44. Thus, while the Supreme Court's expansive reading of § 4 provided consumers with standing to sue for damages they incurred from anticompetitive activities, Judge Posner read consumer welfare as a constructive limitation on the range of antitrust law objectives.

\textsuperscript{214.} 682 F.2d 660 (7th Cir. 1982).

\textsuperscript{215.} \textit{Id.} at 661-62. The case was dismissed by the district court in favor of the defendant after completion of pretrial discovery. \textit{Id.} at 663.

\textsuperscript{216.} \textit{Id.} at 663.
second conclusion was based on the premise that competition, for purposes of antitrust analysis, is concerned with consumer welfare and not with the welfare of individual competitors. Consequently, even if the plaintiff suffered financial injury at the hands of conspirators in the insurance industry, Posner would conclude that no antitrust cause of action existed because consumers were not adversely affected; the demand and supply of products liability insurance for ladder manufacturers presumably remained constant. Judge Posner also concluded that consumers are not concerned with the number of competitors in the market. Rather, their only concern is that "there be enough [competitors] to assure [them] competitive price and quality." If antitrust plaintiffs are required to abide by this judicial definition of competition, then plaintiffs excluded from the market must prove (1) their exclusion affected competition in the marketplace; and (2) consumers were injured by this effect on competition. Such a standard would devastate private enforcement of the antitrust laws because it effectively requires plaintiffs to prove the efficacy and validity of microeconomic theory in their particular antitrust suit. Such a burden would be nearly insurmountable for private plaintiffs. Even if a well-financed individual can overcome this excessive burden, the judiciary is not an appropriate forum for an empirical debate on the validity of microeconomic theory. Nonetheless, in order to demonstrate that Judge Posner's definition of competition is theoretically inconsistent with nearly one hundred years of antitrust jurisprudence, it is necessary to examine the differing views of the Chicago school theorists and the Supreme Court on the values subsumed within the meaning of competition.

B. Chicago School Theory: Its Critics and Its Judicial Limitations

Premised on the Chicago school theorists' evaluation of the antitrust laws under static microeconomic theory, Judge Posner's definition of competition rests upon his assertion that the most efficient producers should not be penalized by antitrust liability. The Chicago school theorists contend

217. Id. at 664-65; accord Marrese v. American Academy of Orthopaedic Surgeons, 692 F.2d 1083, 1095-98 (7th Cir. 1982) (competition in its antitrust sense is not a process whereby rivalry is robust but, rather, is a consequence of promoting consumer welfare).

218. 682 F.2d at 664. The conclusion that the supply and demand of product liability insurance for ladder manufacturers remained constant was based on the fact that the plaintiff failed to prove any adverse effects on the competitive conditions of the ladder market. Id. Reliance on the plaintiff's failure to demonstrate adverse market impact, in order to dismiss the claim, is of questionable efficacy. A plaintiff is not required to "prove an actual lessening of competition in order to recover" under § 4 of the Clayton Act because "competitors may be able to prove antitrust injury before they are driven from the market. . . ." Blue Shield v. McCready, 457 U.S. 465, 482 (1982) (quoting Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 n.14 (1977)).

219. 682 F.2d at 664.

220. See supra notes 18-26 and accompanying text. The theory is static because its models contain highly abstract assumptions that fail to account for environmental and evolutionary changes which occur in the industry.
that a monopolized industry results in inefficient resource allocation due to a lower output of production and a higher market price. They further argue that if competition exists, there will be an increase in supply and a decrease in price; thus, total consumer satisfaction, as measured by market prices, will be maximized.

To Chicago school theorists, the efficiency of market activity identifies whether the consumers' satisfaction, and hence their welfare, is being met. Utilizing the perfect competition and pure monopoly models, economic welfare would be optimized and resources allocated ideally if efficiency were recognized as the determinative factor in all legal decisions having economic implications. Consequently, the overriding premise of the Chicago school approach is that to the extent other values are involved in antitrust, they are to be disregarded if these noneconomic values conflict with efficiency, for it is efficiency that is in the consumer's, and hence society's, best interest.

The proper role for microeconomic theory in antitrust litigation is a matter of disagreement among Chicago school theorists and those loosely identified as Harvard theorists. The Harvard theorists do not reject efficiency

---


222. See Bohling, supra note 179, at 474-75.

223. Efficiency is a term of art that is used generally to indicate some useful, or better, way of doing things. To the economist, however, efficiency is a technical term, having a productive component—generating a maximum number of goods and services with scarce resources—and an allocative component—putting scarce resources to their most productive use. Efficiency has been defined by Judge Posner as "exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay ... is maximized." R. Posner, Economics and the Law 4 (1974). For an evaluation of the normative basis inherent in this definition, see infra notes 274-85 and accompanying text.


226. See, e.g., Sullivan, Sources of Wisdom for Antitrust, supra note 26, at 1216-18. Judge Posner wrote an article which was intended to refute the notion that there still exists a distinction between the Chicago and Harvard positions. His basic point was that Harvard theorists have abandoned their intellectual foundations and have generally merged with Chicago school theorists. Thus, there is no need to insist that differences exist between the two camps. Posner, The Chicago School of Antitrust Analysis, 127 U. Pa. L. Rev. 925 (1979). Following Judge Posner's article, a rebuttal written by a Harvard professor delineated some of the theoretical differences that justify maintaining the labels upon each school of thought. Nelson, Comments on a Paper by Posner, 127 U. Pa. L. Rev. 949 (1979). This Comment will maintain the distinction because it appears that scholars still maintain significant disagreements over the application of economics to antitrust law. For a classic debate highlighting the distinction between the two schools of thought, compare Bork & Bowman, The Crisis in Antitrust, 65 Colum. L. Rev. 363 (1965) (advocating the Chicago school approach) with Blake & Jones, Toward a Three Dimensional Antitrust Policy, 65 Colum. L. Rev. 422 (1965) (advocating that economic, social, and political goals are inherent in the antitrust statutes).
enhancement as a goal of antitrust; however, they reject the dogmatic position that it is the sole aim of antitrust jurisprudence.\footnote{227 See L. Sullivan, \emph{Handbook of the Law of Antitrust} § 1 at 2-6, 9, 10 (1977); Blake & Jones, supra note 226; Bohling, \emph{supra} note 178, at 473-77; Flynn, \emph{The Misuse of Economic Analysis in Antitrust Litigation}, 12 Sw. U.L. Rev. 335 (1981); Markovitz, \emph{Monopolistic Competition, Second Best, and the Antitrust Paradox: A Review Article}, 77 Mich. L. Rev. 567, 577-80 (1981); Schwartz, \emph{Book Review}, 128 U. Pa. L. Rev. 244, 249-53, 266-68 (1979).} In addition, the Harvard scholars do not agree with the Chicago school theorists' rigid reliance on static economic models.\footnote{228 It is generally agreed by Harvard economists that microeconomic price theory is necessarily dependent upon highly abstract assumptions. These economists argue that due to the questionable structural and behavioral assumptions of neoclassical economics, price theory disregards important deterministic factors incapable of quantification. These structural assumptions were identified \emph{supra} note 19-25. In addition to these structural assumptions, price theory is premised on the major behavioral assumption that both individuals and firms are rational maximizers of their self-interest. R. Posner, \emph{Economic Analysis of Law} 4 (1977). Rationality, as the prime psychological force, is used in Adam Smith's sense of self-interest. A. Smith, \emph{supra} note 7. For an insight into Smith's philosophical views, which recognize that economics examines only one aspect of the individual in society, see Lerner, \emph{Introduction} to A. Smith, \emph{The Wealth of Nations}, \emph{supra} note 7. See also \emph{supra} note 9 and accompanying text.} Microeconomic theory quantifies self-interest in the concept of maximizing utility. See J. Henderson & R. Quant, \emph{supra} note 18, at 6. Since microeconomic theory presumes that whatever decision is made is rational, one need not make any qualitative judgments on any given choice. See, e.g., Flynn, \emph{supra} note 227, at 365 ("The individual's perceived reason for a choice is irrelevant [under microeconomic theory], so are the moral, psychological, or other constraints influencing the choice."). Rational maximization of self-interest is the only behavioral or psychological explanation of individual action. See, e.g., Leff, \emph{Economic Analysis of Law: Some Realism About Nominalism}, 60 Va. L. Rev. 451, 466 (1974). In criticizing Judge Posner's book \emph{Economics and the Law}, Leff questions the validity of relying on rational maximization as the sole motivating force of humankind: "Can one actually, now, write 400 pages about human action without advertising to Freud, his followers or his enemies?" Leff, \emph{supra}, at 466. For a suggestion that these assumptions lead to great distortions and necessarily limit the applicability of neoclassical economics to legal analysis, see Flynn, \emph{supra} note 227, at 363-69.

Several preeminent economists have challenged the behavioral postulates of microeconomic theory as being overly simplistic. See, e.g., W. Baumol, \emph{Business Behavior, Value and Growth} 1-8 (rev. ed. 1967) (group interaction defies easy categorization); F. Hirsch, \emph{Social Limits to Growth} 60-64 (1976) (questioning whether people really make rational decisions); E. Mishan, \emph{The Economic Growth Debate: An Assessment} 14-15, 29-37 (1977) (microeconomics fails to account for the dynamics of human behavior); J. Schumpeter, \emph{Capitalism, Socialism, and Democracy} 81-106 (3d ed. 1950) (self-interest is a capitalistic notion that merely justifies wealth accumulation). In 1979, Judge Posner attempted to justify the assumption that rational maximization is a valid behavioral postulate. Posner, \emph{Some Uses and Abuses of Economics in Law}, 46 U. Chi. L. Rev. 281, 301-06 (1979). First, he claimed that "introspection provides the only reliable evidence of motivation; at the level of unconscious, it appears, without being a Freudian, that humans act out of self-interest." \emph{Id.} at 302-03. Second, even though the behavioral assumptions of economic theory are unrealistic, "they do not falsify the studies that utilize them." \emph{Id.} at 303.

Judge Posner's first argument in support of the behavioral assumptions upon which microeconomic theory is constructed ignores psychological theories of human behavior that prescribe motivations other than self-interest for action. Rather than addressing these psychological theories which more fully explain human action, he expresses a personal observation on human character. Judge Posner's second argument expresses a generalization that economics is a concise science because its hypotheses are generally valid. Economics, however, is based on deduc-
static models upon which price theory is premised, Harvard theorists recognize that economic theory will be relevant to antitrust policy only if more realistic economic models, those that recognize the changes that occur within an industry over time, are employed. For instance, industrial organization economists have introduced models explaining the existence of barriers to entry other than economies of scale, uncertainty by business planners and
investors, product differentiation (which accounts for more than competitive profits without conditions of monopoly), and market power. To Harvard theorists, perfect competition and pure monopoly are only hypothetical extremities which are inappropriate theoretical tools for evaluating the dynamics of economic competition.

As evidenced by this scholarly debate, there is no scientific method for
predicting the actual market effects of a business practice. The absence of such a method is not disastrous, however, because the legal concept of competition has never been an economic one; instead, it has been a standard from which to evaluate business behavior. Since it must be applicable to various situations and changing environments, the imprecision of the legal standard of competition may be a virtue. Viewed in this light, the juxtaposition of the political and economic ideals of competition distinguishes the law of antitrust from a mere instrumentality designed to measure the technicalities of industrial efficiency. Inherent throughout the development

power, see infra note 232. Industrial organization economists have been concerned with pre-existing market structures consisting of competitive conditions. Monopolistic competition was developed to explain preexisting markets with monopoly characteristics, yet without the attendant conditions of pure monopoly. A monopolistically competitive industry has a large number of sellers who engage in some amounts of product differentiation. Professor Chamberlin is credited with establishing the monopolistic competition model. E. Chamberlin, The Theory of Monopolistic Competition (7th ed. 1956). Compare E. Chamberlin, Towards a More General Theory of Value (1957) (affirming the validity of the monopolistic competition model) and E. Mason, Economic Concentration and the Monopoly Problem (1957) (supporting the monopolistic competition model when an industry has a large number of sellers since this type of market structure is neither predominantly monopolistic nor predominantly competitive) with G. Stigler, The Organization of Industry (1968) (finding monopolistic competition theoretically unsound and reverting to pure theory).

Oligopolistic competition recognizes interdependence among firms in certain markets characterized by high concentration ratios. Whereas monopolistic competition is closer to perfect competition, oligopoly is closer to monopoly. Interconnectedness and mutual dependence of firms characterize an oligopolistic industry. For developments of this theory, see W. Baumol, Business Behavior, Value and Growth (rev. ed. 1967); R. Triffin, Monopolistic Competition and General Equilibrium Theory (1940). For a concise review of the oligopoly behavior models, see E. Singer, Antitrust Economics: Selected Legal Cases and Economic Models 85-111 (1968).

234. See, e.g., J. P. Areeda & S. Turner, Antitrust Law 91, 1113 (1976) (authors acknowledge the inexactitude of economics due to its theoretical gaps and lack of empirical verification).

235. As early as 1939, Harvard economist Edward Mason noted the great discrepancy between the legal problem of monopoly and the economic theory of monopoly. He concluded that the discrepancy was warranted because the law was trying to achieve social objectives that economists could not adequately consider. Mason, Monopoly in Law and Economics, 47 Yale L.J. 34, 45-46 (1939); see also E. Mason, Economic Concentration and the Monopoly Problem 332-36 (1957) (distinguishing legal and economic definitions of monopoly and competition).

236. Bernhard, supra note 229, at 1129.

237. Labeling it the "Magna Carta of free enterprise," the Supreme Court has equated the Sherman Act with the preservation of economic freedom. Community Communications Co. v. City of Boulder, 455 U.S. 40, 56 n.19 (1982) (quoting United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972)). The mere fact that since 1980 the Sherman Act has continually been used by the courts to strike down anticompetitive conduct is evidence of the act's flexibility to adjust to different environments.

238. The historian Richard Hofstader insightfully grasped the relationship between political and economic ideals in antitrust when he declared:

What makes it possible to institutionalize antitrust activities at the higher plateau that has been maintained since 1938 is not a consensus among economists as to
of antitrust policy is the belief that a self-regulating competitive economy is necessary to preserve our democratic institutions and to ensure a prosperous nation. Related to these underlying virtues of competition is the suspicion of concentrated power.

Another prevalent theme of antitrust policy is the populist notion that an environment that is conducive to the development of human potential is one in which everyone has a certain amount of freedom to act and to make decisions for himself. A powerful recognition of this theme was provided by Justice Marshall’s inspiring declaration:

its utility in enhancing economic efficiency, but a rough consensus in society at large as to its value in curbing the dangers of excessive market power. As in the beginning, it is based on a political and moral judgement rather than economic measurement of even distinctively economic criteria.


239. Consistent with our constitutional structure of checks and balances within the federal government, competitive markets serve to prevent private accumulation of economic power that could undermine democratic procedures. C. LINDBLOM, POLITICS AND MARKETS 165 (1977). As a result, the antitrust laws perpetuate the quest to defuse power that is exercised by a single entity or a consolidated group of interests. Cf. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 390 n.15 (1956) (a market dominated by a few producers would effectively insulate them from the discipline of competition).

240. See Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1956); see also supra note 186.

241. The suspicion of concentrated power is reflected in the classic statement by Judge Learned Hand, “Throughout the history of [the antitrust laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.” United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945). For a criticism of the Jeffersonian belief in a system of small producers, see Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & ECON. 7 (1966) (congressional intent was to promote efficiency). For repeated expressions of the concern with small business, see Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 56, 57 n.26 (1977); Ford Motor Co. v. United States, 405 U.S. 562, 578 n.12 (1972); United States v. Von’s Grocery, 384 U.S. 270, 274-75 (1966); Brown Shoe Co. v. United States, 370 U.S. 294, 333-34 (1962); Klor’s, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959); Fashion Originators’ Guild v. FTC, 312 U.S. 457, 463 (1941); United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 323 (1897).

Many commentators have argued that the Warren Court used the antitrust laws to forestall a perceived increase of concentrated economic power. See, e.g., Arnold, The Supreme Court and the Antitrust Laws: 1953-1967; 34 ANTITRUST L.J. 2 (1967) (Court appeared to ignore economic theory completely in its § 1 decisions); Kauper, The “Warren Court” and the Antitrust Laws: Of Economics, Populism, and Cynicism, 67 Mich. L. Rev. 325, 329 (1968) (same).

242. The standard precepts of the perfect competition model envision a large number of buyers and sellers, thereby preventing any individual from influencing another. Additionally, there exists complete freedom of entry to, or exit from, the market. Thus, deconcentrated markets are consistent with the assumptions of microeconomic price theory and the mistrust of social and political power. See, e.g., H. THORELLI, supra note 16, at 227 (congressional intent was to maintain business freedom); Bernhard, supra note 229, at 1129-36 (highlighting freedom of action as a basic concern to both legal and economic conceptions of competition); Blake & Jones, supra note 226, at 427-36; Bohling, supra note 179, at 465-70 (Supreme Court has articulated business autonomy and freedom of opportunity as the basic social concerns of the antitrust laws).
Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.2

As a professor, Judge Posner contended that “although noneconomic objectives are frequently mentioned in the legislative histories, it seems that the dominant legislative intent has been to promote some approximation to the economist’s idea of competition, viewed as a means toward the end of maximizing efficiency.”244 Most interpretations of the Sherman Act, however, recognize that its intended goal encompassed more than economic concerns.245 From the Act’s inception, Congress sought to alleviate the perceived economic and moral wrongs caused by the massive accumulation of wealth and power in trusts and combinations.246 Thus, the antitrust laws were based upon the recognition that without governmental intervention, the theory of classical economics would lead to antidemocratic institutions. Consistent with this recognition, courts may sacrifice perceived efficiencies in a given situation to preserve the overriding values that make economic competition desirable.247

244. R. Posner, Economic Perspective, supra note 31, at 20. Posner relied heavily on Professor Bork’s interpretation of the Sherman Act’s legislative history. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & Econ. 7 (1966) (Congress intended the courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output.)
245. The legislative history of the Sherman Act is rich in political perspectives reflecting the turn of the century. The debates, however, fail to provide a clearly articulated legislative intent for the Act. Hans Thorelli’s exhaustive examination of the events behind the passage of the Sherman Act represents the most widely accepted authority on the subject. H. Thorelli, supra note 16. Thorelli’s conclusion is that while a mixture of social, political, and economic factors existed, no singular congressional intent can be derived. Professor Letwin’s analysis reveals that both broader and vaguer goals motivated enactment of the Sherman Act. W. Letwin, supra note 14; Letwin, Congress and the Sherman Antitrust Law: 1887-1890, 23 U. Chi. L. Rev. 221 (1956); see also Sullivan, Sources of Wisdom for Antitrust, supra note 26, at 1218-23 (economic efficiency could not have been the primary intent behind passage of the Sherman Act).

The subsequent passage of amendments and additions to the Sherman Act provides additional evidence that Congress intended the antitrust laws to assume a broad political and social function. Section 7 of the Clayton Act was revised “to aid in preserving small business as an important competitive factor in the American economy.” S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950); see also Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962) (discussing at length the legislative history of § 7).
246. See, e.g., 21 Cong. Rec. 2,457, 2,460-61, 2,569 (1890) (remarks of Sen. Sherman) (Act is to be a bulwark against oppression at the hands of the economically powerful).
247. The Supreme Court has asserted that potential economic efficiencies cannot be used as a defense to illegality. FTC v. Proctor & Gamble Co., 386 U.S. 568, 580 (1967); accord
This broad objective of ensuring a competitive economy required equally broad statutory language. The courts were given the task of delineating the contours of the statute, a process inevitably highlighted by doctrinal confusion. As in most other areas of the law that require a balancing of multiple values, antitrust analysis is dynamic and typically characterized by the absence of mechanical rules. The stark simplicity of a single goal of efficiency enhancement, in light of the complexity of antitrust law, weighs against Judge Posner's claim that economic theory alone should determine legal conclusions.

In addition to disregarding the pervasive social and political goals of antitrust law, Judge Posner's judicial conception of competition forces him to disregard contrary precedent. For instance, in Products Liability, Judge Posner completely disregarded the Supreme Court's concern with individual competitors. He attempted to classify the Court's holding in Klor's, Inc.

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370-71 (1963); Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212-13 (1959); Northern Pac. Ry. v. United States, 356 U.S. 1, 6, 11 (1956) (tying arrangement denied competitors their freedom of access into the market for the tied product and the deprivation of the buyers' choice of products); Standard Oil Co. v. United States, 337 U.S. 293, 309 (1949). See generally United States v. Topco Assoc., Inc., 405 U.S. 596 (1972) (cooperative association that functioned as a purchasing agent for its members, thereby enabling the group to compete more effectively against the larger chains, held to be illegal since it inhibited freedom of competition).

248. 21 CONG. REC. 3, 148 (1890) (remarks of Sen. Edmunds) (stating that the Committee on the Judiciary believed that to attack the trusts legally, terms used in the bill should have preexisting legal definitions; the courts would then determine "how far they could carry . . . it's definition as applicable to each particular case")

249. Analogizing the antitrust statutes to constitutional provisions, the Supreme Court has identified its role in interpreting these laws as similar to its role in developing constitutional standards. In Appalachian Coals, the Court stated:

As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through participation defeat its purposes by providing loop holes for escape.

Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).


251. Before his elevation to the bench, Judge Posner analyzed the practice of judicial reliance on precedent as follows:

It is the practice of deciding in accordance with precedent that makes decisions operate as precedent. No matter how willful a judge is, he is likely to follow precedent to some extent, for if he did not the practice of decision according to precedent . . . would be undermined and the preceptual significance of his own decision thereby reduced. There is, to be sure, a potentially serious free-rider problem. The judge who disregards all precedents but his own may gain more utility in increased freedom to impose his personal preferences on the community than he loses by contributing to a general erosion of the principle of adherence to precedent. But the free-rider problem is held in check by the structure of appellate review. . . . [A higher court's] power to review the decisions of the lower courts checks any tendencies on the part of the lower-court judges to disregard precedent (reversal foils a judge's attempt to create his own precedent), and its own position in the judicial hierarchy checks its members' tendencies in that direction.

J. Ehrlich & R. Posner, An Economic Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257,
v. Broadway-Hale Stores, Inc.\footnote{252} as "belong[ing] to an era in Supreme Court jurisprudence when the Court was concerned with the welfare of individual competitors as well as with the health of the competitive process viewed as a means of protecting consumers."\footnote{253} Contrary to Judge Posner's belief, the preservation of both competitors and competition is a legitimate and consistent goal of antitrust law.\footnote{254} Since the protection of competitors would be incompatible with his legal theory that the sole aim of antitrust is the enhancement of efficiency, he seemingly requires a choice to be made between protecting either competitors or competition.\footnote{255} By relegating the Court's decision in Klor's to a jurisprudential approach that he perceives is no longer defensible, Judge Posner discards a finding of an illegal conspiracy to drive out a plaintiff who was such a minute factor in the marketplace that its absence could in no way affect market conditions.\footnote{256} Significantly, however, the Supreme Court has neither implicitly nor explicitly overruled Klor's.

\footnote{273}{(1974).}

Recently, in Vail v. Board of Educ., 706 F.2d 1435 (7th Cir. 1983), an interesting exchange occurred between Judge Eschbach and Judge Posner on the nature of the precedential value of United States Supreme Court decisions. Judge Eschbach wrote a concurring opinion especially designed to respond to Judge Posner's "strongly worded dissenting opinion." \footnote{Id.}{at 1441 (Eschbach, J., concurring).} After describing a certain case that dealt with the property interest in employment as "correctly decided," Judge Eschbach went on to explain:

> When I say "correctly" decided, I mean that it was decided in accordance with the authoritative pronouncements of the United States Supreme Court and remains good law in light of subsequent precedent. Whether it was correctly decided in some sort of ultimate jurisprudential or philosophical sense is not within my domain as an intermediate appellate court judge once I have decided that it was properly decided in the former sense. My brother Posner calls this approach to deciding cases "putting the blame on the [Supreme] Court." . . . I call it adherence to \textit{stare decisis} and to a superior authority.

\footnote{Id.}{(Eschbach, J., concurring).}


253. 682 F.2d at 665 (7th Cir. 1982).

254. Although it has been repeatedly recognized that the antitrust laws protect competition, and not competitors, competitive systems inherently require competitors. Hermann, \textit{Antitrust Law}, 51 CHI.-KENT L. REV. 288, 300 (1974). An economy that is comprised of multiple competitors should not be preserved for nostalgic reasons; social and economic realities dictate that certain industries will have fewer competitors. Yet, this fact of contemporary industry does not lead to the conclusion that efficiency occurs only by concentration. Rather, when there are a great number of effective competitors, downward pressure on price will occur, greater diversity of ideas will be generated, and dispersion of economic and, hence, political power will result. \textit{See generally Fox, Economic Concentration, Efficiency and Competition: Social Goals and Political Choices}, in \textit{Industrial Concentration and the Market System} 137 (E. Fox & J. Halverson ed. 1979).

255. Judge Posner's distaste for the preservation of competitors presumably derives from his objection to "deviant" noneconomic objectives. R. Posner, \textit{Economic Perspective}, \textit{supra} note 31, at 18-22. Although noneconomic objectives historically have been recognized, they are difficult to formulate into coherent legal criteria. Furthermore, the recognition of values other than efficiency has made antitrust law an anticompetitive doctrine. \textit{Id.} at 22 ("the scope for judicial reform of antitrust doctrine is enormous").

256. The plaintiff in Klor's was a small retail appliance dealer which alleged that one of its competitors had effectively conspired with 10 national appliance manufacturers which agreed either not to sell to Klor's, or to sell to Klor's only at devastating prices. 359 U.S. at 208-09.
C. Possible Trends of the Seventh Circuit

The manipulation of precedent illustrates the two divergent directions in which the Seventh Circuit is moving. One direction leads to embracing the Chicago school approach to antitrust resolution. Five months after *Products Liability* was decided, Judge Posner cited that decision as the authoritative definition of "competition in its antitrust sense." As previously noted, this definition is based purely on the economic theory that he personally espouses. Because competition is the explicit concern of antitrust laws, its legal definition determines the disposition of antitrust adjudication. By defining competition exclusively as a technical economic term, the Seventh Circuit has narrowed the scope of protection under the antitrust laws by excluding the political and social objectives of the statutes. Such a contraction is unfortunate; it ignores the broad philosophical view of competition that lies outside the economists' thinking. Economists themselves cannot reach a consensus on the meaning of competition, and, even if they could, the definition would fail to recognize some of the multifarious aspects of the term. The economic approach tends to disregard the ethical, legal,
and social concepts that a humanistic approach to the law would recognize.263

In Sylvania, the Supreme Court stated that "[c]ompetitive economies have social and political as well as economic advantages . . . but an antitrust policy divorced from market considerations would lack any objective benchmark. . . ."264 This statement has been used by Chicago school theorists to support their position that the Court has embraced efficiency as the standard for antitrust adjudication.265 Although Sylvania supports a stronger position for economic theory in antitrust law, the decision merely concluded that the economic benefits derived from using nonprice vertical market restraints are sufficient to justify rejecting the per se illegality standard.266 Moreover, the Supreme Court has continued to apply per se illegal rules267 that disallow any inquiry into the presumed economic justifications for the practice.268

As the Court has recognized, "Per se rules thus require [the judiciary] to make broad generalizations about the social utility of particular commercial practices."269 Ultimately, the Seventh Circuit would have to reject all per se illegality rules if efficiency becomes the standard for evaluating alleged antitrust violations.270

The Seventh Circuit is also moving toward accepting the theoretical postulates of Judge Posner. According to one of these postulates, efficiency should be the sole standard in analyzing antitrust cases.271 Judge Posner con-

266. See supra notes 157-58 and accompanying text.
268. See, e.g., Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968) (vertical maximum price-fixing agreements held per se illegal over objection that they were not the "economic equivalent" of minimum price fixing); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("Among the practices which the Courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements."); Keifer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213 (1951) (per se rule to maximum price fixing agreements for "no less than those to fix minimum prices, cripple the freedom of trader and thereby restrain their ability to sell in accordance with their own judgement"); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, 226 (1940) (inquiry into the reasonableness of price-fixing agreements is not permitted; all such agreements "are banned because of their actual or potential threat to the central nervous system of the economy").
270. By opting for an economic approach to antitrust law, the practices of "[t]ie-ins, reciprocal buying, exclusive dealing, vertical mergers involving large market shares, [and] boycotts" would logically become per se legal. Posner, Reflections on Sylvania, supra note 31, at 13. This conclusion is premised on the notion that by rejecting the per se illegal rule created in Schwinn, the Supreme Court has chosen economic efficiency as the sole aim of antitrust. "To accept that conclusion, one must believe that the Schwinn holding embraced the Brandeis-Hand interpretation [that the laws were designed to preserve a system of small entrepreneurs] exclusively, and that the present Supreme Court necessarily adopted an opposing policy in overruling Schwinn." Kellman, supra note 151, at 1111.
tends that acceptance of such a standard would create a more manageable and coherent body of legal precedent. His descriptive use of economics—one which generates predictions of various courses of action from hypotheses derived from microeconomic theory—is becoming the accepted antitrust doctrine of the Seventh Circuit.

In his academic writings that advance the jurisprudential value of economic analysis, Judge Posner also has asserted a normative claim. He maintains that because legal rules allocate the rights and duties of members of society, the law should promote efficiency in order to maximize social welfare. Judge Posner defines efficiency as "exploiting resources in such a way that human satisfactions as measured by aggregate willingness to pay . . . [are] maximized." Thus, in resolving legal disputes, the courts should attempt to achieve the allocation of rights which will generate the greatest efficiency; such allocations would increase human satisfaction and, thereby, advance society's wealth.

The justification for the normative assertion that efficiency should guide legal resolutions invites several devastating criticisms. First, the notion that welfare is identical to human satisfaction or desires ignores several important factors. One such factor, the distribution of income from which individuals derive their ability to purchase goods, may be unjust. Since willingness to pay supposedly measures human satisfaction, and in the aggregate social welfare, those with the greatest amount of wealth have the greatest ability to pay. Rules that maximize wealth would therefore favor the wealthy and, consequently, preserve the status quo. In legal disputes, however,

273. For example, the Seventh Circuit has begun to accept his definition of competition as the standard for evaluating antitrust claims. See supra notes 212-13 and accompanying text.
275. For a development of the distinction between the normative and descriptive aspects of economic analysis, see Posner, supra note 228, at 284-87.
277. Judge Posner attempted to develop wealth maximization as an ethical norm in Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 103 (1979). His definition of wealth is "the value in dollar or dollar equivalents . . . of everything in society." Id. at 119. For an argument that wealth is not an ethical value, see Dworkin, Is Wealth a Value?, 9 J. Legal Stud. 191 (1980).
279. See supra notes 276-77 and accompanying text.
280. Professor Morton J. Horwitz of Harvard Law School has identified the ramifications of Judge Posner's assertion that wealth maximization should be the normative goal of judicial decision making:
I also suppose that the shift from "efficiency" to "wealth maximization" is a response to a decade of attacks on the claims of "efficiency" to scientific status.
For a long time, efficiency has been used in the economic analysis as if it were
the divergence between social ideals and the existing social order is often the cause of conflict. Another related factor, which is ignored by the criterion of efficiency, is that economics measures only market transactions—what is bought and sold. Accordingly, economics relates to objects and not to subjects. People's conscious wants, desires, or aspirations are ignored by merely focusing on what they consume. As one critic of the normative basis of economic theory declared, "The simple claim that the market maximizes value begs the question; it fails to justify the way or amount an individual's evaluation is weighed in determining value."

Finally, equating welfare with the desire for commodities at a given price ignores the fact that what is desired may not actually be in the best interests of the individual or society. This criticism assumes that most desires are socially learned and that a large part of the desire to consume is generated by product advertisements. When a business advertises, its goal is to generate sales in order to maximize profits—not to promote social welfare.

Whether the Seventh Circuit will embrace the normative claim of efficiency (wealth maximization) has yet to be determined. If the court does, it must recognize that efficiency is dependent on explicit assumptions about human desires and specified factual circumstances. Judge Posner's transformation, from efficiency postulates to his repeated attempts at justifying the normative validity of wealth maximization, reflects the transparency of his claim that an economic approach to judicial decision making is a scientific methodology. As Professor Horwitz concluded in one of his recent articles, Judge Posner's shift from efficiency to wealth maximization is the first time that I know of that Professor Posner has left the comfort-

an independent concept, not entirely relative to whatever distribution of wealth existed. And once it has been realized that efficiency is, by definition, a function of a particular distribution (invariably the status quo), the inherently conservative bias of the definition of efficiency becomes clear.


For another equally eloquent critique of wealth maximization, see Baker, supra note 278, at 957.


282. Attempting to justify the claim that by concentrating on consumption, economics is a powerful indication of human desires, Judge Posner declared that "[w]illingness to pay provides more credible evidence of preference than willingness to say." Posner, Economic Justice and the Economist, 33 Pub. Interest 109, 114 (1973).


284. Professor Baker has argued that product offerings are restricted to those that ensure continuing control of resources in the hands of the existing owners. Because of limited alternatives, the consumers cannot be expected to promote welfare. Id. at 36 n.63.

285. See, e.g., Tushnet, Legal Scholarship: Its Causes and Cure, 90 Yale L.J. 1205, 1212 (1981). Professor Tushnet argues that the Chicago school model uses unsupported abstractions. "When the scientific pretensions of the Chicago approach are greatest, the analyst follows the model of the physical scientist and adopts a large number of simplifying assumptions. The purified system is then analyzed and predictions and explanations are generated. The real world, however, is necessarily more complex. . . ." Id.
ting but dogmatic and parochial certainties of the scientist behind and attempted to engage in systematic social theory.

... The economic analysis of law, I believe, could maintain its prestige only so long as it wrapped itself in the cloak of science. Once its practitioners became overt apologists for a grossly unequal Distribution of Wealth, it is only a matter of time before they are pluralistically assigned to the class of one of the many "ideologies" from which one may pick and choose. After twenty years of attempting to claim that they stood above ideology in their devotion to science, the practitioners of law-and-economics have finally been forced to come out of the closet and debate ideology with the rest of us.286

In the search for a valueless criterion by which to determine appropriate business behavior, Judge Posner's embrace of efficiency must be recognized as entailing a particular viewpoint based on a predetermined set of priorities.287

CONCLUSION

Before becoming a judge for the United States Court of Appeals for the Seventh Circuit, Richard A. Posner suggested that antitrust law was in need of major reform.288 He maintained that the reforms should be accomplished by judicial reevaluation of antitrust jurisprudence through the lens of microeconomic price theory. According to Judge Posner:

The body of antitrust doctrine is largely the product of judicial interpretation of the vague provisions of the antitrust laws and thus can be changed by the courts within the very broad limits set by the statutory language and what we know of the intent behind it. What is required is judicial recognition that many of the existing judge-made rules of antitrust are inconsistent with the fundamental, and fundamentally economic, objectives of the antitrust law.289

286. Horwitz, supra note 280, at 912. Professor Horwitz also maintained that once the ground of debate shifts to social theory—as the cumulative assaults on Posner's position finally have forced him to acknowledge—it is only a short time before the main attraction of efficiency analysis—the promise of a single "scientific" right answer—will begin to fade into a quaint and nostalgic past. Id. at 905.


288. Judge Posner has professed that only abusive monopoly pricing and cartel arrangements at a horizontal level (among competitors) would be illegal. This is because theoretically these are the only dangerous business activities in a capitalistic society. Furthermore, according to Chicago school theory, since cartels are inherently unstable it is only their short term effects that must be guarded against. R. Posner, Economic Perspective, supra note 31, at 16-18. Monopolies also are prone to market instability; if their profits are exorbitant, new firms will enter the market (assuming few barriers to entry exist). Id. Consequently, decisions dealing with criminal intent, see, e.g., United States v. United States Gypsum Co., 438 U.S. 422 (1978); tying and exclusive dealing arrangements, see, e.g., Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958); and price/nonprice vertical restraints, see, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), would no longer be of antitrust concern. R. Posner, Economic Perspective, supra note 31, at 225-26, 274-76, 201-13, 247-67.

This Comment has attempted to show that Judge Posner remains committed to radical revisions of antitrust law consistent with his personal view.\footnote{90} To accomplish these fundamental changes, Judge Posner has shown a willingness to ignore the scope of appellate review by presenting advisory conclusions on substantive antitrust issues.

The focus of this Comment generally has been on the procedural and evidentiary rulings of Judge Posner in the antitrust context and on how these rulings affect the substantive law of antitrust.\footnote{91} The cumulative impact of these rulings, subsequently applied and extended in a manner consistent with the theoretical postulates of Judge Posner, is that antitrust plaintiffs must be prepared to overcome a host of mechanisms explicitly designed to decrease their success rate.\footnote{92} Because it is well recognized that the Reagan administration has systematically restricted the initiation of governmental enforcement of many areas of antitrust law, private litigation assumes even more impor-

\footnote{90} This Comment has attempted to draw a parallel between Judge Posner's academic writings and his subsequent judicial opinions. In his judicial opinions, Judge Posner has the distinct tendency to draw upon, and cite to, his own writings (both judicial and nonjudicial) and to other Chicago school theorists' works. This reliance on an isolated school of thought is also readily apparent in his writings as an academician. One renowned commentator highlighted this tendency in reviewing The Economic Analysis of the Law:

"What Posner has done is to capture in a single volume the rather distinctive ideology which has tended to reflect itself in the intellectual activity of the University of Chicago Law School for the last twenty years or so. . . . [T]he analysis of the controversial issues [in this book] is often short of persuasive. One flaw in the analysis, as it seems to this reviewer, is a tendency of Posner to be doctrinaire. This tendency is fairly overt; Posner, with few exceptions, cites only his colleagues at the University of Chicago or their students and associates."

\footnote{Carrington, Book Review, 1974 U. ILL. L.F. 187, 188.}

\footnote{91} Judge Posner depicts the legal system as "an instrument reflecting the objective of economic efficiency." Hermann, Book Review, 1974 WASH. U.L.Q. 354, 371 (reviewing R. POSNER, ECONOMIC ANALYSIS OF LAW (1974)). Professor Hermann stated:

Civil procedure is discussed from the viewpoint of maximizing efficiency of the trial and encouraging settlement, thus reducing the overall cost of the judicial system. Settlement is affected by the relative cost of settlement and litigation, the parties' attitudes toward risk, and their evaluation of the likely outcome. All of these are, of course, affected by the rules of pretrial procedure as well as the cost of litigation."

\footnote{Id. at 371 n.102 (citations omitted).}

Judges Posner once identified the relationship between procedural and substantive rules as follows:

An important purpose of substantive legal rules . . . is to increase economic efficiency. It follows . . . that mistaken imposition of legal liability, or mistaken failure to impose liability, will reduce efficiency. Judicial error is therefore a source of social costs and the reduction of error is a goal of the procedural system.

\footnote{Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. LEGAL STUD. 371, 400-01 (1973). Thus, viewing procedural as well as substantive rules as capable of enhancing efficiency, Judge Posner, through procedural rulings, is attempting to effectuate his ideal that efficiency should be the sole aim of the antitrust laws.}

\footnote{92} Judge Posner once analyzed the effects of procedural and substantive rules on the expense of litigation. Due to the fact that litigation is premised on "mutual optimism," that is, that "both parties believe they have a good chance of winning," it follows that any change in the substantive or procedural law that affects one of the parties' evaluations of its chance of success will decrease the rate of litigation. Posner, supra note 291, at 417-19.
tance as the vanguard of vigorous antitrust enforcement. Yet, due to the antitrust decisions highlighted in this Comment, effective private enforcement of the antitrust laws is undermined. Thus, the current policies of the Justice Department's antitrust division, combined with Judge Posner's assaults on antitrust plaintiffs, evince a significant deterioration of antitrust enforcement within the Seventh Circuit's jurisdiction.

As an academician, Professor Posner was in the proper position to criticize the inexactitude of the Supreme Court's antitrust decisions. The theoretical hypothesis he presented to the legal community often served as the focal point for debate among legal scholars. His criticism of the use of a per se illegality standard to nonprice vertical restraints was cited with approval by the Supreme Court in overturning that standard. Nevertheless, one need not contemplate too long on whether the Court has adopted his perspectives on antitrust in toto; resoundingly, it has not.

Judge Posner's ultimate conclusion—that efficiency predictions should be the basis for evaluating antitrust disputes—requires complete relinquishment of recognized values incompatible with economic efficiency. The overriding premise of the Supreme Court's various interpretations of the antitrust laws is that competition in the marketplace assures economic, political, and social freedom. By promoting competition, the antitrust laws conform with these broad objectives and ensure that the gap between the ideals of capitalism and present-day reality does not become irreparable. Neither the Supreme Court nor Congress has mandated that economic efficiency is the determinative value of the antitrust statues. Recently, however, the Seventh Cir-


Ironically, Posner had successfully argued on brief and before the Court for the government in Schwinn, the case in which the per se illegality standard was established. See Brief for Appellant, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). With respect to these inapposite positions, Professor Posner responded that since the time of Schwinn, his economics had taken a "180° turn." Posner, Reflections on Sylvania, supra note 31, at 2.

294. R. POSNER, ECONOMIC PERSPECTIVE, supra note 31, at 2, 236.

295. Id. at 18-22.

296. For a discussion of the values associated with competition, see supra notes 236-43 and accompanying text.

297. If, as can be assumed from the opening quotation of this conclusion, judges must interpret the will of Congress, then it appears that much of the complexity surrounding the antitrust statutes is due to the lack of a clear congressional intent. Judge Posner, however, relies solely on Professor Bork's description of congressional intent in arguing that efficiency is the singular intent underlying the Sherman Act. See R. POSNER, ECONOMIC PERSPECTIVE, supra note 31, at 23 (citing Bork, Legislative Intent and the Policy of the Sherman Act, 6 J. L. & ECON. 7 (1966), for proposition that framers of Sherman Act were "concerned mainly with the price and output consequences of monopolies and cartels"). There are major studies suggesting that no economic intent can be derived, and that Congress had strong social and political objectives in enacting the Sherman Act. See supra notes 245-48 and accompanying text.

Furthermore, if efficiency is the goal of the antitrust statutes and the courts have deviated
THE SEVENTH CIRCUIT'S RESISTANCE TO THE CHICAGO SOLUTION

The Seventh Circuit has evinced a willingness to accept the efficiency standard of Chicago school theory as articulated by the court's new colleague. It is urged that the Seventh Circuit should remain more objective in its approach to the antitrust statutes, the vitality and integrity of which must not be compromised by blind adherence to a singular theoretical position.

Jerry M. Santangelo

from that objective, then Congress could provide a remedy as suggested by President and Supreme Court Chief Justice Taft:

"It is impossible that such a function as [antitrust adjudication] could be performed by judges, who are only men, without at times exceeding their just discretion, without at times stepping over the line which is very hard to draw between judicial construction and judicial legislation. But it must always be remembered that the legislature has complete power in this regard, and that if the courts in their construction of law miss the intention of the legislation there is immediate relief at hand in a new law which may be made more clearly to set forth the legislative will." W. Taft, The Anti-Trust Act and the Supreme Court 3 (1914).

298. See supra notes 212-13 and accompanying text. But see MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1177-79 (7th Cir. 1983) (Wood, J., dissenting). Judge Harlington Wood dissented from the majority's adoption of the Areeda and Turner rule for predatory pricing analysis because, in his opinion, the rule inappropriately considers only certain limited economic criteria. After outlining the historically recognized social and political goals of antitrust law, Judge Wood addressed the articulation of efficiency enhancement as the sole goal of antitrust jurisprudence.

With this rich history and jurisprudence stressing the wide-ranging social concern of the antitrust laws, it is difficult to entirely understand the enthusiasm with which many embrace the theory that these laws stand only for economic efficiency. Intellectual fashion no doubt plays a part. It is interesting to note in this connection that the historical and jurisprudential arguments on behalf of this narrowed horizon for the antitrust laws were not articulated with any coherence until the mid-1960's, when the "law and economics" movement began to attain an economic foothold. . . . While it is perhaps best left for legal historians to trace the intellectual origins and impact of the "law and economics" approach, we note here only that it is at most a set of contestable premises and certainly a relative newcomer to areas marked by rich legislative and decisional history. While not negating the value of policy arguments based on efficiency, I am hesitant to abandon the jurisprudence and historical texture of the antitrust laws in order to embrace a set of seemingly hard and fast efficiency rules which present an illusion of conceptual and empirical tidiness.

Id. at 1179 (Wood, J., dissenting).

299. See generally Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605 (1908) (arguing that scientific tools for attaining justice cannot make the law subservient to their insights).

300. It is fitting to end this Comment by quoting from a letter written by a former colleague of Judge Posner's and published in the February 7, 1983, edition of the National Law Journal:

Since President Reagan has demonstrated no reluctance to appoint law professors to the federal judiciary, it may be appropriate to take another look at the proper role of the Senate in reviewing and approving these most important presidential appointments. In particular, the question arises: to what extent should a person's public expression of and commitment toward an ideology hostile to prevailing law and public policy effectively preclude him from serving as a judge?

Part of the job of a law professor is to criticize and seek change. In fact, law
professors often achieve prominence through their association with innovative reform and more radical schools of thought. Yet the role of a federal judge is institutionally different, if for no other reason that to engender respect for the rule of law—distinguishing our government system from others—among the public.

Perhaps most startling among this group of professor-judges is Richard A. Posner, formerly a prolific University of Chicago law professor. . . .

Judge Posner's writing and consulting had long been known for its revisionist, anti-populist critique of the existing body of antitrust legislation and Supreme Court caselaw. Judge Posner's antitrust casebook had set forth and criticized 50 years of Supreme Court antitrust boycott law as being too restrictive to business integration and not promoting economic efficiency.

Perhaps, therefore, it should have come as no surprise that Judge Posner's opinion in [Marrese v. American Academy of Orthopaedic Surgeons, 692 F.2d 1083 (1982)] relied on his own views and ignored at least six relevant landmark Supreme Court decisions, constituting the 50-year development of the law through the present day. . . .

The Posner opinion in Marrese represents the imperial judiciary in its extreme. The possibility of similar judicial nullification, based upon any ideology, should be addressed specifically by the Senate in its confirmation hearings, at least where the nominee is so publicly associated with an extralegal view of public policy.