Corporations, Securities & Antitrust

The Roberts Court's Antitrust Jurisprudence: The Chicago School Marches On

*By Joshua D. Wright**

The Supreme Court issued four antitrust decisions this term—(the most since the 1989-90 term)—and seven cases over the past two years. The antitrust activity level of the Roberts Court thus far has exceeded the single case average of the Court prior to the 2003-04 term by a significant margin.[1] In addition to these decisions, the Roberts Court requested input from the government in six antitrust cases over the past three years. This flurry of antitrust activity, combined with an apparent willingness to reconsider long established precedents that conflict with modern antitrust theory, suggest that the Roberts Court will play a relatively significant role in shaping antitrust doctrine for years to come.

This article examines three of the Supreme Court's 2006-2007 decisions—*Leegin*, *Twombly*, and *Weyerhaeuser*—with the goal of characterizing the antitrust philosophy of the Roberts Court.[2] To preview my conclusion: I argue that the Roberts Court's jurisprudence is heavily influenced by the Chicago School of antitrust analysis. This is not a function of the Court's composition, but rather the inevitable result of what has been a largely uninterrupted march by the Chicago School on antitrust analysis. Chief Justice Roberts and Justice Alito were presumed to be conservative antitrust thinkers, but there was little evidence from their prior judicial output or litigation experience that either would offer any distinctively Chicagoan influence on the Court's jurisprudence.

"Chicago School," is a term that means many different things to different people in the antitrust community. It has been used to describe the contributions to economic thought from the University of Chicago in the 1930s and 40s, the school of antitrust analysis that derived from Aaron Director's teachings at the University of Chicago. The term also, unfortunately, has been used pejoratively to describe reflexively naïve non-interventionist antitrust policy. However, in this article, I employ the term to describe the three pillars of antitrust analysis derived from the Chicago Law and Economics movement led by Aaron Director: (1) rigorous application of price theory; (2) commitment to empiricism; and (3) appreciation of the role of error costs on the optimal design of legal rules.[3]

I. The Chicago School of Antitrust Analysis: A Brief History and Some Defining Characteristics

The history of the Chicago School's influence on antitrust analysis has been well documented.[4] Professors Jonathan Baker and Timothy Bresnahan usefully break the Chicago School's influence on antitrust into two separate analytical components.[5] The first component, "the Chicago School of industrial organization economics," consists of the work in industrial organization economics which aimed, and succeeded, at debunking the structure-performance-conduct paradigm and its hypothesized relationship between market concentration and price or profitability.[6] Especially influential in the dismantling of the structure-conduct-performance hypotheses was UCLA economist Harold Demsetz,[7] whose work was central to exposing the misspecification of this relationship in previous work by Joe Bain and followers, as well as offering efficiency justifications for the observed correlation: firms with large market shares could earn high profits as a result of obtaining efficiencies, exploiting economies of scale, or creating a superior product.[8]

The second component, "the Chicago School of antitrust analysis," primarily (but not exclusively) contributed empirical work in the form of case studies demonstrating that various business practices previously considered manifestly anticompetitive could be explained as efficient and pro-competitive. Perhaps the most well-known contribution of the Chicago School of antitrust was the "single monopoly profit theorem," which posits that only a single monopoly profit is to be had in any vertical chain of distribution. The logic of the theorem is that a firm with monopoly power at one level of distribution would prefer competition at every other level of the supply chain because that will reduce the price of the product to consumers, increase sales, and maximize total profits. The theorem has been applied to monopoly leveraging theories, as well as tying, essential facilities, vertical integration, and vertical restraints.

The basic features of this second component are generally attributable to the work of Aaron Director[9] and others from 1950 to the mid-1970s.[10] A group of eminent antitrust scholars such as Richard Posner, Robert Bork, and Frank Easterbrook followed in Director's footsteps, building on these studies and economic analysis, and advocating bright line presumptions, including per se legality, which reflected the growing consensus that most conduct is efficient most of the time.

This is not to say that the Chicago School's contributions to antitrust economics were completed by the 1970s, nor that they were limited to the ultimate rejection of the structure-conduct-performance paradigm. For example, Chicagoans have continued to contribute to our economic understanding of various business practices, despite the fact that developments in industrial organization economics for the past twenty years have relied primarily upon game theoretic modeling techniques. Recent "Chicagoan" contributions to antitrust economics include work on exclusive dealing,[11] slotting contracts,[12] and vertical restraints theory.[13]

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There is little doubt that the influence of the Chicago School on antitrust law and policy has been substantial, particularly in the Supreme Court. Supreme Court decisions such as *Sylvania*,[14] *Khan*,[15] *Trinko*,[16] and *Brooke Group*[17] were influenced by Chicago School thinking, not to mention the development of the 1982 Horizontal Merger Guidelines by Assistant Attorney General William Baxter. Indeed, the 1970s and '80s were marked by a dramatic shift in antitrust policies, a significant reduction in enforcement agency activity, and calls from Chicago School commentators for the use of bright line presumptions,[18] per se legality of vertical restraints,[19] and even repeal of the antitrust laws altogether.[20] Perhaps the Chicago School's most important and visible victory has been the continual narrowing of the per se rule, which, after *Leegin* lifted the prohibition on minimum resale price maintenance, exists only in naked price-fixing cases and in a weakened form in tying cases.

There are undoubtedly many themes to the Chicago School movement in antitrust. While some of these themes are shared universally by Chicago School proponents, it would be a mistake to contend that the movement was monolithic. To the contrary, the Chicago School exhibited substantial variance in interests, beliefs, and methodologies employed. However, I contend that the following three "methodological commitments" are distinctively, while perhaps not exclusively, Chicagoan in nature: (1) rigorous application of price theory; (2) the centrality of empiricism; and (3) emphasis on the social cost of legal errors in the design of antitrust rules. While the first claim probably will not generate any significant dispute, the second and to a lesser extent the third will attract some dissent and warrant greater discussion. Consequently, I spend the bulk of this section arguing that both (2) and (3) are indeed distinctively Chicagoan, while conceding that the Post-Chicago and Harvard Schools shared some of these commitments some of the time.

A. Rigorous Application of Price Theory

The first defining characteristic is the rigorous application of economic theory, especially, but not exclusively, neoclassical price theory, to problems of antitrust analysis. Richard Posner described the key distinguishing attribute of the Chicago School of antitrust was that it "view[ed] antitrust policy through the lens of price theory."[21] Because I suspect that most commentators will agree that application of price theory is indeed a distinctive characteristic of the Chicago School of antitrust, I will not expand on this point other than to offer two caveats.

The first caveat is that Chicago's application of price theory does not imply that both the Harvard School and post-Chicago applications of economic theory to antitrust lacked rigor. Although this criticism has been leveled at the contributions of the Harvard School to industrial organization in the 1950s and '60s,[22] most criticisms of the post-Chicago movement have focused on its excessive mathematical complexity and highly stylized models rather than lack of theoretical rigor. The primary difference between the post-Chicago and Chicago Schools with respect to economic theory is likely that the latter rejects game theory as a useful tool for policy analysis, while the former embraces it as its primary weapon. Importantly, one reason that the Chicago School favored price theory is its ability to generate testable implications for the purpose of empirical testing, while game theory has been criticized on the grounds that it produces too many equilibria to be useful.[23]

The second caveat is to recognize that many of the Chicagoan's contributions, especially in the area of vertical restraints, do not rely solely upon neoclassical price theory and the model of perfect competition. Several of the key contributions by Chicagoans shed the confines of the neoclassical price theory model of perfect competition in favor of reliance on the New Institutional Economics and its focus on institutional details and transaction costs. In a series of articles, Professor Alan Meese has correctly noted that strict adherence to the perfect competition model envisioned in neoclassical economics was not consistent with the Chicago explanations of vertical restraints, which depend on the presence of downward sloping demand curves.[24] While noting that this objection is not without some force, I adopt a "big tent" view of the philosophical underpinnings of the Chicago School here, which is inclusive of these contributions.

Adherence to neoclassical price theory was no doubt a hallmark characteristic of Chicago analysis—and much progress was made in advancing antitrust analysis with simple application of price theory. However, embracing a one-to-one correspondence between perfect competition and Chicago would be overly narrow and not capture the contributions of many members of the Chicago movement. Chicago School economists frequently deviated from the confines of the model of perfect competition where such deviation was useful to generate helpful insights about various business practices.[25] In fact, Chicagoans themselves were among the first to criticize reliance on the model of perfect competition as a useful benchmark for antitrust analysis.[26]

B. The Centrality of Empiricism

The second defining feature is the centrality of empiricism to the Chicago antitrust analysis research agenda. This, I realize, is a somewhat more controversial claim. Post-Chicago scholars have frequently argued that it is the Chicagoan views that are without empirical support.[27] This argument is in some tension with recent empirical surveys of vertical restraints which appear to support the view that these practices are not likely to produce anticompetitive effects and favor a presumption of legality.[28] The question I address here, however, is not whether the predictions of Chicago School models have generated superior predictive power relative to their Post-Chicago counterparts. Rather, my claim is merely that empirical testing is a central feature of the Chicago School analysis.

There is at least one set of generally undisputed empirical contributions from Chicago School economists: the debunking of the purported relationship between concentration and price asserted by proponents of the structure-conduct-performance paradigm.[29] However, even holding aside the contributions of these "early" Chicagoans, it is clear that the relative weight attached to empirical evidence by later Chicago antitrust scholars was also relatively high.

Perhaps the most striking example of a Chicago School scholar who offered substantial empirical contributions to the antitrust literature was George Stigler. Seminal Chicago School figures Ronald Coase and Demsetz have both noted Stigler's

dedication to empiricism with a note of admiration. Coase describes Stigler as moving effortlessly "from the marshaling of high theory to aphorism to detailed statistical analysis, a mingling of treatments which resembles, in this respect, the subtle and colourful Edgeworth. It is by a magic of his own that Stigler arrives at conclusions which are both unexpected and important."[30] Demsetz eloquently elaborates on this theme:

Housed in Stigler's mind, neoclassical theory had more than the usual quality of material with which to work. It was coupled with a joy in verification and with a strong work ethic and sense of duty to his profession. Intelligence, insight, wit, and style were evident in his writings. His articles and essays could not be ignored. They provoked readers to think and often to follow his lead. For some readers, they simply provoked. Stigler's passion for evidence gathering is also evident in his work, and he made no secret of it.[31]

Stigler's work lived up to the billing described by these prominent Chicagoan colleagues and displayed an unmistakable passion for empirics. It was the empirical flavor of his economic analysis that landed Stigler a Nobel Prize in 1982 for his "seminal studies of industrial structures, functioning of markets, and causes and effects of public regulation." Ironically, Stigler was initially rejected by the University of Chicago Economics Department for being "too empirical." In his 1964 presidential address to the American Economic Association, Stigler announced that the "age of quantification is now full upon us," and that this age would be characterized by policy analysis informed by empirical evidence.[32]

Stigler's body of work in industrial organization, which he referred to often as "microeconomics with evidence," is powerful proof of the centrality of empiricism to his own approach. For example, Stigler offered an early study of the effects of the antitrust laws,[33] an empirical assessment of block booking practices,[34] and a study of the economies of scale[35] introducing the survivorship principle. Perhaps the strongest support for Stigler's dedication to empirical evidence in the development of antitrust policy was his change in position in favor of de-concentration policy in the early 1950s. This change was in response to the state of empirical evidence debunking the consensus views concerning the relationship between concentration and profitability.[36]

The uniquely Stiglerian commitment to empiricism is a noteworthy feature of the Chicago School's contribution to antitrust analysis in its own right, but there are others who demonstrate a similar commitment. For example, the case studies offered by many Chicagoans have played an important role in antitrust policy. Former FTC Chairman Tim Muris has made special note of Benjamin Klein's case studies emphasizing the role of vertical restraints in facilitating dealer supply of promotional services when performance is difficult to measure.[37]

In sum, the Chicago School of antitrust analysis places a strong emphasis on empiricism both in the form of statistical analysis and case studies of specific restraints. One might view the Chicago commitment to price theory, and even measured deviations from price theory where useful to explain economic phenomenon, as an extension of the emphasis on empiricism because of the testable implications that follow from its application.

C. Adoption of the Error-Cost Framework

A third defining feature of the Chicago School of antitrust analysis is the emphasis on the relationship between antitrust liability rules, judicial error, and the social costs of those errors. From an economics perspective, it is socially optimal to adopt the rule that minimizes the expected cost of false acquittals, false convictions, and administrative costs. Not surprisingly, the error-cost approach is distinctively Chicagoan because it was pioneered by Judge Frank Easterbrook, a prominent Chicagoan.[38] Subsequently, several commentators have adopted this framework as a useful tool for understanding the design of antitrust rules.[39]

The error-cost framework begins with the presumption that the costs of false convictions in the antitrust context are likely to be significantly larger than the costs of false acquittals since judicial errors that wrongly excuse an anticompetitive practice will eventually be undone by competitive forces. On the other hand, judicial errors which wrongly condemn a pro-competitive practice are likely to have significant social costs, as such practices are condemned and not offset by market forces.

The insights of Judge Easterbrook's error-cost framework, combined with the application of price theory and sensitivity to the state of empirical evidence, could be powerful tools for improving antitrust policy. For example, David Evans and Jorge Padilla demonstrate that such an approach to tying favors a modified per se legality standard in which tying is deemed pro-competitive unless the plaintiff presents strong evidence that the tie was anti-competitive.[40] Their conclusion is based upon the formulation of prior beliefs concerning the likely competitive effects of tying grounded in an assessment of the empirical evidence evaluating both Chicago and post-Chicago economic theories. Evans and Padilla label their approach "Neo-Chicago" because it purportedly adds to the conventional Chicago approach to the error-cost framework. To the extent that this label helps to distinguish calls for presumptions of legality informed by decision-theoretic analysis from those who would argue for per se legality based solely upon the Chicago School "impossibility theorems," it may be a useful addition to the antitrust nomenclature. However, largely for expositional convenience, and also because it is quite fair to credit Judge Easterbrook's contribution of the error-cost framework to the Chicago School, I will use "Chicago" as synonymous with Evans and Padilla's "Neo-Chicago."

This is not to say that the Chicago School possesses an exclusive claim to placing significant weight on error and administrative costs in the design of antitrust standards. Indeed, FTC Commissioner William Kovacic has persuasively demonstrated that the Harvard School has played an integral role in promoting the administrability of antitrust rules, which is a predecessor of the error-cost framework discussed above.[41] Perhaps the most well-known proponents of this position are Professors Phillip Areeda and Donald Turner, who have consistently argued that antitrust rules should be administrable.[42] Harvard School's then-Judge Stephen Breyer incorporated the insights of the Harvard approach into antitrust doctrine in *Barry Wright*, noting that "antitrust laws very rarely reject... 'beneficial birds in hand' for the sake of more

speculative... 'birds in the bush.'"[43] Again, the Harvard School's sensitivity to the possibility of deterring pro-competitive conduct as a result of judicial error is related to the Chicago School's error-cost framework.

II. The Roberts Court's 2006-07 Antitrust Output

The Supreme Court heard four antitrust cases this term. In relative and historical terms, this is an astonishing level of activity. The Roberts Court's production over the past two terms, and its apparent comfort with complex antitrust issues, suggests that this Court is likely to remain interested and engaged in antitrust, even if not at its current rate of output. In this section, I summarize three of these decisions before turning to my central claim.

A. Leegin Creative Leather Products, Inc. v. PSKS, Inc.[44]

Leegin is a straightforward resale price maintenance (RPM) case involving a terminated dealer. The plaintiff, PSKS, operated a women's apparel store in Texas. The defendant, Leegin, manufactures and distributes a number of leather goods and accessories including handbags, shoes, and jewelry under the "Brighton" brand name. In 1997, Leegin introduced its RPM program, the "Brighton Retail Pricing and Promotion Policy," a marketing initiative under which it would sell its products exclusively to those retailers who complied with the suggested retail prices. When Leegin learned that PSKS was discounting the Brighton product line below the suggested retail prices, Leegin terminated PSKS and PSKS in turn filed suit alleging that Leegin's new marketing and promotion program violated the Sherman Act. The trial court found Leegin's policy per se illegal under *Dr. Miles*,[45] and the jury awarded a $1.2 million verdict which was upheld by the Fifth Circuit.[46]

Justice Kennedy authored the Supreme Court's majority opinion, reversing the Fifth Circuit, and was joined by Justices Scalia, Thomas, Roberts and Alito. Justice Kennedy's analysis largely adopted the structure of the argument offered by both the antitrust agencies and a group of economists in amicus briefs filed in support of Leegin and in favor of overturning *Dr. Miles*, and offered four central points: (1) per se analysis is reserved for restraints that, echoing the language of *Sylvania*,[47] "always, or almost always, reduce consumer welfare by limiting competition and output;" (2) economic theory strongly suggests that RPM does not meet that stringent standard; (3) empirical evidence comports with economic theory on RPM; and (4) stare decisis rationales for continuation of a per se rule and adhering to *Dr. Miles* are unpersuasive.

The majority launched their attack on *Dr. Miles* with a reminder that the rule of reason, and not per se analysis, is the default rule for antitrust analysis of any economic restraint, and deviation from this default is warranted only when the restraint is known to be "manifestly anticompetitive"[48] and "would always or almost always tend to restrict competition and decrease output."[49] Measured against this standard, Justice Kennedy finds the case for continued application of the per se rule profoundly lacking after a review of the theoretical justifications for RPM and the empirical evidence concerning its competitive effects.[50] While recognizing the potential for RPM to produce anticompetitive effects by facilitating collusion, the majority finds that the empirical literature suggests that efficient uses of RPM are not "infrequent or hypothetical," and that the standard for applying the per se rule has not been satisfied.

Justice Breyer's dissent offers an enthusiastic defense of *Dr. Miles*. Unfortunately, as discussed in greater detail by Professor Miller, the enthusiasm is not supported by evidence or economic theory.[51] While Justice Breyer begins his dissent by recognizing the "*always or almost always*" standard that must be satisfied in order to apply the per se rule (in the absence of overriding stare decisis concerns), his failure to understand the economics of vertical restraints and to recognize the state of empirical evidence are fatal to his argument. A brief summary of the flaws is instructive. First, with respect to the empirical evidence, Justice Breyer relies heavily on studies that cannot possibly show that RPM meets the relevant standard.[52] Second, Justice Breyer displays surprising unfamiliarity with the economics of vertical restraints, failing to recognize the point emphasized in both the majority opinion (and by extension, the FTC/ DOJ Brief and the Economists' Brief), that the key explanation for the use of RPM is Klein and Murphy's demonstration that RPM may be used to enforce efficient contracts involving promotional services or other non-contractible elements of performance. Breyer's contention that he does not "understand how, in the absence of free-riding, an established producer would need RPM" is also puzzling. The argument that vertical restraints can facilitate retailer supply of promotion even in the absence of dealer free-riding is cited in the majority opinion and explained in the Economists' Brief in a fairly accessible manner. This argument has been well accepted in the economics literature for over twenty years.

Of course, the antitrust enterprise does not turn solely on the view of economists and economic theory.[53] The dissent offers two further defenses of the *Dr. Miles* rule that turn upon principles of stare decisis and identifying Congressional intent in 1975. The stare decisis defense depends critically on Justice Breyer's assessment that the economic arguments in favor of overturning *Dr. Miles* have not changed "for close to half a century." This is not so. As discussed above, this characterization is undermined by the dissent's erroneous interpretation of the empirical evidence concerning RPM and a failure to understand the role of RPM in facilitating the increased supply of promotional services even without inter-dealer free-riding.

The dissent next argued that overruling *Dr. Miles* would effectively repeal the Consumer Goods Pricing Act of 1975 that repealed the 1937 Miller-Tydings Act, which allowed states to authorize RPM. The dissent argues that the repeal of the 1937 Act should be interpreted as a statement of Congressional intent to endorse application of the per se rule against RPM. The majority rejects this argument, noting that "the text of the Consumer Goods Pricing Act did not codify the rule of *per se* illegality for vertical price restraints. It rescinded statutory provisions that made them *per se* legal" and, therefore, merely placed RPM once again within the ambit of the Sherman Act.[54]

It remains to be seen what impact *Leegin* will have on antitrust jurisprudence more generally. In many ways, the decision's impact is likely to be limited for several reasons. First, manufacturers and retailers had adapted to *Dr. Miles* by creating innovative arrangements that avoided the application

of the per se rule and accomplished the functional equivalent of RPM. In this sense, *Leegin*'s marginal impact will be to allow transactors to accomplish these goals directly rather than circuitously, and presumably at a lower cost. Congress, presumably along with state legislatures, might also reduce *Leegin*'s impact by reviving *Dr. Miles*. One possible result will be a patchwork of laws on RPM, which are likely to impose significant costs on manufacturers attempting to navigate these standards across state lines.[55] Nonetheless, *Leegin* is a significant improvement in antitrust jurisprudence on a much broader level because it reconciles previously incoherent antitrust doctrine with modern economic thought. It is also a symbolic victory for the Chicago School in persuading the Court to abandon one of the last vestiges of the "pre-Chicago" era's hostility to vertical restraints.

B. Bell Atlantic Corp. v. Twombly[56]

While *Twombly* offered the Court an opportunity to clarify the pleading requirements under Section 1 of the Sherman Act, it has also been viewed as having greater procedural implications outside of the antitrust context for its apparent rejection of notice pleading in favor of a "plausibility pleading."[57] While some commentators have argued that *Twombly* is not likely to become very significant,[58] it undoubtedly alters the Section 1 landscape considerably by increasing the pleading burden imposed on plaintiffs alleging horizontal conspiracies. Some factual and procedural background is necessary to place the decision in context.

The plaintiff class alleged that four major local exchange carriers—Bell Atlantic, Bell South, Qwest Communications International, and SBC (ILECs)—colluded to block competitive entry by Competitive Local Exchange Carriers (CLECs), pursuant to the framework established by the 1996 Telecommunications Act, which required the incumbent carriers to sell local telephone services at wholesale rates, lease unbundled network services, and permit interconnection. The allegations themselves consisted of claims that the defendants agreed not to enter each other's territories as CLECs and to jointly prevent CLEC entry altogether.

The district court found that these allegations amounted simply to assertions of parallel conduct, and as such were vulnerable to dismissal, pursuant to defendants' Rule 12(b)(6) motions without allegations of additional "plus factors," such as those required at the summary judgment stage. The Second Circuit reversed unanimously, despite some hesitation and concern regarding the "sometimes colossal expense" of discovery in complex antitrust cases, and held that Rule 8(a) did not require allegations of the "plus factors" required to survive summary judgment.

Justice Souter authored the majority opinion in a 7-2 decision holding that "stating [a Section 1 claim] requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.... [This requirement] simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[59] The majority makes clear that allegations of parallel conduct alone are not sufficient to survive the pleading stage, "retiring" and rejecting the "no set of facts" formulation favored by *Conley v. Gibson*,[60] despite the conventional rule disfavoring motions to dismiss in antitrust cases. The Court's rationale for increasing the pleading burden faced by plaintiffs in antitrust conspiracy cases is explicitly motivated by the desire to avoid the extraordinary costs of discovery in such cases unless there is good reason to believe that an agreement will be unearthed.

One lesson from Twombly is entirely clear: a conclusory "allegation of parallel conduct [with] a bare assertion of conspiracy" is not sufficient to plead a conspiracy without "a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[61] The application of the new "plausibility" standard to plaintiffs' claims was relatively straightforward as the allegations consisted of parallel conduct alone and no independent allegation of actual agreement among the ILECs. But it remains to be seen precisely what sort of allegations will be sufficient to survive a motion to dismiss. In one recent case, *In re OSB Litigation*,[62] plaintiffs' Section 1 allegations survived a post-*Twombly* motion to dismiss largely because the complaint described alleged repeated communications between rivals announcing an intention to shutdown plants and reduce output, and detailed the mechanism by which the collusive agreement was formed (involving use of published prices in a trade publication), monitored, and enforced.

The full implications of *Twombly* are yet to be seen. Concerns with false positives in Section 1 cases and the massive social costs of discovery clearly motivated the Court's push towards an increased pleading burden. An open question remains as to precisely what "plus factor" allegations will be sufficient, when added to parallel conduct, to survive *Twombly*'s more rigorous standard. One result of *Twombly*, which appears unavoidable, is that the plausibility standard may operate as "Full Employment Act" for economists who will now be called in at the pleading stages to declare that market conditions are conducive to coordination or tend to exclude the possibility of independent action.

C. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.[63]

Weyerhaeuser raised the issue of identifying the appropriate standard for "predatory buying" claims under Section 2 of the Sherman Act. Ross-Simmons, a saw mill in the Pacific Northwest, alleged that Weyerhaeuser overpaid for alder sawlogs in a scheme designed to drive its rivals out of business. The district court instructed the jury that Ross-Simmons was required to prove that Weyerhaeuser engaged in "conduct that has the effect of wrongly preventing or excluding competition or frustrating or impairing the efforts of the firms to compete for customers within the relevant market." With respect to the "predatory buying" allegation specifically, the district court instructed the jury that:

> One of [respondents'] contentions in this case is that the [petitioner] purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act.

The jury found in favor of Ross-Simmons and awarded $78.7 million. The Ninth Circuit affirmed the judgment, despite Weyerhaeuser's contention that the district court erred by not including both prongs of the *Brooke Group*[64] standard in the jury instruction. The Department of Justice and FTC

petitioned the Supreme Court for certiorari and submitted joint amicus briefs recommending that the Court apply the *Brooke Group* standard to predatory buying.

Justice Thomas authored the unanimous decision on behalf of the Court, which agreed with the position advocated by the enforcement agencies. In predatory buying cases, plaintiffs must demonstrate both that the buyer's conduct led to below-cost pricing of the buyer's outputs and that the buyer "has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."[65] Because Ross-Simmons conceded that it had not satisfied the *Brooke Group* standard, the Court vacated the Ninth Circuit's judgment and remanded the case.

The Supreme Court's endorsement of the *Brooke Group* standard appears to rest on three principles. The first is that "predatory-pricing and predatory- bidding claims are analytically similar" as a matter of economic theory, suggesting that similar legal standards are appropriate.[66] The second is that the Court espouses a view that the probability of successful predatory buying, like predatory pricing, is very low,[67] in part because of the myriad of explanations for "bidding up" input prices in an effort to increase market share and output, hedge against price volatility, or as a result of a simple miscalculation.[68] Finally, the Court notes that like low output prices, higher input prices may result in increased consumer welfare as firms increase output.[69]

While the Supreme Court does not take the lower court to task for allowing this jury instruction, there appears to be little, if any, doubt that the Supreme Court was correct to reverse the Ninth Circuit's affirmation of a disastrous jury instruction that would require a determination as to whether a firm purchased more inputs than it "needed" or paid more than "necessary." Rather, the Supreme Court focused almost exclusively on the theoretical similarities between predatory pricing and buying, the attributes of the *Brooke Group* standard, and why the economic similarity should translate into symmetrical legal treatment. Interesting questions remain concerning the implications of *Weyerhaeuser* (does this unanimous opinion suggest that the Supreme Court may be willing to adopt the *Brooke Group* test to bundled discounts, "compensated" exclusive dealing, all-units discounts, or other forms of allegedly exclusionary conduct?) However, there seems to be very little dispute that the decision is correct on the merits.

I claim that these decisions, taken together, suggest an unmistakable connection to the characteristics of the Chicago School of antitrust analysis discussed above. So what is it about these decisions that suggests the Roberts Court has adopted a Chicago School approach to antitrust analysis? And, if I am correct, what does it tell us about where this prolific Court might venture next in the world of antitrust jurisprudence? The remainder of this essay is dedicated to a discussion of these issues.

III. The Roberts Court and The Chicago School

The Roberts Court's productivity in the 2006-07 term alone has supplied sufficient fodder to keep both commentators and practitioners busy analyzing this output for likely trends in future antitrust jurisprudence. There is no doubt that this Court is quite comfortable with antitrust. It has not shied away from complex issues requiring analysis of economic theory or, in the case of *Leegin*, overturning century-old precedent. Perhaps this is because the current justices, led by Justices Breyer and Stevens, have significant antitrust experience.[70] Justice Scalia is considered the Court's only true Chicago School author. Despite the fact that Justice Breyer taught antitrust at the University of Chicago, he is generally acknowledged as a member of the Harvard School with substantial antitrust expertise.[71]

The new Supreme Court justices are also familiar with antitrust issues. Chief Justice Roberts was involved in a significant amount of antitrust litigation, representing both plaintiffs and defendants in a wide variety of cases. Justice Alito's most discussed antitrust moment came in joining an important and vigorous dissent by Judge Greenberg in the controversial and heavily criticized *LePage's* decision.[72]

The antitrust output and experience of these two new Justices certainly would not have allowed one to confidently predict that the Roberts Court's jurisprudence would exhibit a distinctively Chicago flare. For example, consider the following excerpt from an article written by Chief Justice Roberts in 1994 addressing whether the Supreme Court was "conservative":

In the antitrust area, the Court seems to regain its equilibrium after the dizzying *Kodak* decision of two Terms ago. That decision surprised most observers by upholding a predatory pricing verdict based on dubious if not implausible economic theory. In the 1992–93 Term, in three decisions the Court returned to a regime in which the objective economic realities of the marketplace take precedence over fuzzy economic theorizing or the conspiracy theories of plaintiffs' lawyers. This is bad news for professors and lawyers, good news for business.[73]

Admittedly, the implicit critique of *Kodak* appears to be consistent with Chicago School views. But the excerpt also exhibits some aversion to the application of economic theories —at least fuzzy ones—and academic theorizing more generally and especially when it is detached from real world market conditions and empirical realities. While there are kernels in the antitrust history of both judges that might encourage Chicagoans and post-Chicagoans, it is difficult to generalize any antitrust philosophy from these limited sources.[74]

Leegin bears all of the identifying marks of Chicago School influence. Justice Kennedy's analysis applies Chicago economic theory to minimum RPM in order to assess its likely competitive effects. The *Leegin* majority recognizes the several pro-competitive rationales for vertical restraints in the economics literature, many pioneered by Chicagoans, including the use of vertical restraints to facilitate the provision of promotional services in the absence of dealer free-riding. Importantly, *Leegin* at least implicitly broadens the Court's view of the role of vertical restraints outside of the conventional "inter-dealer" or "discount" dealer free-riding rationale, which does not appear to explain many instances of RPM. In summarizing the theoretical literature, the Court notes that the "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."[75]

Leegin also displays the two remaining Chicago School characteristics: reliance on empiricism and sensitivity to error costs in designing antitrust rules. Justice Kennedy certainly displays sensitivity to the available empirical evidence concerning the competitive effects of RPM, emphasizing documentation that the practice is infrequently associated with anticompetitive effects. Specifically, the Court notes that "[t]he few recent studies documenting the competitive effects of resale price maintenance also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule."[76]

Finally, the majority also embraces the error-cost framework. This is not surprising since this framework is embodied in *Business Electronics*, limiting the application of per se rules to restraints that are "always or almost always" anticompetitive. But the Court goes further than such an implicit recognition of the error-cost framework when rejecting the argument that per se illegality is the appropriate antitrust default rule on the grounds that per se rules decrease administrative costs. The Court's response clearly reveals that its view of the proper scope of per se rules is illuminated by Judge Easterbrook's error-cost framework:

> *Per se* rules may decrease administrative costs, but that is only part of the equation. Those rules can be counterproductive. They can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage. See Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 158 (1984).[77]

Twombly also strongly exhibits two of the three Chicago characteristics set forth above, and arguably the third as well. There is no doubt that the Court's decision to heighten the pleading burden facing plaintiffs alleging conspiracy in violation of Section 1 is influenced by the error-cost analysis. As discussed above, the Court explicitly motivates its reasoning with reference to the massive social costs imposed by allowing discovery in cases that are not likely associated with real collusion. The Court notes that conspiracy allegations are especially ripe for false positives because parallel conduct might well arise from competitive behavior, and that those considerations favor more rigorous pleading standards.

But does *Twombly* have separate antitrust content, or is it an opinion about procedure with some collateral antitrust implications? I would argue that the former interpretation is correct. Justice Souter's opinion extends the logic of *Matsushita* and *Monsanto*, seeking to avoid false inferences of conspiracy at the pleading stage. This extension itself has important antitrust implications. One such implication is that lower courts will be faced with the challenge of assessing whether conditions tending to exclude the possibility of independent action are present *before* discovery has occurred.

Returning to the claim that *Twombly* was influenced by Chicago logic, the majority's analysis also displays commitment to the application of economic theory. *Twombly*'s primary antitrust lesson is that lower courts are to analyze the "plausibility" of the conspiracy allegations in light of "common economic experience." This lesson combines the Chicago School principles of application of economic theory and the centrality of empiricism. What role does evaluation of the "common economic experience" have in determining "plausibility"? *Twombly*'s analysis of market conditions suggests that rational, profit-maximizing independent action is the likely explanation of the ILEC's parallel conduct. Applied outside the case at bar, *Twombly* requires that the market conditions must be conducive to coordination *and* tend to exclude the possibility of independent action.

But where does a court turn to evaluate whether the "common economic experience" and market conditions are conducive to agreement? The answer is economic theory, and an evaluation of empirical realities. Specifically, the modern oligopoly theory built upon the work of Chicago's George Stigler lays the foundation for this analysis in a manner that provides useful guidance to courts by focusing on the conditions that lower the costs of forming, monitoring, and enforcing a collusive agreement.[78] *Twombly* requires lower courts to evaluate market realities to determine whether they are consistent with those conditions that would support an inference of conspiracy.

Weyerhaeuser also fits nicely into the Chicago School framework described above, with respect to its application of economic theory to predatory bidding and its consistency with the error-cost framework. Justice Thomas's opinion, however, demonstrates very little interest in empiricism. As discussed above, Justice Thomas's opinion on behalf of the unanimous Court begins with what reads much like a literature survey, noting the consensus view of economists that predatory buying is analytically identical to predatory pricing. This reliance on economic theory allows the Court to both equate monopsony and monopoly analysis for the purposes of antitrust and set the stage to adopt the *Brooke Group* standard. The reliance on *Brooke Group* makes clear that the error-cost framework plays a central role in Justice Thomas's analysis, relying on both the low probability of competitive harm associated with predatory buying,[79] as well as the economic logic that predatory pricing is likely to benefit consumers, to justify adoption of the *Brooke Group* standard.

The Roberts Court's antitrust output generally appears to embrace the Chicago School principles identified in Part II. I offer this as a descriptive theory of these cases rather than a normative judgment on their merits. Such a description may be useful in its own right in highlighting these aspects of the Roberts Court's antitrust jurisprudence. Nor do I wish to overstate my claim as denying the existence of any distinctively Harvard or Post-Chicago themes in these cases. But, for the most part, I believe these cases largely adopt what can accurately be described as a Chicago School approach.

One can anticipate the objection that the Supreme Court, at least since *Sylvania*, has long been influenced by Chicago School and so the Roberts Court's antitrust output is merely reflective of the status quo that persisted prior to the 2006-07 term. While that argument is not without force, and it is certainly true that Chicago School principles are not new to Supreme Court antitrust jurisprudence, it was unclear that the Roberts Court would adopt a Chicago School approach to antitrust analysis. Even if it were true that the Roberts Court's antitrust jurisprudence represents a mere continuation of a pre-existing trend, that point would not detract from the importance of identifying the distinctive themes displayed by

the Roberts Court, which has proven unique in its productivity, willingness to engage antitrust issues, and its familiarity and expertise with the subject matter. Holding these points aside, another useful application of this descriptive theory is the generation of some predictions concerning the future antitrust output of the Roberts Court.

IV. Where Will The Roberts Court Go Next?

The Roberts Court's interest in and proclivity for antitrust analysis raises the question: Where will they go next? Is the Court going to limit itself to "clean up" decisions such as *Independent Ink* and *Leegin* that correct long standing and broadly criticized precedents? Will the Court intervene only in cases where an economic consensus is apparent in the literature, such as *Weyerhaeuser* and *Leegin,* rather than engaging in its own hands-on economic analysis? An aversion to taking on complex antitrust issues where such a consensus does not exist might explain the Court's unwillingness to grant certiorari in *Tamoxifen*.[80] Or will the Court be willing to engage some of the more difficult and complex issues of the day, such as addressing the correct standard for unilateral "exclusionary pricing" in cases such as *LePage's*? Or perhaps the Roberts Court will tackle a horizontal merger case? I offer some predictions on topics that the Supreme Court may take on in the near future that are consistent with the analysis above.[81]

The first prediction is that the Roberts Court will finally take on a horizontal merger decision. The Supreme Court has not offered any substantive guidance on horizontal mergers in over thirty years,[82] allowing merger analysis to develop amongst the lower courts with substantial influence from the antitrust agencies in the form of the Horizontal Merger Guidelines. There are, of course, significant obstacles to the Supreme Court addressing a merger case in the near future even if it is so inclined, such as the elimination of automatic direct appeal. Nonetheless, a Supreme Court merger opinion may be consistent with the pattern exhibited in the 2006-07 term. Economic theory, and the Merger Guidelines, both suggest that the structural presumptions in the Supreme Court jurisprudence do not make much economic sense and do not reflect modern economic learning concerning the potential unilateral effects of mergers or the competitive effects of mergers. The Supreme Court may take advantage of this economic consensus and "clean up" troublesome merger decisions. Such a decision would be consistent with the Supreme Court's revealed preference for relying on economic consensus to overturn problematic, if not long-lived, precedents.[83]

In the same spirit, I predict the Roberts Court will overturn *Jefferson Parish's* modified per se rule in favor of the rule of reason, thus eliminating the last vestiges of the hostile approach to vertical contracting practices of antitrust era's past.[84] This is another area that matches the criteria set forth above. Economic theory suggests an overwhelming consensus that, like RPM, the literature is "replete" with pro-competitive explanations for tying. The empirical evidence, if not only in the form of ubiquitous tying in the economy by firms both with and without any market power of antitrust concern, bolsters the case for abandoning the per se rule. Finally, application of the error-cost framework to tying suggests a structured rule of reason approach adopting a presumption of *legality*—certainly not the per se rule of illegality.[85]

A third prediction is that the Court will eventually agree to hear a case challenging patent settlements in the pharmaceutical industry involving "reverse payments," although it did not grant certiorari in *Tamoxifen* this year. One view of the Court's denial of certiorari on reverse payments cases to this point is that the consensus economic and empirical view on these issues is still emerging, as evidenced by the antitrust agencies' disagreement as to the ripeness of reverse payment cases for review. In any case, reverse payments do not present quite the low hanging fruit presented in cases such as *Weyerhaeuser* and *Leegin*. However, a circuit split on these issues is likely to develop, and our empirical knowledge of these settlements is likely to improve over time with increased study, both which militate in favor of certiorari.

I conclude with one area where I am less convinced that the Roberts Court will apply its impressive energies in the antitrust realm: exclusionary pricing in the form of bundled rebates or loyalty discounts. While there is broad consensus that *LePage's* adopted a nonsensical "harm to competitor" standard in lieu of requiring harm to competition, and many have argued that *Brooke Group* or a modified *Brooke Group* approach should apply to all discounting conduct, no real consensus has emerged as to the appropriate test to apply to bundled rebates or loyalty discounts. In addition, the economic literature on bundled rebates and loyalty discounts is growing, with much attention paid to anticompetitive theories that have not yet been subjected to empirical testing and, therefore, may not be "ready for primetime."[86] Even further, economic research exploring pro-competitive justifications for bundled rebates, partial and limited exclusive contracts, and loyalty discounts is still emerging. In the absence of any economic or empirical consensus, and no clear benefit in deviating from the rule of reason approach to exclusionary pricing cases, it is unlikely that the Court will be motivated to address these issues.

Endnotes

1 J. Thomas Rosch, "A New Direction for Antitrust at the Supreme Court?," Remarks Before the Antitrust Section of the Minnesota Bar (March 1, 2007).

2 I omit analysis of *Credit Suisse Sec. (USA) LLC v. Billing,* 127 S. Ct. 2383 (2007). For an excellent discussion of Credit Suisse's potential impact on antitrust activity in regulated industries, *see* Keith Sharfman, *Credit Suisse, Regulatory Immunity, and the Shrinking Scope of Antitrust*, 2007 eSapience Ctr. for Competition Pol'y (arguing that the "clearly incompatible" standard threatens to render mere regulatory overlap a sufficient condition for implied immunity from the antitrust laws).

3 I do not claim that other "schools" of economic thought are not also associated with these themes. My claim, *infra* Part II.B., is that the Chicago School is uniquely associated with this combination of characteristics.

4 *See, e.g.,* Richard A. Posner, *The Chicago School of Antitrust*, 127 U. Penn. L. Rev. 925 (1979); Robert H. Bork, The Antitrust Paradox (New York: Free Press 1978); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Persp. 43 (2000); Edmund W. Kitch, The *Fire of Truth: Remembrance of Law and Economics at Chicago, 1932-70*, J.L. & Econ. 163 (1983); Alan J. Meese, *Tying Meets the*

New Institutional Economics: Farewell to the Chimera of Forcing, 146 U. Penn. L. Rev. 1 (1997); William H. Page, *The Chicago School and The Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 Va. L. Rev. 1221 (1989).

5 Jonathan B. Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power* 23-26 (Stanford Law School, Working Paper No. 328, July 2006).

6 *See, e.g.*, Yale Brozen et al., Concentration, Mergers, and Public Policy (1982) (questioning the causal link between market concentration and price and providing alternative, efficiency-based explanations for the correlation); Industrial Concentration: The New Learning (Harvey J. Goldschmid et al. eds., 1974).

7 Professors Demsetz and Armen Alchian are frequently associated with the Chicago School despite the fact that both spent the bulk of their careers at UCLA. As any UCLA economist should note, the antitrust community has allowed the Chicago School to take credit for many of the contributions from UCLA. The contributions of the UCLA economists to antitrust analysis are discussed by former Federal Trade Commission (FTC) Chairman, and UCLA alumnus, Timothy J. Muris. *See* Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 Geo Mason. L. Rev. 1 (2003).

8 Harold Demsetz, *Two Systems of Belief About Monopoly*, *in* Industrial Concentration: The New Learning (Harvey J. Goldschmid et al. eds., 1974). The contributions of Demsetz and other participants in the famous Airlie House Conference are discussed in Timothy J. Muris, *Economics and Antitrust*, 5 Geo Mason. L. Rev. 303 (1997).

9 *See* The New Palgrave Dictionary of Economics and the Law 227-33, 601-05 (Peter Newman ed., Macmillan Reference 1998); *see also* Sam Peltzman, *Aaron Director's Influence on Antitrust Policy*, 48 J.L. & Econ. 313 (2005).

10 Seminal contributions from the Chicago literature include, but are not limited to, Robert H. Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. Chi. L. Rev. 157 (1954); Aaron Director & Edward H. Levi, *Law and the Future of Trade Regulation*, 51 Nw. U. L. Rev. 281 (1956); Ward S. Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957); John S. McGee, *Predatory Price Cutting: The Standard Oil (NJ) Case*, 1 J.L. & Econ. 137 (1958); Lester G. Telser, *Why Should Manufacturers Want Fair Trade?* 3 J.L. & Econ. 86 (1960).

11 Howard P. Marvel, *Exclusive Dealing*, 25 J.L & Econ. 1 (1982); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 Antitrust L.J. 473 (2007).

12 Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & Econ. (forthcoming 2007); Joshua D. Wright, *Slotting Contracts and Consumer Welfare*, 74 Antitrust L.J. 439 (2007); Joshua D. Wright, *Antitrust Law and Competition for Distribution,* 23 Yale J. on Reg. 169 (2006).

13 Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & Econ. 265 (1988).

14 Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977).

15 State Oil Co. v. Khan, 522 U.S. 3 (1997).

16 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004)

17 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

18 *See, e.g.*, Frank Easterbrook, *The Limits of Antitrust*, 65 Tex. L. Rev. 1 (1984).

19 Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981).

20 *See, e.g.*, D. T. Armentano, Antitrust Policy: The Case for Repeal (1986).

21 Posner, *Chicago School of Antitrust*, *supra* note 4, at 928; *accord* Bork, The Antitrust Paradox, *supra* note 4, at 117.

22 *See, e.g.*, Posner, *Chicago School of Antitrust*, *supra* note 4, at 928-29:

> It is still fair to ask why the application of price theory to antitrust should have been a novelty. The answer, I believe, is that in the 1950s and early 1960s, industrial organization, the field of economics that studies monopoly questions, tended to be untheoretical, descriptive, "institutional," and even metaphorical. Casual observations of business behavior, colorful characterizations (such as the term "barrier to entry"), eclectic forays into sociology and psychology, descriptive statistics, and verification by plausibility took the place of the careful definitions and parsimonious logical structure of economic theory. The result was that industrial organization regularly advanced propositions that contradicted economic theory.

23 *See* Bruce H. Kobayashi, *Game Theory and Antitrust, A Post-Mortem*, 5 Geo. Mason L. Rev. 411, 412 (1997) (criticizing the application of game theory in antitrust on the grounds that "game theoretic models of [industrial organization] have not been empirically verified in a meaningful sense"). *See also* David Evans & Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73, 98 (2005) ("it has yet to demonstrate a capacity to produce what we would call identification theorems—useful descriptions of the circumstances determining whether a practice is procompetitive or anticompetitive").

24 *See, e.g.*, Alan J. Meese, *Price Theory and Vertical Restraints: A Misunderstood Relation*, 45 UCLA L. Rev. 143 (1997); Alan J. Meese, *Exclusive Dealing, The Theory of the Firm, and Raising Rivals' Costs: Toward a New Synthesis*, 50 Antitrust Bull. 371 (2005); Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. Ill. L. Rev. 77; Alan J. Meese, *Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust*, 1 J. Competition L. & Econ. 21 (2005).

25 *See, e.g.*, George J. Stigler, *The Economics of Information*, 69 J. Pol. Econ. 213 (1964) (analyzing the economics of information from a search cost perspective whereas search costs would not exist under perfect competition); Telser, *supra* note 10 (analyzing resale price maintenance); Klein & Murphy, *supra* note 13; Benjamin Klein, *Market Power in Aftermarkets*, 17 Managerial & Decision Econ. 143 (1996); Klein & Lerner, *supra* note 11 (analyzing the role of exclusive dealing contracts in preventing dealer free-riding).

26 *See* Harold Demsetz, *100 Years of Antitrust: Should We Celebrate*?, Brent T. Upson Memorial Lecture, George Mason University School of Law, Law and Economics Center (1991).

27 For example, at a recent antitrust conference at Georgetown University on "Conservative Economic Influence on U.S. Antitrust Policy," the following panel discussions questioning the empirical underpinnings of various assumptions were held: (1) Is the Assumption Valid That Cartels Are Fragile and Temporary - Particularly Because of the Difficulty of Controlling Cheating?; (2) Is It Valid to Assume that Vertical Arrangements (Merger and Distribution) Can Very Rarely Injure Consumer Welfare?; *(3)* Has the "Free Rider" Explanation for Vertical Arrangements Been Unrealistically Expanded?; and (4) Has Merger Enforcement Been Unduly Influenced by Conservative Economic Analysis: Consider Barriers to Entry and Structural Presumptions? A gambler might wager with some confidence that the answers to these questions were likely "No, No, Yes, and Yes," respectively.

28 *See* James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 Int'l J. Indus. Org. 639 (2005); Francine Lafontaine & Margaret Slade, *Exclusive* Contracts and Vertical Restraints: Empirical Evidence and Public Policy, *in* Handbook of Antitrust Economics (Paolo Buccirossi ed., forthcoming).

29 *See* Brozen, *supra* note 6; Demsetz, *Two Systems of Belief About Monopoly*, *supra* note 8.

30 R.H. Coase, *George J. Stigler*, *in* Essays on Economics and Economists (1994).

31 Harold Demsetz, *George J. Stigler: Midcentury Neoclassicalist with a Passion to Quantify*, 101 J. Pol. Econ. 793 (1993).

32 *See, e.g.*, George J. Stigler, *The Economists and the State*, 55 Am. Econ. Rev. 1 (1965):

> It will become inconceivable that the margin requirements on securities markets will be altered once a year without knowing whether they have even a modest effect. It will become impossible for an import-quota system to evade calculus of gains and costs.... Studies will inevitably and irresistibly enter into the subject of public policy, and we shall develop a body of knowledge essential to intelligent policy formation.

33 George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 J.L. & Econ. 225 (1966).

34 George J. Stigler, United States v. Loew's*: A Note on Block Booking*, 1963 Sup. Ct. Rev. 152 (1963).

35 George J. Stigler, *The Economies of Scale*, 1 J.L. & Econ. 54 (1958).

36 George J. Stigler, The Memoirs of an Unregulated Economist 97-100 (1988).

37 *See* Muris, *supra* note 7, at 17. The seminal article from Klein and Murphy, *supra* note 13, includes a detailed discussion of Coors' use of vertical restraints to solve dealer free-riding problems.

38 Easterbrook, *supra* note 18.

39 *See, e.g.*, Evans & Padilla, *supra* note 23; C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 Antitrust L.J. 41 (1999); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 Antitrust L.J. 469 (2001); Luke Froeb et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 Int'l J. Indus. Org. 639 (2005).

40 Evans & Padilla, *supra* note 23. Others have applied the error-cost framework in a similar manner. *See supra* note 39.

41 *See* William Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago-Harvard Double Helix*, 2007 Colum. Bus. L. Rev. 1 (2007).

42 I Phillip Areeda & Donald Turner, Antitrust Law 31-33 (1978).

43 Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983).

44 127 S. Ct. 2705 (2007).

45 Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

46 171 F. App'x 464 (2006) (per curiam).

47 Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

48 *Id.* at 49-50.

49 Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) (quoting Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289-90 (1985)).

50 Importantly, the majority does not limit its discussion of justifications for RPM to the conventional "discount dealer" free-riding story, instead it finds the literature "replete with pro-competitive justifications" and notes the consensus on this point amongst economists. Importantly, the majority also recognizes that RPM might be used to encourage retailer services even where inter-dealer free-riding is not possible. This argument has long been accepted in the economics literature, first introduced by Klein & Murphy, *supra* note 13, and later formalized by Frank Mathewson & Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13 Rev. Indus. Org. 57, 74–75 (1998). Until *Leegin*, antitrust legal analysis had focused primarily on the narrow "discount dealer" free-riding introduced by Lester Telser, *supra* note 10.

51 Robert T. Miller, *The End of the Road for Dr. Miles: Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 8 Engage: The Journal of the Federalist Society Practice Group 4, 40-52.

52 Justice Breyer points to a 30-year-old study that compared retail prices across states after the repeal of the Miller-Tydings Fair Trade Act, which found that retail prices were higher by 19-27%, and a statement from a Bureau of Economics Staff Report to the Federal Trade Commission stating that RPM frequently increased retail prices. While this evidence obviously is not sufficient to meet the "always or almost always anticompetitive" standard required for applying the per se rule, it suffers from an even more fundamental flaw. Specifically, the fact that both anticompetitive and pro-competitive theories of RPM predict higher prices implies that one must look at the output effects of RPM in order to make reliable inferences about its competitive impact. Justice Breyer's failure to recognize this rather pedestrian economic point is puzzling in light of his experience with antitrust arguments, his reputation as a savvy antitrust analyst, and the fact that this very point was raised in oral argument.

53 Justice Breyer offered this reminder as a circuit court judge in *Barry Wright*, noting that "unlike economics, law is an administrative system the effects of which depend on the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983).

54 127 S. Ct. at 2724.

55 *See* Tad Lipsky & Alexi Maltas, *Leegin and the Future of Resale Price Maintenance*, 2007 eSapience Ctr. for Competition Pol'y.

56 127 S. Ct. 1955 (2007).

57 *See* A. Benjamin Spencer, Plausibility Pleading (working paper, July 30, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003874.

58 *See* Einer Elhuage, *Twombly*—The New Supreme Court Antitrust Conspiracy Case, Volokh Conspiracy Blog (May 21, 2007), http://www.volokh.com/posts/1179785703.shtml.

59 127 S. Ct. at 1965.

60 355 U.S. 41 (1957).

61 127 S. Ct. at 1966.

62 No. 06-826, 2007 WL 2253418 (E.D. Pa. Aug. 3, 2007).

63 127 S. Ct. 1069 (2007). The author participated in this case as a signatory to the Law Professors' Amicus Brief in Support of Petitioner (filed Aug. 24, 2006).

64 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

65 *Weyerhaeuser*, 127 S. Ct. at 1078.

66 *Id.* at 1076 (citing Herbert Hovenkamp, *The Law of Exclusionary Pricing*, 2 Competition Pol'y Int'l, 21, 35 (Spring 2006), and John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. 625 (2005)).

67 *Id.* at 1077 (citing *Brooke Group*, 509 U.S. at 206, for the proposition that "predatory pricing schemes are rarely tried, and even more rarely successful").

68 *Id.*

69 *Id.* at 1077-78.

70 *See* Rosch, *supra* note 1 (documenting the significant experience and written output of the current justices).

71 *See* Kovacic, *supra* note 41, at 67.

72 LePage's Inc. v. 3M Co., 324 F.3d 141 (3d Cir. 2003).

73 John Roberts, *Symposium: Do We Have a Conservative Supreme Court?*, 1994 Pub. Int'l L. Rev. 104 (1994).

74 For the purposes of this essay, I do not address the earlier output of the Roberts Court in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006), *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), and *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006). However, I believe these 2005-06 term decisions are largely consistent with the claim advanced here.

75 *Leegin*, 127 S. Ct. at 2714-15 (citing Brief for Economists as Amici Curiae statement that "In the theoretical literature, it is essentially undisputed that minimum[resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects").

76 *Id.* at 2715 (citing T. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* 170 (FTC 1983), and Pauline Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J.L. & Econ. 263, 292-93 (1991)).

77 *Id.* at 2718.

78 *See* George J. Stigler, *The Theory of Oligopoly*, 72 J. Pol. Econ. 44 (1964); *see also* Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 Antitrust Bull. 143, 150 (1993) ("Stigler profoundly changed the way economists understand coordination among oligopolists; and his analysis has also influenced antitrust law.").

79 *Weyerhaeuser*, 127 S. Ct. at 1077.

80 *In re Tamoxifen Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 3001 (2007).

81 The Supreme Court is likely to return to the issue of identifying the appropriate measure of cost in predatory pricing cases, evidenced by the fact that it granted certiorari in *Spirit Airlines, Inc. v. Northwest Airlines Inc.*, 431 F.3d 917 (6th Cir. 2005), on this issue, but was taken off the Court's docket because it was not filed before a deadline.

82 United States v. General Dynamics Corp., 415 U.S. 486 (1974).

83 *See, e.g.*, Joshua Wright, *Von's Grocery and The Concentration-Price Relationship in Grocery Retail*, 48 UCLA L. Rev. 743, 773 (2001) ("Beyond the inherent conceptual inconsistencies of the *Von's Grocery* decision and its inability to contribute to modern enforcement of the Sherman Act, failure to overturn *Von's Grocery* results in the very danger that stare decisis and antitrust enforcement agencies have attempted to avoid—unreliability").

84 *See* David S. Evans, *Tying: The Poster Child For Antitrust Modernization* (working paper 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=863031) (making the case that the per se rule should be abandoned).

85 Evans & Padilla, *supra* note 23, apply the error-cost framework to tying and reach this conclusion.

86 *See* Bruce Kobayashi, *Does Economics Provide A Reliable Guide to Regulating Commodity Bundling By Firms? A Survey of the Economic Literature*, 1 J. Competition L. & Econ. 707 (2005).