

## COMMENTARY

# THE FUNCTION AND DYSFUNCTION OF PER SE RULES IN VERTICAL MARKET RESTRAINTS

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### I. INTRODUCTION

In 1963, the Supreme Court held it did not know enough about the "economic and business stuff" out of which nonprice vertical market restraints "emerge" to determine whether they should be measured by a "rule of reason" test or one of "per se illegality."<sup>1</sup> Seventeen years later, after one flip<sup>2</sup> and one flop<sup>3</sup> (or vice-versa depending on your view) by the Court and extensive academic speculation on all sides of the issue,<sup>4</sup> only one certain conclusion remains: We do not know enough to generalize conclusively about the impact of a wide variety of vertical nonprice restraints on the preservation of a competitive process and the goals of antitrust policy, which the process seeks to achieve.

In the debate and court decisions, which continue to wrestle with various aspects of the question, fixed theological convictions and factual speculation too often are substituted for a factually based, but principled, analytical process. Court decisions appear to substitute

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1. *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

2. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (Court used "per se violation" test).

3. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("per se" test overruled in favor of "rule of reason" test).

4. In addition to the articles cited by Professors Stewart and Roberts, 58 WASH. U.L.Q. 727 (1980), other articles of particular note include: Altschuler, *Sylvania, Vertical Restraints and Dual Distribution*, 25 ANTITRUST BULL. 1 (1980); Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis and Sylvania*, 64 IOWA L. REV. 461 (1979); Goldberg, *The Law and Economics of Vertical Restrictions: A Relational Perspective*, 58 TEX. L. REV. 91 (1979); Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978); Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953 (1979); Zelek, Stern & Dunfee, *A Rule of Reason Decision Model After Sylvania*, 68 CALIF. L. REV. 13 (1980).

concept shoving, ad hoc ideological decisions, or factual speculation about hypothetical cases not before the Court for a reasoned and understandable method for resolving issues raised by controversies over vertical nonprice restraints. Academic debate on the issue sometimes proceeds from closed systems of fixed beliefs that claim the "oughts" of the belief determine the "is" of reality or that the "is" of reality cannot hope to do other than conform to the "oughts" of the beliefs wrapped up in the model if the legal system would only allow reality to operate free of intervention.<sup>5</sup> Other commentators indulge in general factual speculation derived from a particular hypothesis of limited observed phenomena, by claiming that the general factual speculation or observed phenomena can decide particular cases in the future only if overriding weight be given that particular hypothesis or slice of reality. One can read and ponder samples of each type of criticism and become impressed by the logic of the analysis, the persuasiveness of the approach, and the sincerity of the advocate, yet conclude that we do not know enough to reach firm conclusions about the antitrust implications of vertical market restraints. If we did know enough about the "stuff" of vertical market restraints, why then the growing number of law review articles offering different approaches and opposing solutions?

The proliferation of divergent proposals for antitrust analysis of vertical restraints makes clear that the Court's conclusions and method of analysis in *Continental T.V., Inc. v. GTE Sylvania, Inc.*<sup>6</sup> are just as incomplete and full of unknown implications as the Court's conclusions and methodologies in *United States v. Arnold, Schwinn & Co.*<sup>7</sup> Some aspect of the assumptions and methodology of each opinion, or the lack

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5. These methods of analysis are characteristics of advocates making particular economic models the premise of antitrust analysis. Not only are the assumptions of the model carried over to antitrust analysis of specific cases, but also the deductive application of the method of the school of economic analysis is carried into the legal analysis of specific cases. When this occurs, only those factual explanations of the dispute consistent with the preordained model and its assumptions are the permitted explanations of the conduct before the Court. Thus, the "oughts" of the belief determine the "is" of reality. In the case of disciples of a rigid following of neoclassical theory, who see most government intervention in the market as counterproductive to the "efficient" functioning of the "market," they believe reality cannot hope but to conform to the dictates of the "market" if the legal system would only leave it alone. For pre-*Sylvania* analysis of vertical restraints with these tendencies, see Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Divisions (pt. II)*, 75 YALE L.J. 373 (1966); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975).

6. 433 U.S. 36 (1977).

7. 388 U.S. 365 (1967).

of them, suggests that the Court has grabbed a few of the relevant issues, but not all of them or even all sides of the few. The *Schwinn* opinion made the test for legality and illegality a wooden application of the venerable doctrine of restraints on alienation. The *Sylvania* opinion, however, makes conclusive as a test for legality, the wooden application of an abstract, artificial, and theoretical analysis of one brand of neoclassical economic thought.<sup>8</sup> Both cases represent an either/or mentality when reality, the facts of cases, common sense, the legal process, and the goals of antitrust policy call for something in between these bright line rules. Professors Stewart and Roberts demonstrate partially why bright line rules are inadequate in their analysis of the implications of *Sylvania* for other per se rules and their proposals for resolution of the ambiguities raised by *Sylvania*. Their proposed solutions, a series of complex rules stressing the quantitative impact of particular restraints, however, strike me as theoretically titillating, but practically unworkable and undesirable standards for efficient and effective implementation of antitrust policy in the context of the judicial process. The problem is not one initiated by Stewart and Roberts because it is not their analysis that generates the complexity. Rather, the Court's opinion in *Sylvania* causes the difficulty. The problem is a broader one than merely the manipulation of some of the unstated and often unrealistic factual assumptions of the neoclassical paradigm implicitly relied on by the Court in *Sylvania* in order to develop standards that account for more of the reality of vertical market restraints than permitted by the paradigm and *Sylvania*. A re-evaluation of the Court's assumptions of fact and value, as well as the Court's skill in the use of the legal process in *Sylvania*, is necessary to suggest sensible standards for other areas of per se and rule of reason analysis.

In view of the limitations of the task Stewart and Roberts set out for themselves, the Authors did not pursue extensively an inquiry into the merits of the *Sylvania* Court's substantive assumptions and methodology. They question instead the significance of some of the Court's assumptions, account for a broader slice of the reality of vertical restraints than involved in *Sylvania*, substantially ignore the potential of criticizing the Court's methodology, and compile a list of substantive rules to determine—category by category—the outcome of future litigation. It is a thoughtful and useful project, but one that does not go

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8. See Flynn, *The Role, if Any, of Economic Analysis in Antitrust Litigation—A Response*, 12 Sw. U.L. Rev. — (1980).

far enough in view of the significant implications of the *Sylvania* decision. Rather than limit this inquiry to the post-*Sylvania* vitality of other per se rules in terms of the *Sylvania* analysis and methodology, the task requires first a critical examination of the goals of antitrust policy posited by *Sylvania* and shortcomings in the methodology by which the Burger Court implemented those goals through a common-law process of analysis.

*Schwinn* and *Sylvania* are symptomatic of some deeper problems in both the evolution of antitrust policy and the Court's skill in carrying out its function of enforcing the antitrust laws. These are problems that will not be resolved by fiddling with this and fiddling with that to arrive at a list of substantive rules tracking *Sylvania*, which one may carry to future frays with the misguided confidence of a law student entering an examination with an outline of simplistic rules but little understanding of the policies behind those rules and no method for either intelligently invoking them, determining their meaning, or applying them.

## II. ASSUMPTIONS OF THEOLOGY AND METHODOLOGY

Because Stewart and Roberts do not confront directly the *Sylvania* Court's assumption of a particular brand of economic theory as the theological predicate for analysis of vertical market restraints and the methodology employed by the Court for making the theology decide particular cases, the Authors engage in the practical task of divining the implications of what is an unartful and inappropriate exercise of the judicial process by the Burger Court. In *Sylvania* the majority identified several potential commercial justifications for imposing vertical market restraints.<sup>9</sup> The Court assumed that a manufacturer would not ordinarily impose those restraints in light of the neoclassical theory that assumes maximization of unit sales and revenues by a firm assumed to be operating under the dictates of a perfectly competitive market, making presumably rational decisions, dealing with presumably rational distributors, and marketing to presumably rational consumers.<sup>10</sup> The

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9. 433 U.S. at 54-56.

10. The following observation is of a type found often in the *Sylvania* opinion:

Generally a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, because a lower retail price means increased sales and higher manufacturer revenues. In this context, a manufacturer is likely to view the difference between the price at which it sells to its retailers and their price to the consumer as its 'costs of distribution,' which it would prefer to minimize.

433 U.S. at 56, n.24 (citing Posner, *Antitrust Policy and The Supreme Court: An Analysis of the*

Court used one kind of economic theorizing to test reality and used the theory in the end of the analysis, rather than as a source for potential insights to understand reality and as a hypothesis for the beginning of analysis. Pyramiding assumptions to dictate conclusions should be at least as objectionable in law as building rickety structures of inferences on inferences to find facts. Conceptualizing economic analysis as one brand of thought among many and making that brand of thought the primary or sole goal of antitrust policy builds a dangerous inflexibility and blindness into the law. The Court invited these risks by adopting the neoclassical views of Professors Bork<sup>11</sup> and Posner<sup>12</sup> for not only determining what the law ought to be in analyzing vertical restraints, but also as the only basis for determining what reality ought to be used in the analysis.

The "rationality" assumption of both consumer and firm, the "efficiency" assumption of the functioning of perfectly competitive markets, and the existence of a competitive market in conformity with the models as the parameters of the reality of the dispute before the Court, and as expressions of the values that are permissible considerations for deciding the case, provides an airtight syllogism for deciding all cases in all categories of recognized per se violations despite the facts of any particular case. Justice White's concurrence<sup>13</sup> and the post-*Sylvania* comments of Professors Bork<sup>14</sup> and Posner,<sup>15</sup> which hoist the Court on the twin petards of its assumptions and methodology with regard to vertical price-fixing, serve to emphasize the consequences of adopting a narrow view of the purposes of the antitrust laws and an axiomatic method of deductive logic for implementing the law. Carried to its logical extreme, the Court's analysis may jeopardize all horizontal per se tests, absent a significant quantitative effect of a restraint that injures

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*Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283 (1975), and Note, 88 HARV. L. REV. 636, 641 (1975)). It is impossible to assess the degree to which the Court assumed such speculation explains all reality, the reality of the case before the Court, or what "ought" to be the assumptions underlying what "ought" to be the legal standard governing vertical market restraints. In any event, it remains speculation and indicates a tendency to decide real cases by postulating hypothetical ones.

11. Bork, *supra* note 5.

12. Posner, *supra* note 5, at 283.

13. 433 U.S. at 586.

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

15. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977).

"consumer welfare."<sup>16</sup>

If one begins with the proposition that the sole goal of antitrust policy is to maximize "consumer welfare" as defined by the fixed models of one brand of economic theorizing and the imaginary workings of a perfectly competitive market, which only permit a minor premise on factual assumptions in accord with the models of the major premise but not necessarily in accord with unvarnished reality, the operations of deductive logic dictate the conclusion: Only those restraints that quantitatively displace the "market" and impair "consumer welfare" are unlawful under the antitrust laws because all others are either promoting "consumer welfare" or will be efficiently remedied by the functioning of the perfectly competitive market. Q.E.D. It is a conclusion, how-

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16. Professor Bork has defined "consumer welfare" in a libertarian way by making the definition hinge on measuring economic performance and the scope of the law in terms of the impact of judicial intervention on the operations of the "market," rather than seeing the court's function as judging the validity of market intervention by private agreements in light of the goals of antitrust policy. He is allowed to offer this interpretation by virtue of the following definition: "'Competition' may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree." R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 61 (1978). "Basic price theory" is made the "criteria" for courts to determine whether their intervention enhances "consumer welfare." *Id.* at 84. The concept of "consumer welfare," like the slogans "fair trade" and "right to work," has a popular and respectable ring to it but is not directly defined. It apparently is defined in terms of business "efficiency . . . lowering the costs of goods and services or . . . increasing the value of the product or service offered." *Id.* at 7. By definition, therefore, any judicial intervention not increasing "efficiency" is an inappropriate use of antitrust policy. Shifting the focus of analysis from evaluation of the "efficiency" enhancing and other consequences of private agreements that displace the competitive process, to the evaluation of whether judicial intervention enhances "efficiency" in terms of neoclassical price theory carries with it the implication that judicial intervention not meeting the criteria is anti "efficiency," useless, unwise or otherwise not appropriate under the antitrust laws. Moreover, attention is distracted from whether the private arrangement in question is efficient, not efficient, or neutral. The presumed existence of perfectly competitive markets—a presumption of rather large dimensions, questionable universality, and void of any reality in fact—apparently will serve to protect the public interest in all cases where judicial intervention does not increase "efficiency" or the private arrangement is not "efficiency" enhancing.

Although a useful line of speculation that calls attention to the factor of judicial intervention in the calculus of what antitrust policy "ought" to be, the gross factual and theoretical constraints on which the argument is built—as well as the epistemological and metaphysical assumptions one must make to use the analysis with confidence—make the argument a dangerous one that severely limits a process that is largely inductive and continuously confronted with sensibly resolving disputes arising in unvarnished reality. See Flynn, *supra* note 8. Cf. F. COHEN, *THE ETHICAL BASIS OF LEGAL CRITICISM* (1959) (arguing that every legal decision is an ethical one dependent on inductive reasoning). It is also an analysis that does not comport with the language of the statute or its purposes. Section 1 of the Sherman Act has not been amended to read: "Every judicial decision not enhancing consumer welfare is hereby declared to be unlawful."

ever, we cannot claim as true or false or right or wrong because the conclusion is assumed in the predicate.<sup>17</sup> It is the logical fallacy of affirming the consequent. If the factual and legal postulates of the syllogism are either not true or not true in all circumstances, then the worth of the conclusion is worthless or nearly so. If the facts of the dispute do not comport with assumptions of fact and value of the model governing the decision of the case, then the decision is also misleading. Exporting the result to determine the legality of other practices can only perpetuate and aggravate errors imbedded in the original analysis. For example, if the congressional purpose in adopting the antitrust laws is broader than the narrow goals assumed by Bork, Posner, and presumably the Court in *Sylvania*,<sup>18</sup> or if some or all of the factual assumptions underlying the economic model selected for analysis are inoperative, the analysis is one that confirms the model, rather than sensibly deals with the dispute and gives effect to congressional purposes. If Congress adopted the antitrust laws to maximize sensibly distributor and consumer freedom and choice as well as "consumer welfare" as defined by manufacturer self-interest, or if factors other than maximization of

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17. Moreover, the predicate is a value choice inescapably premised on complex moral choices that cannot be ignored or buried beneath mechanical definitions of "efficiency," "consumer welfare," or "price theory" if intelligent discussion of what the law "ought" to be or not be is to take place. Felix Cohen has observed:

An ethics, like a metaphysics, is no more certain and no less dangerous because it is unconsciously held. There are few judges, psychoanalysts, or economists today who do not begin a consideration of their typical problems with some formula designed to cause all moral ideals to disappear and to produce an issue purified for the procedure of positive empirical science. But the ideals have generally retired to hats from which later wonders will magically arise.

F. COHEN, *supra* note 16, at 3. See also Wiles, *Ideology, Methodology and Neoclassical Economics*, 2 J. POST KEYNESIAN ECONS. 155 (1979).

18. This conclusion is difficult to avoid if one surveys the legislative history, what little there is of it, in an open minded fashion and not as an exercise in conforming history to one's view of what the law ought to be. See H. THORELLI, *THE FEDERAL ANTITRUST POLICY—ORGANIZATION OF AN AMERICAN TRADITION* (1955) (the most comprehensive attempt surveying the legislative history of the Sherman Act). Judicial decisionmaking in the context of a common-law process, particularly when implementing the purposes of fundamental, but vaguely stated policies founded in the Constitution and statutes like the Sherman Act, continually walks the fine line between pouring new wine into old bottles and breaking old bottles by attempting to get the old wine out or the new wine in. New insights and evolutions in reality must be accommodated to old values through the flexible process of the art of legal reasoning. The limits of the judicial function in relation to the legislative branch mean courts must not repeal or amend the old to conform to the new. It is a process requiring the flexibility of inductive reasoning, a generous understanding and appreciation of the past, the limits of the process, the function and functioning of the other branches of government, and a capacity for self-reflection and skepticism that one's model for reality or method for resolving some cases can resolve all cases.

profits because of market imperfections motivated the manufacturer to impose vertical restraints, or if consumers were unable to maximize correctly utility in the context involved, an analysis that pretends otherwise generates a false and specious certainty in the law, does not decide justly the case before the Court, and frustrates goals of antitrust policy not admitted by the Court's model for decisionmaking. Sooner or later, a price must be paid because the law is failing to deal constructively and creatively with the opaqueness of an ever shifting and changing reality, the controversy before the Court, and the goals that the law is expected to achieve. While there may be comfort, and even a feeling of rectitude when the artificial assumptions of the model selected coincide with one's metaphysical biases of what ought to be, it is a comfort that comports neither with modern understandings of what legal analysis or economic analysis is or ought to be. To one schooled in jurisprudence, this analysis is also a return to nineteenth century legal positivism and the tunnel vision generated to the damage of both law and the society that law is designed to serve.<sup>19</sup>

The same criticisms may, of course, be made of *Schwinn*, in which the ancient rule against restraints on alienation became the universal talisman for determining legality and illegality for some vertical market restraints. The wooden application of the principle, divorced from its moral roots, current meaning, and practical consequences, soon generated dissatisfaction in the ranks of the decisionmakers.<sup>20</sup> Predictably, exceptions and exemptions quickly cropped up in the litigation because reality does not conform to a rule or model that artificially presupposes what reality is, ignores its complexity,<sup>21</sup> or becomes detached from the ends of the law and the complex process and concepts<sup>22</sup> by which the policies of the law are implemented in specific cases. Distorting or ignoring reality to serve the ends of a rule or model is no less dangerous than distorting the goals or purposes of a law to make the law conform to one's ideological fancy. In either case the certainty purchased is a

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19. Leff, *Economic Analysis of the Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 452 (1974).

20. Much of the dissatisfaction is summarized in ABA Antitrust Section, Monograph No. 2, *Vertical Restrictions Limiting Intra-brand Competition* (1977), and some of which are noted in the *Sylvania* decision. 433 U.S. at 48, n.14.

21. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

22. See Simpson, *The Analysis of Legal Concepts*, 80 L.Q. REV. 535 (1964) (criticizing various attempts to explain the function and functioning of concepts in legal decisionmaking).



false certainty. The public benefits claimed to result are an illusion. Lofty sounding values like promoting "efficiency" or "consumer welfare" may well turn out to be masks that hide the opposite result. Broader goals of the legal process also may be jeopardized since fairness, justice, and common sense become lost in such a mechanistic process.

The analysis of Stewart and Roberts amply demonstrates the conclusion that *Schwinn* found too many activities conclusively unlawful and *Sylvania* held too many activities conclusively lawful. Their analysis of *Sylvania's* logical implications for other rules of per se illegality is also both enlightening and persuasive. Yet, I am not persuaded of the wisdom of their conclusions as a means to escape the resulting quagmire or of the practical consequences of their specific proposals for realistic enforcement of the law to govern vertical market restraints. The quagmire has been generated by more serious difficulties than the mental sloppiness caused by an unseemly haste on the part of the Court to overrule *Schwinn*,<sup>23</sup> a failure to articulate standards for a rule of reason analysis of vertical restraints,<sup>24</sup> or an indulgence in gross factual assumptions like the magnitude of the "free-rider" problem in vertical restraint cases on a record that presents slight evidence of a "free-rider" problem or little specific evidence of any of the other speculative justifi-

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23. Most of the *Sylvania* opinion is devoted to the accumulation of a variety of policy reasons and factual speculation for overruling *Schwinn*. Aside from a general factual summary of Continental's claims at the beginning of the case, no detailed factual analysis of the case appears in the Court's opinion. While a reproduction of the record in the case is an inappropriate form of opinion writing, a general disregard of the facts and a failure to articulate why the Court concluded the facts justified a test of "reasonableness" in the particular case before the Court is an equally inappropriate form of decisionmaking. A fuller statement of the facts is found in the lower court opinion. 537 F.2d 980 (9th Cir. 1976), *aff'd*, 433 U.S. 36 (1977).

24. One can trace the Court's failure to articulate standards for its rule of reason analysis to a number of factors including the case being tried under one theory of legality—illegality (the *Schwinn* rule), the court of appeals majority deciding the case by legally defining the conduct as not falling within the category of per se illegality that the lower court jury instructions were based on, and the Supreme Court affirming the court of appeals' reversal and remand for further proceedings on grounds that the category of per se illegality the court of appeals found irrelevant and the trial court found relevant is no longer a category of per se analysis for all vertical nonprice restraints. The opinions pass like ships in the night without grappling with each other. While these observations may undercut slightly the criticisms of note 23 *supra*, they make speculation about the implications of the Court's mental process in *Sylvania* for other per se categories risky at best. The peculiar posture of the case, in light of its prior treatment by lower courts, may have contributed to the Court's failure to articulate what factors and facts are relevant to a rule of reason analysis on remand and presumably other cases involving similar restraints.

cations for imposing vertical market restraints.<sup>25</sup> Those difficulties include an unstated misperception of the goals of antitrust policy and a breakdown in the appropriate methodology by which the Court should analyze cases that raise the question of whether to adopt a per se or rule of reason standard and how the standard adopted should be implemented for analyzing a particular category of restraints. The *Sylvania* opinion substituted axiomatic theological propositions for a reflective analysis of the reality of the dispute before the Court in light of the goals of the law. A mechanical deductive process of reasoning from fixed rules has been substituted for what ought to be a complex inductive and deductive process of legal analysis in light of the facts of the case and the goals of the law.

### III. THE GOALS OF ANTITRUST LAW

*Sylvania* left unclear the goals or purposes the Court believes antitrust enforcement achieves, although the majority clearly appeared to emphasize the primacy of what are loosely called "economic" goals. The majority in *Sylvania* noted: "Competitive economies have social and political as well as economic advantages . . . but an antitrust policy divorced from market considerations would lack any objective benchmarks."<sup>26</sup> A court that believes refuge in "economic analysis" rescues it from moral, political, and social considerations obviously has not thought deeply, or does not wish to, about the nature of the legal process. Such a court is likely to integrate legal analysis and "economic analysis" by disregarding "legal analysis," rather than making economic insights subservient to the goals of the legal process. Moreover, the implication that there are those who advocate divorcing antitrust policy from economic concerns was neither supported by any references, nor is it likely that the implication could be supported.

The inference that economic analysis provides "objective benchmarks," while political or social concerns do not, is clearly unten-

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25. This criticism is analogous to the problem in tort litigation of deciding particular cases through analysis of hypothetical cases not before the court. See Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause In Fact*, 46 TEX. L. REV. 423 (1968). The possibility that certain vertical restraints may enhance interbrand competition in some circumstances does not mean they will do so in all circumstances. Nor does the possibility necessarily justify a conclusion that the restraint should be lawful in those circumstances where interbrand competition is likely to be enhanced. The latter determination is one of policy, not logic, and one that requires an articulation of the goals of the law in light of the particular circumstances of the case.

26. 433 U.S. at 53. See also note 23 *supra*.

able on a number of grounds. I have discussed elsewhere the questionable "objectivity" of "economic analysis."<sup>27</sup> The assumption is a superficial one perhaps induced by claims that "economic analysis" is empirically based, mathematically rigorous, and logically coherent.<sup>28</sup> Research and speculation in other social sciences, as well as astrology and numerology, purport also to be empirical, mathematically rigorous, and logically coherent. One should not be seduced to believe, however, that because we gain limited and transitory insights into some aspects of reality that we have all "truth" or that the limited "truth" that we do perceive is enduring, perpetual, and universal. Dressing the analysis in the raiments of mathematics, deductive logic, and coherence is no guarantee of the truth of the conclusions. Law should not rest its judgments on the flimsy foundations of superficial efforts to be a "science."<sup>29</sup>

The post-*Sylvania* speculations in the courts and academia purporting to be based on "objective benchmarks" of "market considerations," have spawned a multiplicity of conflicting decisions and proposals sup-

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27. See Flynn, *supra* note 8, at —. For a more elaborate analysis of the "objectivity" of neoclassical analysis, see M. HOLLIS & E. NELL, *RATIONAL ECONOMIC MAN* (1975); Wiles, *supra* note 16.

28. See E. SCHUMACHER, *SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* (1973) (an example of a humanistic approach to economics and a rejection of a quantitative and mathematically based analysis). The empirically based, mathematically rigorous, and logically coherent economic analysis of the post-Keynesians offers fundamentally different "objective" standards to guide policy. See *A GUIDE TO POST KEYNESIAN ECONOMICS* (A. Eichner ed. 1980). Post-Keynesian analysis also appears more persuasive in light of current circumstances. See Heilbroner, *A Guide to Post-Keynesian Economics*, *The New York Review of Books*, Feb. 21, 1980, at 19, col. 1.

29. Cf. Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955) (criticizing claims that the Supreme Court's findings in the desegregation decisions were "scientifically" based). Theodore Roszak observed in his introduction to E. SCHUMACHER, *supra* note 28, at 8:

The great majority of economists' Schumacher laments, "are still pursuing the absurd ideal of making their 'science' as scientific and precise as physics, as if there were no qualitative difference between mindless atoms and men made in the image of God." He reminds us that economics has only become scientific by becoming statistical. But at the bottom of its statistics, sunk well out of sight, are so many sweeping assumptions about people like you and me—about our needs and motivations and the purpose we have given our lives. Again and again Schumacher insists that economics as it is practiced today . . . is a "derived body of thought." It is derived from dubious, "meta-economic" preconceptions regarding man and nature that are never questioned, that dare not be questioned if economic science is to be the science it purports to be rather than (as it should be) a humanistic social wisdom that trusts to experienced intuition, plays by ear and risks a moral exhortation or two.

See also Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 VA. L. REV. 413 (1964).

ported by extensive factual speculation not based on any particular objective study other than unverified assumptions of fact and value underlying the proponent's analysis. One should not be surprised by the chaos because an antitrust decision divorced from a deeper understanding of the social, political, and economic goals of the law and a due humility for the complexity of reality cannot avoid generating confusion. The chaos results because facts are detached from consequences, inductive reasoning is suppressed by an excessive reliance on deductive reasoning, and reality refuses to bow down to the syllogism. Stewart and Roberts rightly challenge, but do not fully explore, the merits of some of the assumptions made by proponents of a per se legality rule for all vertical market restraints.<sup>30</sup> For example, why should a conclusive presumption be given a supplier's perception of the most efficient way to distribute its product when that decision is implemented by restricting or displacing the decision of independent distributors and consumers? Why is "efficiency" and "consumer welfare" measured only in terms of supplier self-interest? A response predicated solely on models of a particular school of price theory or pure competition is not enough. We all know that both models are figments of the imagination and premised on a set of narrow and rigid normative assumptions that do not equate with reality while ignoring other factors of legal significance that often seem to be at work in disputes worthy of litigation.<sup>31</sup>

One must begin with an understanding of the goals of the law, the subservient role of economic and other analysis in the process, and a sophisticated understanding of the methodology of the legal process in order to reach principled, yet pragmatic, conclusions. Precedent will be a useful guide, yet not a barrier to dealing with the facts of subsequent cases. Analytical symmetry should be a feature of our understanding of the law, yet neither its only goal nor its false god. Legal analysis is

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30. Stewart & Roberts, *supra* note 4, at 742.

31. An imbalance of bargaining power between buyer and seller is frequently one factor inherent in vertical market restraints, but usually ignored by "economic analysis." For an interesting analysis of vertical restraints taking account of an imbalance in bargaining power, see Goldberg, *supra* note 4. Another factor not accounted for by "economic analysis" is the integral function of time in the analysis. Deciphering short and long term consequences of conduct cannot be done sensibly if time is ignored in the calculus. See J. HICKS, CAUSALITY IN ECONOMICS 37-38 (1979). A belief to the contrary is the equivalent of assuming that micro- and macroeconomic theorizing can be connected sensibly by the indiscrete summation of individual supply and demand curves.

an art, not a science. It requires judges to make judgments in light of the policies of the law, rather than merely apply syllogisms to facts served up for decision.

The general purpose of the antitrust laws is to protect and maintain the competitive process from unreasonable displacement by contracts, combinations, and conspiracies<sup>32</sup> or by the unreasonable exercise or possession of monopoly power.<sup>33</sup> This general purpose is designed to serve social, political, and economic goals. Even those who believe that the goals of the law are purely "economic," cannot escape moral, political, and social considerations in making that choice, giving it meaning, or applying the choice to factual controversies. The policies, however, behind choosing the competitive process as our fundamental method for governing economic activity in the private sphere always have been viewed as achieving goals broader than a materialistic measure of economic "efficiency." Those goals are limited not only to the narrowly defined and peculiar concepts of maximization of "efficiency" and "consumer welfare," but also include, *inter alia*, the goals of insuring that individual entrepreneurs succeed or fail on the competitive merits and not by the dictates or conspiracies of others who unreasonably displace the competitive process,<sup>34</sup> maximizing intelligent consumer choice, dispersing undue economic power, and subjecting private power to the discipline of the competitive process in place of affirmative government regulation.<sup>35</sup> They are goals whose meanings are not

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32. It is the "contract, combination . . . or conspiracy, in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. . . . And the amount of interstate or foreign trade involved is not material . . . since § 1 of the Act brands as illegal the character of the restraint and not the amount of commerce affected.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224, n.59 (1940).

33. [T]here can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition. To repeat, if the earlier stages are proscribed, when they are parts of a plan, the mere projecting of which condemns them unconditionally, the realization of the plan itself must also be proscribed.

United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945).

34. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959); Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165 (1959).

35. See Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965); Leff, *supra* note 19; Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Schwartz, *On the Uses of Economics: A Review of the Antitrust Treatises*, 128 U. PA. L. REV. 244 (1979); Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979); Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1 (1980); Sullivan, *Economics and More Humanistic Disciplines:*

frozen by values or conditions of the seventeenth century any more than the conditions or the constraints of the eighteenth century froze the meaning of the commerce clause and the first amendment.

Since the beginning of judicial experience with the Sherman Act, it has been recognized that all contracts and many unilateral actions by those engaged in trade literally restrain trade.<sup>36</sup> The words of the statute, literally applied, appeared to require legal condemnation of every activity having the prohibited effect of restraining trade. The dilemma created has required the discovery of a principled and predictable methodology for sorting out joint and unilateral conduct restraining trade which "ought" to be found unlawful from conduct which "ought" not to be unlawful. Courts and commentators have resorted to the ancillary/nonancillary distinction,<sup>37</sup> per se and rule of reason analysis,<sup>38</sup> and the "gumball machine methodology" of using artificial economic models as the major premise of a rigid deductive syllogism to dictate conclusions without much regard to the facts of particular cases.<sup>39</sup> In the instance of gumball machine analysis, logic may provide the springboard of the analysis, but it does not guarantee the success of the dive or the eternal and general verity of the models made the premise of the analysis. Reality often does not conform to the assumptions of the models. The goals the law seeks to achieve are broader than those permitted by the model. The process through which law is implemented and the environment in which it is done imposes constraints

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*What Are the Sources of Wisdom For Antitrust?*, 125 U. PA. L. REV. 1214 (1977) (surveys of the goals of antitrust policy).

36. See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 327 (1897). In *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918), Justice Brandeis observed:

The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.

*Id.* See also *Standard Oil Co. v. United States*, 221 U.S. 1, 63-70 (1911).

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

38. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (1940); Allison, *Ambiguous Price Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis?*, 16 HOUS. L. REV. 761 (1979). The Court's most recent analysis of the per se—rule of reason dichotomy is found in *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978).

39. Flynn, *supra* note 8, at —.

and responsibilities beyond those permitted by the methodology of economic analysis.

Whichever methodology the courts have followed never seems to work well for an extended period of time or provide a basis for deciding all types of cases. For example, courts have held a restraint to be a per se unlawful restraint in one circumstance and a lawful restraint in other circumstances.<sup>40</sup> As Stewart and Roberts so ably demonstrate, reliance on a strictly neoclassical analysis of the problem of vertical restraints to the exclusion of all other considerations appears to sanction too many forms of conduct in conflict with antitrust goals. The dilemma, in part, is one of articulating policy goals achieved through preserving a competitive process as the rule of trade and finding a methodology that permits a reasoned, efficient, and practical assessment of the factual implications of specific marketing practices in light of the goals identified and in the context of the legal process. The chosen methodology must be one that is sufficiently flexible to account for facts unique to the dispute, while balancing in a reasoned way the competing goals of the law involved. The methodology also must be a knowable methodology and produce predictable standards, which can induce one to recognize like circumstances and be guided accordingly in compliance with the law. The methodology also must be one capable of application in a like manner to like circumstances in subsequent cases factually dissimilar. Neither *Schwinn* nor *Sylvania* meet these criteria and thus the confusion and debate that follow both decisions.

Stewart and Roberts' analysis does not satisfy these criteria either. They did not approach the problem in the aforementioned manner. It is not fair to criticize the Authors for failing to follow the criteria because they performed a different task. Nevertheless, they have not identified the goals of antitrust policy involved in vertical restraints other than expressing the generality that antitrust laws are designed to "promote competition and the free market system" and accordingly must "pay deference to economic analysis and reality."<sup>41</sup> But what is "competition," "the free market system," "economic analysis," and "reality"? When is deference "due" and "undue"? Stewart and Roberts never clearly define these concepts or assess the "dueness" of the defer-

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40. Van Cise, *The Future of Per Se In Antitrust Law*, 50 VA. L. REV. 1165 (1964). For a more recent analysis of the disregard of per se rules, see Redlich, *The Burger Court and the Per Se Rule*, 44 ALB. L. REV. 1 (1979).

41. Stewart & Roberts, *supra* n.4, at 749.

ence to them. Although their concept of "economic analysis" is apparently the neoclassical paradigm, their concept of "reality" indicates a belief that factual conditions for operation of the paradigm do not always or even generally exist. If this is true, pretending otherwise necessarily will not achieve the pre-defined "maximization of consumer welfare" or "efficiency" because we must vary some of the variables of the model. And, as Arthur Leff has irreverently pointed out with regard to this kind of thinking: "[I]f you think you know what [will] happen when you vary [one of] your variables, you're a booby."<sup>42</sup>

Because I begin with a belief that antitrust policy was intended to concern itself with a broader range of goals than those admitted directly by the neoclassical model and cannot avoid doing so, I believe that it is necessary to proceed beyond the analysis of other vertical *per se* restraints than those offered by Stewart and Roberts. The impact of the restraint on consumer freedom to maximize choice and the freedom of distributors to maximize their choice and efficiencies must enter the calculus along with "efficiency," the "free market system," "economic analysis," "reality," and the other goals of the law. The proposition that supplier self-interest is a sufficient surrogate for these interests and a reliable indicator of the facts of a case assumes too much about the perfect functioning of the market and the coincidence of reality before the court with the assumptions of the model. The proposition also ignores a tradition of antitrust law in according weight to the values of maximizing consumer choice and the independence of distributors freely to act in their own self-interest for political and social reasons as well as economic ones. The establishment of a sensible and desirable balance among these often competing and conflicting goals within the context of a bewildering array of potential factual circumstances cannot be achieved by mechanical invocation of artificial economic models or venerable legalisms from another age. A flexible, but structured, methodology is required. The relative weight of the competing goals of antitrust policy raised by vertical market restraints, the facts of the case, and the qualitative effect of the category of restraint involved on the ideal of a competitive process as the rule of trade must all be weighed sensitively, efficiently, and inductively by the legal process.

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42. Leff, *supra* note 19, at 476.



## IV. METHODOLOGY OF ANALYSIS

I have argued elsewhere that recent antitrust litigation has generated substantial confusion by the failure to pay much attention to the *way* cases are analyzed or the method of analysis that "ought" to be followed in resolving antitrust disputes.<sup>43</sup> Most of the attention is focused on *what* is decided and the merit or demerit of specific substantive conclusions on economic, political, social, or other grounds. The *way* cases are decided is at least as significant as *what* is decided because methodology determines the range of the permissible legal and factual inquiry, the degree of flexibility in the relevance and meaning of principles found applicable, and the intellectual portability of the analysis from one case to another and one category of conduct to another. Little or no attention is paid to the Court's method of analysis by those seeking to explore the implications of the *Schwinn* and *Sylvania* decisions for vertical market restraints and other per se rules of illegality. Rather, the category by category proponents of ad hoc substantive rules of legality or illegality invite a comparison of resulting antitrust standards to the Internal Revenue Code and other undesirable monuments to the methodology of legal positivism and the folly of man in placing too much trust in concepts and language to control the complexities of reality, express the goals of the law, and dictate legal decisions in future cases.<sup>44</sup>

The primary source of the difficulty is the conceptualization of per se

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43. Remarks delivered to the Sherman Act Subcommittee of Antitrust Section of The American Bar Association, by J. Flynn, *Rethinking Sherman Act Analysis: Three Proposals For Reducing the Chaos*, in Honolulu, Hawaii (August 5, 1980).

44. The insights of Dean Leon Green are particularly apt when considering the methodology of *Schwinn* and *Sylvania*:

No natural or social science has found its secrets in words and phrases and neither will the science of law. . . . There is no such thing as words so plain that they are not to be interpreted. There are no premises to be found so certain that nothing more than an irrefutable logic is required. . . . A process which assumes the very ends it is employed to discover will in the end betray its futility. . . . The attempt has been made and is still made to make language do the service of judging itself. There can be no such substitution. Words are the machinery by which the power of thought is handled, but if there is no such power put into them the words are lifeless. In the administration of law, both the judge who surrenders this power to phrases as well as the judge who spends his time attempting to pattern phrases to control succeeding judges in the cases to come, can only do his science ill. . . . There is no warrant for the fear that a fluid language and adjustable rules are undependable. We have never had any other sort, although we have lost much by not recognizing that fact. The point is we have looked to the wrong source for dependability. We have sought it through a technic of language instead of a technic of judging. We rather trust the machinery than its engineers.

Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1018-19 (1928).

and rule of reason analysis as two separate tracks of analysis. Each line of analysis allegedly follows clearly understandable substantive rules that are applied mechanically and deductively to the knowable facts of a dispute. It is a difficulty that characterizes the methodology of both *Schwinn* and *Sylvania*, where a rule-oriented mentality is carried too far and generates future confusion and complexity without settling the dispute before the Court or the general policy to be applied in other cases. Unfortunately, the relevance and meaning of rules continually shift in light of the facts of the dispute. In addition, the facts of disputes worthy of litigation do not seem willing to conform to the fixed meaning and objectives of the rules of *Schwinn* and *Sylvania* or the economic models underlying the analysis for a deductive process to work routinely. The frictionless application of a fixed rule to mechanically produced facts replicating previous experiments can never take place because the rule is not fixed and the facts of disputes never match the assumptions of the model underlying the rule or the reality of prior cases. The reasoning process is more inductive than deductive, with the relevance, meaning, and application of rules each requiring a complex and dynamic thinking process beyond the capacity of a "gumball machine methodology" of analysis.

Courts usually are confronted with questions of an inductive nature at any one or more of at least four points in antitrust litigation under section 1 of the Sherman Act: 1) Whether the evidence is sufficient to infer there is a "contract," "combination," or "conspiracy" within the meaning of the antitrust laws?<sup>45</sup> 2) whether the facts "ought" to induce the conclusion that joint action "ought" to be presumptively unlawful<sup>46</sup> or whether it is within or without a recognized category of presumptively illegal conduct?<sup>47</sup> 3) what evidence rebutting the presumption of illegality or establishing a justification for the restraint

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45. Compare *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221 (1939) (conspiracy inferred from coerced parallel behavior) with *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954) (parallel behavior standing alone is not a conspiracy). See also Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962); Note, *Intra-Enterprise Conspiracy Under Section 2 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977).

46. See Redlich, *supra* note 40 for a recent survey of the adoption and evolution of per se rules.

47. *United States v. Container Corp.*, 393 U.S. 333 (1969); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); Allison, *supra* note 38. The remedy sought in a case also may vary the standard of proof of the category of conduct labelled per se unlawful. See *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); Garvey, *The Sherman Act and the Vicious Will:*

“ought” to be either relevant or admissible in light of the facts and circumstances of the case and the policies of the law?<sup>48</sup> and, 4) if the evidence does not justify inducing the conclusion that the conduct is within a recognized category of per se illegality, what factors “ought” to be relevant and how should they be weighed in determining the reasonableness or unreasonableness of the restraint?<sup>49</sup> None of these questions can be analyzed sensibly without a clear understanding of the goals of the antitrust laws, the interrelationship of those goals in light of the characteristics of the dispute, and the limitations and methodology of the legal process in effectuating its function of implementing the goals of the law, deciding the case before the Court, and providing guidance for resolution of similar disputes in the future. The process by which any one of the four questions is decided may require an extended evidentiary inductive inquiry into purpose, effect, benefits, detriments, horizontal or vertical nature of the restraint, power of the participants, and/or unique characteristics of the activity or the industry in which the activity occurs.<sup>50</sup> Moreover, the subtle interplay

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*Developing Standards For Criminal Intent in Sherman Act Prosecutions*, 29 CATH. L. REV. 389 (1980).

48. *Compare* *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) (joint licensing of copyrights not per se illegal price-fixing) *with* *National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679 (1978) (joint limitation of bidding competition per se illegal price-fixing). The lower court confusion in *Catalano, Inc. v. Target Sales, Inc.*, 100 S. Ct. 1925 (1980), a case raising the issue of whether a conspiratorial elimination of short-term credit was horizontal price-fixing, appeared to stem from the Supreme Court’s failure to articulate standards for distinguishing per se price-fixing from rule of reason price-fixing in *Broadcast Music* and *Professional Engineers*.

49. *National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679 (1978); *United States v. Topco Assocs.*, 405 U.S. 596 (1972); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). The analysis of boycott cases frequently presents an issue of whether the conduct is a boycott within the meaning of that antitrust concept or, even if it is a boycott, whether it is a boycott warranting per se condemnation because of other factors or values deemed relevant. *See* *Missouri v. NOW, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 49 U.S.L.W. 3216 (U.S. Oct. 7, 1980) (No. 79-2037); Comment, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131 (1980). Adoption of Professor Bork’s definition of competition as the predicate of antitrust analysis of boycott cases, see discussion *supra* note 16, would result in overruling cases like *Klor’s* because judicial intervention does not appear to enhance “consumer welfare.” The fact that a conspiratorial displacement of the competitive process did not enhance “consumer welfare” and excluded the plaintiff from business apparently would be irrelevant under Professor Bork’s rationale. His discussion of the boycott and individual refusals to deal cases does not reach these conclusions. Indeed, it is difficult to comprehend what policy conclusions Bork advocates in these areas other than the generality that all refusals to deal ought not be per se unlawful. *See* R. BORK, *THE ANTITRUST PARADOX* 330-46 (1978).

50. *See* L. SCHWARTZ & J. FLYNN, *ANTITRUST AND REGULATORY ALTERNATIVES* 467 (5th ed. 1977) (factors generally involved in a rule of reason analysis).

among each of these questions in the process of analysis may confuse the analysis because doubt or certainty about one question (the existence of a "contract" for example) may tempt a court to manipulate the factors necessary to answer one of the other questions.<sup>51</sup>

In order to expose these kinds of issues to rational analysis, the *per se*—rule of reason dichotomy should be recognized as a single evidentiary methodology establishing burdens of proof of varying levels of conclusiveness and nonconclusiveness to determine whether there has been an unreasonable displacement of the competitive process. The dichotomy should not be viewed as separate sets of rules and sub-rules to dictate conclusions irrespective of the facts.<sup>52</sup> Conduct that clearly displaces, in a qualitative sense,<sup>53</sup> goals that the competitive process seeks to achieve or maintain is condemned on a presumptively, or nearly presumptively, conclusive basis. Whether the conduct invokes

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51. See *Kaplan v. Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979), *cert. denied*, — U.S. —, 100 S. Ct. 3016 (1980); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978); *Eastern Scientific Co. v. Wild Heerbrug Instrs., Inc.*, 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978); *Borger v. Yamaha Int'l Corp.*, [1980-2] Trade Cas. (CCH) ¶ 63,373 (2d Cir.).

52. For a more elaborate explanation of the significance of conceptualizing the rule of reason—*per se* dichotomy as a single method of analysis that establishes burdens of proof of varying levels, see Flynn, *supra* note 43. The idea is not a new one. See Van Cise, *supra* note 40. Several scholars, including Professors Stewart and Roberts, are gravitating to this view in the context of vertical market restraints. See Bohling, *supra* note 4; Pitofsky, *supra* note 4; Zelek, Stern & Dunfee, *supra* note 4. It is appropriate to apply this methodology to the analysis of all cases arising under section 1 of the Sherman Act. While many cases, particularly the ones not litigated, will involve a nearly conclusive presumption of legality or illegality, those cases worthy of litigation because ambiguity over some element of the offense will be analyzed more sensibly if this methodology is adopted. While difficult policy choices will not be resolved by this analysis, they will not be ignored or confused as under the present methodology of the courts. Recognizable circumstances that trigger the inference of the necessary joint action category of *per se* conduct, level of and permissible evidence of rebuttability or justification, and standards of unreasonableness will evolve gradually. A reconsideration of existing precedent in light of this methodology makes clear that this approach is one most courts have been in fact following even though courts have not expressly identified the methodology. Some decisions appear to have no methodology of decision-making in mind other than finding a rationale for denying plaintiffs a trial of their claims. See *supra* note 51.

53. The "qualitative"/"quantitative" distinction is a traditional one in antitrust analysis. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Consideration of quantitative factors, power of the defendant, or structure of the industry, may be relevant, but subsidiary considerations in whether to draw the inference of conspiracy or whether it is a conspiracy to engage in presumptively unlawful conduct. See *United States v. Container Corp.*, 393 U.S. 333 (1969); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

the presumption, and the degree to which it is conclusive or not, depends on the facts of the case in light of the policies of the law. For example, any type of conspiratorial price-fixing, whether it is maximum, minimum, horizontal, or vertical, clearly displaces the competitive process. Its qualitative effect on the ideal of a competitive process establishing price, allocating resources, and other goals of the law, warrants condemnation in all but the most rare or unique circumstances.<sup>54</sup> Price-fixing is a tampering with the "central nervous system of the economy"<sup>55</sup> and an assumption of power we have conceded only to a democratically elected government<sup>56</sup> and in circumstances requiring affirmative regulation.

The evidentiary presumption of illegality is a means to sort out the facts of the dispute in the process of determining whether the goals of the law have been violated. The quantitative impact of the conduct is irrelevant in view of the centrality of our moral commitment to the competitive process as the rule of trade if it is shown that joint action that amounts to a contract, combination, or conspiracy has displaced that process in purpose or effect. The statute outlaws an unreasonable "restraint of trade," not the restraint of all or most trade. While market structures and power of the participants may be relevant in some cases to aid in determining whether to infer the existence of an agreement or the category of restraint, the basic inquiry is a qualitative one in light of the goals of the law and not a quantitative one in light of the amount of trade impaired.<sup>57</sup> While the fairness implications of the sanctions imposed for such conduct may justify the requirement of proving purpose and effect in the case of criminal sanctions,<sup>58</sup> the fundamental duty imposed by law is one of not displacing the competitive process and its goals. Whether the facts of a particular case "ought" to be found a violation of the statute cannot be decided by the verbalization of rules divorced from the facts. It is the paradox of legal reasoning that one must know the facts to determine what rules are relevant and know what rules are relevant to determine what facts are relevant. The rec-

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54. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

55. *Id.*

56. *See Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941). In some circumstances when regulatory powers have been delegated to quasi-private institutions, antitrust policy has been relied on to extend due process constraints on exercises of governmental powers to the private institution. *See Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

57. *See* note 53 *supra*.

58. *See* note 47 *supra*.

ognition of legal reasoning as both inductive and deductive is the first step out of the paradox. The refusal to permit theological dogmas to control the thinking process is the second step. A due appreciation for the complexity of the goals of the law and the influence of facts in determining the relevance, meaning, and applicability of concepts and rules is the third step. Finally, the unravelling of the paradox is a matter of artistic skill and mastery of the legal process and its peculiar logic.

Experience, the teachings of economics and other sources of knowledge, and the political and social goals of the antitrust laws justify similar presumptively unlawful treatment of horizontal contracts, combinations or conspiracies to boycott, to divide territories, or to divide customers. The qualitative effect of such conduct on price, resource allocation, independence of traders, freedom of consumers, and allocation of power in society is usually so pronounced that condemnation is warranted except in the most unusual circumstances. Evidentiary presumptions of illegality on a nearly conclusive basis are justified once the conduct is identified. On occasion, even this most fundamental set of principles must yield to the unique circumstances of a particular case.<sup>59</sup> The rigor of their implications also may necessitate modification of the presumption by manipulating the concept of contract or conspiracy or the meaning of a particular per se category to avoid impractical or unjust results in certain factual circumstances.<sup>60</sup>

When the conduct is vertical in nature, values and goals behind the policy of governing our economic affairs by a competitive process also can be threatened; particularly intrabrand price competition, rights of competing sellers, freedom of traders, and freedom of consumers where the market is less than perfectly competitive. At the same time, however, vertical restraints also may promote, in some circumstances, interbrand competition, increase the efficiency and ability of traders to compete, and enhance the consumer's ability to choose or to receive all

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59. See, e.g., *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970); *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir.), cert. denied, 385 U.S. 846 (1966); *Molenas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961); *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

60. See *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953) (combination of investment bankers syndicating new securities issue at a fixed price held a joint venture). A similar line of analysis should have been considered in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979).

the benefits of the choice made. The dilemma usually is one of finding a principled, yet flexible, process for sensibly sorting out the laudable from the odious or unnecessary within the context of a specific case. Fixed rules dictating consequences are not helpful in such circumstances. Elaborate constructs of rules of the type proposed by Stewart and Roberts are neither helpful nor necessary. A more sensitive reform could be adopted to avoid the unnecessary complexity and practical difficulties of the Stewart and Roberts' rules that emphasize a quantitative test for what is primarily a qualitative inquiry.

The treatment of *per se* rules and rule of reason analysis as a methodology that creates evidentiary presumptions, rather than fixed and rigid rules, offers a means for sensibly sorting out circumstances where conduct should be permitted and where it should be condemned. Lesser levels of presumptive illegality, and in some circumstances no presumption of illegality or an affirmative burden of overcoming a presumption of legality, need to be developed in these circumstances. Indeed a realistic appraisal of the Court's application of the *per se* and rule of reason analysis in past cases suggests this is the course courts have implicitly taken in other areas of antitrust analysis. Stewart and Roberts verbalize some of their tests in a similar manner,<sup>61</sup> but do not quite abandon a rule-oriented approach and link most of their tests to a quantitative measurement of market power and/or market structure.

Because of the conduct's impact on trader and consumer freedom and the lessening of intrabrand competition, a presumption of illegality, without regard to market power or structure, is warranted as a beginning guidepost to analysis when the conduct is a product of a vertical contract, combination, or conspiracy explicitly imposing resale price maintenance on territorial or customer divisions. The test is a beginning guidepost because it is uncertain whether the facts will raise the inference that the conduct results from a contract or conspiracy or is within the *per se* category. It is not certain whether a justification or excuse for the conduct is factually present in the case or warranted as a matter of policy under all the circumstances unique to the dispute. Moreover, the test is a qualitative one because the legal essence of the offense under section 1 is contractual or conspiratorial conduct that unreasonably displaces the competitive process. The inquiry is a qualitative one not dependent on the amount of commerce displaced or even

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61. Stewart & Roberts, *supra* note 4, at 758.

that any commerce is displaced. The Authors' attempt to make the primary focus of a section 1 analysis of vertical market tests a measure of quantitative market displacement not only greatly complicates the trial of such cases and converts the analysis into a section 2 inquiry, but also would require the reversal of substantial and significant long standing legal precedent to the contrary.<sup>62</sup>

Before that additional chaos is brought on to comply with the implications of *Sylvania*, other means for sensibly moderating the overly broad implications of both *Schwinn* and *Sylvania* should be explored. The conceptualization of the per se and rule of reason methodology as a series of evidentiary presumptions of varying levels of rebuttability is a more convincing path to follow. The moderately presumptive illegal classification of contractual air-tight vertical restraints as to price, customers, and territories makes good sense. It provides a method for sorting out the conduct in question in light of the goals of the law. The presumption, however, may be rebutted when the conduct is motivated by a good business justification in accord with the goals of the law, *i.e.*, proof of an objective need to provide significant point of sales services, efficiently market a product, gain entry into a market, or protect public health or safety in light of peculiar risks associated with the product. The restraint, however, should be ancillary to these otherwise lawful objectives and no more restrictive than objectively necessary to overcome the presumption of illegality—questions of fact that must be resolved in the circumstances of the restraint and peculiarities of the business.

I have difficulties with several of the remaining standards proposed by Stewart and Roberts with regard to other categories of vertical restraints. Aside from my skepticism with whether we yet have enough "stuff" to presume some of them lawful, unlawful, or subject to "careful scrutiny," many vertical restraints may not involve the requisite contract, combination, or conspiracy for a section 1 violation.<sup>63</sup> I think

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62. Quantitative factors may in some circumstances aid in the determination of the qualitative issues. See note 53 *supra*.

63. Unilateral refusals to deal, to enforce suggested prices in the absence of a monopolistic purpose or effect, and unilateral territorial limitations or customer restraints do not violate section 1 of the Act. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). While subsequent cases may have limited significantly the *Colgate* doctrine, see, *e.g.*, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 36-47 (1960); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-27 (1939), the extended evidentiary inquiry in cases where the element of conspiracy is in question is a vehicle whereby courts determine whether the conduct unreasonably restrains trade as well as determines



other proposals, like the exception to a per se "rule" for horizontal restraints allocating territories based on "smallness" of the competitors,<sup>64</sup> contain no objective benchmark for the exception or appreciation for the legal essence of the offense. These proposals might be better analyzed under joint venture principles or an evidentiary presumption of illegality, which permits joint buying in some circumstances but not division of customers and territories.<sup>65</sup> I would not dismiss casually a per se illegal evidentiary presumption against vertical maximum price-fixing, with claims of "never justified" or "absurd."<sup>66</sup> Vertical maximum price restraints are not only a rare practice, but also are associated mainly with a monopolist's division of customers and territories. In *Albrecht v. Herald Co.*,<sup>67</sup> the leading case in which the question was presented, the issue should not have been analyzed as a problem arising under section 1, but one arising under section 2 of the Act.<sup>68</sup> In light of my perceptions of the goals of the Sherman Act impinged by the conduct and the factual context in which vertical maximum price-fixing arises, I would be hesitant to conclude that a presumption of

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the legal presence of an agreement. While the purely economic consequences of a coercive refusal to deal may be identical to the conspiratorial arrangement to achieve the same ends, the legal consequences are not the same because the law has chosen to outlaw one means to the end but not the other. Because the law's objectives are broader and more complex than under a purely economic approach, it does not constitute a paradox for the legal system to select a different basis for determining illegality (a "contract," "combination," or "conspiracy") from the basis used by a school of economic analysis ("efficiency" or "consumer welfare") to determine what conduct should be allowed.

64. Stewart & Roberts, *supra* note 4, at 760.

65. In *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), the combination may have started out as a relatively small one of geographically dispersed local grocery chains engaging in joint buying and private label marketing, but the combination did not remain relatively small or limited to joint buying. By the time *Topco* was tried, joint sales of the chains amounted to \$2.3 billion and the member chains possessed "much economic muscle, individually as well as cooperatively." *Id.* at 600. The chains also divided territories and customers. The issue is the qualitative effect of the conduct on the ideal of maintaining a competitive process. An inquiry that focuses on the degree of "smallness" or "bigness" is not the end of the analysis, although they may be factors in the process of analysis. A parsing of the practices involved (*i.e.*, joint buying, customer limitations, territorial restrictions, and the like) in light of the goals of the law is of greater significance to determine whether there is a displacement of the competitive process.

66. Stewart & Roberts, *supra* note 4, at 761.

67. 390 U.S. 145 (1968).

68. The problem in *Albrecht* was one of whether The Herald engaged in a unilateral abuse of monopoly power in light of the goals of the law and facts of the case. Permitting a monopolist to have the advantages of vertical integration without the responsibilities of vertical integration by allowing a monopolist to impose maximum price-fixing in the circumstances of *Albrecht*, is not necessarily a wise, just, or appropriate result. See Redlich, *supra* note 40, at 21-24.

illegality for vertical maximum price-fixing by contract, combination, or conspiracy is not "justified." If the test for whether the rule is "absurd" is the supposed "light" from *Sylvania*, the absence of much "light" from *Sylvania* probably supports a conclusion that a test of presumptive illegality is justified in view of the impact of the conduct on the independence of traders, intrabrand price competition, and the tradition of narrowly circumscribing the exercise of monopoly power by those seeking the advantage of vertical integration without its attendant risks and burdens.

The conceptualization of per se rules as substantive rules that dictate an either/or result precludes the evolution of sensible standards to sort out conduct in the factual context of a particular case when pro competitive and anticompetitive results become intertwined. The treatment of per se—rule of reason analysis as a single methodology for allocating burdens of proof of varying levels of rebuttability permits a more discriminatory evolution of knowable and practical standards. The single methodology approach enables the process to strike a balance between procompetitive and anticompetitive effects sensibly in the factual context presented by each case and in light of the complex goals of the law. A rule-oriented approach, as in *Schwinn* and *Sylvania*, ends up with an analytical process that focuses on the narrow goal presumed by the rule adopted to the exclusion of other values that the law seeks to achieve and ignores factors not admitted by the hypothesis underlying the rule. The rule-oriented approach generates an irrelevant exercise of the analysis confirming the self-fulfilling prophecies of the rule rather than grappling with the reality before the court. This approach blindly imposes per se rules of legality and illegality with the finesse of a meat cleaver in circumstances where the skill of a surgeon is required.

Attempts to reason within the confines of a rule-oriented methodology, while taking account of the wider range of values embraced by the law and the rich variety of reality tossed up by the adversary process, simply cannot work. The methodology also is unrealistic because it does not permit a pragmatic weighing of the imbalance of bargaining power between buyer and seller, risks that restraints that appear to be vertical are inspired horizontally, the possibility that advertising is in part directed toward imposing entry barriers by inducing irrational consumer choice, or that the business justifications proffered for the restraint are not present, justified in the circumstances, or sufficient in light of less restrictive alternatives. Moreover, attempts to employ the

analysis seemingly required by *Sylvania*, yet which take account of the more complex reality of vertical market relationships, generate awkward and complex legal standards that may be beyond the efficient administration of the law. This is where and why I part company with Stewart and Roberts' proposals for standards to deal with the other categories of per se rules in light of the *Sylvania* decision.

## V. CONCLUSION

The "stuff" for making fixed, universal, and eternal conclusions about the legality of all vertical market restraints does not appear to be at hand and never will be unless reality and our understanding of it can be frozen in time and space. Relying on the methodology and assumptions of *Sylvania* to establish what "ought" the law to be in the case of other per se tests of illegality is a traditional, but unwise exercise. *Sylvania*, with its narrow assumptions of policy and its rule-oriented approach, is just as objectionable as *Schwinn* as a platform from which to assess other conduct of antitrust concern. The courts and the bar need a principled, but flexible, approach that permits a broader and more sensitive inquiry into the goals of antitrust policy, the facts of specific cases, the practical features of various vertical market restraints, and the gradual evolution of knowable standards grounded in the policies of the antitrust laws, the methodology and limits of the legal process, and the facts of reality.

Stewart and Roberts' analysis of *Sylvania* and its progeny amply illustrate that *Sylvania* does not achieve these goals. Their proposed solutions, constrained by the values and methodology of *Sylvania*, also do not meet these criteria. Understanding per se—rule of reason analysis as a methodology and a means to an end, and not as fixed rules that define categories of legality and illegality, is the first step out of the *Sylvania* quagmire. Per se and rule of reason analysis is a methodology for allocating burdens of proof that range from relatively conclusive presumptions of illegality to evidentiary presumptions of legality determining whether the goals of antitrust policy are impinged in the context of specific cases and categories of conduct. More predictable standards will evolve gradually to guide lawyers in counseling their clients and litigating cases concerning the probability of the legality or illegality of particular practices under all the facts and circumstances of a case. It is, after all, a function of law to both guide and reflect reality

in conformity with the basic long term values and goals of the community.

The analysis of vertical market restraints in light of the Court's assumptions and method of analysis in *Sylvania* demonstrates we are still a long distance from fulfilling that function. Indeed, it is the paradox of *Sylvania* that the Court erred in the same fashion as the *Schwinn* opinion by unartfully deciding too much. We ought not clone the error by reproducing elsewhere in the law the implications of *Sylvania* through a modified repetition of its assumptions and methodology for decision by only varying the factual variables. The quagmire of *Sylvania* is a deeper one, necessitating a re-examination of the Court's theology and method for implementing it, if we expect to make sense of antitrust analysis of vertical market restraints.