THE ROBERTS COURT AND THE CHICAGO SCHOOL OF ANTITRUST: THE 2006 TERM AND BEYOND

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The U.S. Supreme Court issued four antitrust decisions this Term (the most it has issued since the 1989-1990 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 2003-2004 Term by a significant margin. What can be said of the Roberts Court's antitrust jurisprudence? This article examines the quartet of Supreme Court decisions issued during the 2006-2007 Term in an attempt to identify and characterize the antitrust philosophy of the Roberts Court. I argue that the Roberts Court decisions embrace the Chicago School of antitrust analysis and predict that the antitrust jurisprudence of this Court will increasingly reflect this influence.

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I. Introduction

The U.S. Supreme Court issued four antitrust decisions this Term (the most it has issued since the 1989-1990 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 2003-2004 Term by a significant margin.[1] In addition to these decisions, the Roberts Court has 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, suggests that the Roberts Court will play a relatively significant role in shaping antitrust doctrine for years to come.

What can be said of the Roberts Court's antitrust jurisprudence? This article examines the quartet of Supreme Court decisions issued during the 2006-2007 Term in an attempt to identify and characterize the antitrust philosophy of the Roberts Court. To preview my conclusion, I argue that the Roberts Court is heavily influenced by the Chicago School of antitrust analysis and predict that the antitrust jurisprudence of this Court will increasingly reflect this influence. One might contend that increased or continued adherence to Chicago School principles 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. Despite the fact that Chief Justice Roberts and Justice Alito were presumed to be conservative antitrust thinkers, there was little evidence from their prior judicial output or litigation experience that either would exercise any distinctively "Chicagoan" influence on the Court's jurisprudence.

What does it mean to claim that the Roberts Court's antitrust jurisprudence is "Chicagoan"? Chicago School means many different things to different people in the antitrust community. Chicago School has been used to describe the contributions to economic thought from the University of Chicago in the 1930's and 1940's, 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 University of Chicago's Law and Economics movement led by Aaron Director:

(1) rigorous application of price theory;

(2) commitment to empiricism; and

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

(3) appreciation of the role of error costs on the optimal design of legal rules.[2]

Section II of this article introduces some defining characteristics of the Chicago School of antitrust analysis. Section III summarizes the Roberts Court's antitrust jurisprudence as represented by its 2006-2007 output. Section IV argues that the Roberts Court's antitrust jurisprudence exhibits a distinctively Chicago School approach. Section V concludes with some predictions concerning likely future movements of antitrust doctrine under the Roberts Court.

II. The Chicago School of Antitrust Analysis

Modern antitrust analysis consists of several alternative schools of economic thought. Much of the recent analytical debate on the appropriate form of antitrust analysis has been characterized as a battle between two of these schools—the "Chicago School" and the "Post-Chicago School" approaches. Of course, the field of antitrust analysis is more competitive than the Chicago versus Post-Chicago duopoly might suggest. As discussed below, the Harvard School, often associated with the work of Philip Areeda, Justice Breyer, and Donald Turner, has also made significant contributions to modern antitrust analysis. While the evolution of the Chicago School and Post-Chicago approaches have been marked by divergence of predictions and policy prescriptions, the Chicago and Harvard Schools have arguably experienced significant convergence in many areas. I focus primarily on a comparison of the Chicago and Post-Chicago approaches to antitrust, while noting how the Roberts Court deviates from both Post-Chicago and Harvard School principles throughout. This focus on the Chicago and Post-Chicago elements is largely a function of the convergence between the Chicago and Harvard approaches and my view that the battle between the Chicago and Post-Chicago scholars will likely have the greatest impact on the future of antitrust. References to the Chicago School and Post-Chicago School are made rather loosely in the antitrust community, quite often incorrectly, and frequently with very different intended meanings. Thus, I will begin with a brief description of both schools and their role in antitrust analysis to fix ideas and define some distinguishing characteristics of each.

This focus on the Chicago and Post-Chicago elements is largely a function of the convergence between the Chicago and Harvard approaches and my view that the battle between the Chicago and Post-Chicago scholars will likely have the greatest impact on the future of antitrust.

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

A. CHICAGO VS. POST-CHICAGO ANTITRUST ANALYSIS

The history of the Chicago School's influence on antitrust analysis has been well-documented.[3] Professors Jonathan Baker and Timothy Bresnahan usefully break the Chicago School's influence on antitrust into two separate components.[4] 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.[5] Especially influential in the dismantling of the structure-conduct-performance hypotheses was UCLA economist Harold Demsetz,[6] 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, which is that firms with large market shares could earn high profits as a result of obtaining efficiencies, exploiting economies of scale, or creating a superior product.[7]

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

3 *See, e.g.,* Richard A. Posner, *The Chicago School of Antitrust*, 127 U. Penn. L. Rev. 925 (1979); Robert H. Bork, The Antitrust Paradox (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*, 26 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).

4 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).

5 *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).

6 Professors Demsetz and Armen Alchian are frequently associated with the Chicago School despite the fact that both spent the bulk of their careers at the University of California at Los Angeles (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 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).

7 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).

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[8] and others from 1950 to the mid 1970's.[9] 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 1970's, nor that they were limited to the ultimate rejection of the structure-conduct-performance paradigm. For example, "Chicago School" industrial organization economists have continued to contribute to our economic understanding of various business practices, despite the fact that developments in industrial organization economics for the past 20 years have relied primarily on game-theoretic modeling techniques. Recent Chicagoan contributions to antitrust economics include work on exclusive dealing,[10] slotting contracts,[11] and vertical restraints theory.[12]

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*, *Khan*, *Trinko*, and *Brooke Group* were influenced

8 *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).

9 Seminal contributions from the Chicago School 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) (*reprinted in this issue as* 3(2) Competition Pol'y Int'l 253 (2007)); 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).

10 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).

11 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. Reg. 169 (2006).

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

by Chicago School thinking, not to mention the development of the 1982 *Horizontal Merger Guidelines* by Assistant Attorney General William Baxter.[13] Indeed, the 1970's and 1980's 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,[14] per se legality of vertical restraints,[15] and even repeal of the antitrust laws altogether.[16] 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.

The leading alternative to the Chicago School approach is the Post-Chicago School.[17] The Post-Chicago approach challenged the conditions under which Chicago results, such as the single-monopoly-profit theorem, held. Indeed, authors in the Post-Chicago movement were able to produce a series of models in which a monopolist in one market has the incentive to monopolize an adjacent product market.[18] Post-Chicago economists also created a literature focusing on the possibility of vertical foreclosure. This raising rivals' costs strand of literature has become the most influential Post-Chicago contribution, and has provided a theoretical framework for a number of theories exploring the possibility of anticompetitive effects of various exclusionary business practices.[19] For example, such theorems have been produced to demonstrate that it is possible for tying,[20] exclu-

13 Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977); State Oil Co. v. Khan, 522 U.S. 3 (1997); Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

14 *See, e.g.*, Frank Easterbrook, *The Limits of Antitrust*, 65 Tex. L. Rev. 1 (1984), *reprinted in* 1(1) Competition Pol'y Int'l 179 (2005).

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

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

17 On the Post-Chicago approach to antitrust, *see* Jonathan B. Baker, *A Preface to Post-Chicago Antitrust*, *in* Post-Chicago Developments in Antirust Law 60 (Antonio Cucinotta et al. eds., 2002).

18 A seminal paper in this literature is Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 Am. Econ. Rev. 837 (2000).

19 *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986).

20 *See, e.g.*, Whinston (2000), *supra* note 18; Dennis Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 Rand. J. Econ. 194 (2002); *see also* 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) (surveying the bundling literature).

sive dealing,[21] and predatory pricing[22] to generate anticompetitive effects under certain conditions, including an assumed absence of any pro-competitive justifications for the conduct examined.

The Post-Chicago economic framework has had a modest impact on U.S. competition policy. However, the movement towards the rule of reason analysis is consistent with the approach advocated by Post-Chicago thinkers rather than the structural presumptions of legality favored by Chicago School scholars. Perhaps the watershed mark of Post-Chicago analysis is the Supreme Court's decision in *Kodak*, which seemed to open the door, if only for a moment, to Post-Chicago arguments more generally.[23]

The contrast of the Chicago and Post-Chicago Schools often tempts commentators to adopt something resembling the following narrative when describing the history of intellectual antitrust thought:

1. by introducing economic analysis to antitrust, the Chicago School supplanted the pre-Chicago "structural" view that often resulted in condemning business practices without understanding them and exhibited hostility towards market concentration even when such increased concentration was likely to benefit consumers;

2. Post-Chicago economists exposed the myth endorsed by Chicago School proponents that "everything is efficient" by generating models debunking Chicago assertions that various business practices and conduct could never be inefficient or anticompetitive;

3. it follows from (2) that the Chicagoans overshot the mark in arguing for strong presumptions and, at times, per se legality, because they ignored the possibility that various practices might be anticompetitive; and

4. the Post-Chicago literature teaches that economic indeterminacy is the state of play in the industrial organization literature—and that this

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21 Eric B. Rasmusen, Mark J. Ramseyer & John Shepard Wiley Jr., *Naked Exclusion*, 81 Am. Econ. Rev. 1137 (1991); Douglas Bernheim & Michael Whinston, *Exclusive Dealing*, 106 J. Pol. Econ. 64 (1998); John Simpson & Abraham Wickelgren, *Naked Exclusion, Efficient Breach, and Downstream Competition*, 97 Am. Econ. Rev. 1305 (forthcoming 2007).

22 Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L.J. 2239 (2000). These arguments were endorsed by the Department of Justice in *United States v. AMR Corp*. *See* Brief for the Appellant United States of America, United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003) (No. 01-3202).

23 Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992). In aftermarket "lock-in" cases most closely resembling the Post-Chicago theories in *Kodak*, lower courts have "bent over backwards to construe *Kodak* as narrowly as possible." *See* Herbert Hovenkamp, *The Reckoning of Post-Chicago Antitrust*, *in* Post-Chicago Developments in Antitrust Law 8 (Antonio Cucinotta et al. eds., 2002); *see also* David A.J. Goldfine & Kenneth M. Vorrasi, *The Fall of the* Kodak *Aftermarket Doctrine: Dying A Slow Death in the Lower Courts*, 72 Antitrust L.J. 209 (2004).

state favors an optimal antitrust policy characterized by a rule of reason analysis without strong presumptions.

There are many problems with this pendulum narrative. As U.S. Federal Trade Commission (FTC) Commissioner William Kovacic has recently argued, this narrative is not an accurate intellectual history of antitrust in the United States because it misses, or minimizes, the contributions of the Harvard School.[24] Kovacic also points out that this narrative overstates the differences between Chicago and Post-Chicago thinking.[25]

Unfortunately, the Chicago/Post-Chicago narrative has also tempted commentators to adopt extreme and misleading descriptions of one camp or the other—but most frequently of the Chicago School. These descriptions often paint the Chicago School as monolithic, ideological, and extreme in its views.[26] It is none of those things. Chicago authors have documented some of the only empirical examples of raising rivals' costs theories,[27] contributed to the theory of collusion,[28] and explored the use of tying and other practices to monopolize adjacent markets.[29] These caricature-like descriptions of the Chicago movement, however, threaten to nonsensically turn "Chicago School" into a pejorative and have no place in a meaningful dialogue about antitrust policy.[30]

The aim of this essay is not to defend the Chicago School from Post-Chicago analysis or vice versa. When articulated without attention to the particulars, the Chicago versus Post-Chicago debate is at best a distraction from important questions that are critical to generating improvements in antitrust policy. Indeed, both schools agree on a number of important substantive issues for antitrust policy. (For example, both Chicago and Post-Chicago camps view economic theory as the only lens through which to analyze antitrust issues to the exclusion of

24 *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). Kovacic's primary theme is that the Chicago/Post-Chicago narrative minimizes the contributions of the Harvard School scholars such as Professors Phillip Areeda and Donald Turner as well as Justice Stephen Breyer.

25 A view endorsed by one of the Chicago School's more prominent contributors. *See* Richard A. Posner, *Keynote Address: Vertical Restrictions and "Fragile" Monopoly*, 50 Antitrust Bull. 499, 500 (2005).

26 *See* Kovacic (2007), *supra* note 24, at 11 n. 31 (collecting such descriptions).

27 *See* Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 J.L. & Econ. 1 (1996).

28 George J. Stigler, *The Theory of Oligopoly*, 72 J. Pol. Econ. 44 (1964).

29 Carlton & Waldman (2002), *supra* note 20.

30 Of course, caricatures of the Post-Chicago movement are equally counterproductive, but less frequently observed presumably because of the relative youth of that intellectual movement and because the Chicago School is a more attractive target given the influence it has had on antitrust policy.

THE POINT OF THIS ESSAY IS TO PROVIDE THE BACKGROUND NECESSARY TO IDENTIFY THE CHARACTERISTICS OF THE CHICAGO SCHOOL OF ANTITRUST ANALYSIS AS AN INTELLECTUAL ENDEAVOR.

other political and social goals). Rather, the point of this essay is to provide the background necessary to identify the characteristics of the Chicago School of antitrust analysis as an intellectual endeavor. Those definitions are required to explain my claim that the Roberts Court's antitrust jurisprudence appears to be heavily influenced by Chicago thinking.

B. SOME DEFINING CHARACTERISTICS OF CHICAGO SCHOOL ANTITRUST ANALYSIS

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 distinctively Chicagoan, while conceding that the Post-Chicago and Harvard Schools shared some of these values some of the time.

1. 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 stated that the key distinguishing attribute of the Chicago School of antitrust was that it "view[ed] antitrust policy through the lens of price theory."[31] Because I suspect that most commentators will agree that the 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 1950's and 1960's, most criticisms of the Post-Chicago movement have focused on its excessive mathematical complexity and highly stylized models rather than lack of the-

31 Posner (1979), *supra* note 3, at 928; *accord* BORK (1978), *supra* note 3, at 117.

oretical rigor.[32] 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.[33]

The second caveat is to recognize that many of the Chicago School'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 is not consistent with the Chicago explanations of vertical restraints, which depend on the presence of downward sloping demand curves.[34] While noting that this objection is not without some force, I adopt an inclusive 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

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32 *See, e.g.*, Posner (1979), *supra* note 3, 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.

33 *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").

34 *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).

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.[35] In fact, Chicagoans themselves were among the first to criticize reliance on the model of perfect competition as a useful benchmark for antitrust analysis.[36]

2. 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.[37] Recent empirical surveys of vertical restraints, on the other hand, appear to support the view that these practices are not likely to produce anticompetitive effects and favor a presumption of legality.[38] 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.[39] However, even holding aside the contributions of

35 *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 (1960), *supra* note 9 (analyzing resale price maintenance); Klein & Murphy (1988), *supra* note 12; Benjamin Klein, *Market Power in Aftermarkets*, 17 MANAGERIAL & DECISION ECON. 143 (1996); Klein & Lerner (2007), *supra* note 10 (analyzing the role of exclusive dealing contracts in preventing dealer free-riding).

36 *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).

37 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.

38 *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).

39 *See* Brozen (1982), *supra* note 5; Demsetz (1974), *supra* note 7.

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 Harold 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."[40] 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."[41]

Stigler's work lived up to the billing described by these prominent Chicagoan colleagues and displayed an unmistakable passion for empirics. And it is the empirical flavor of his economic analysis that landed Stigler the Nobel Prize in 1982 for his "seminal studies of industrial structures, functioning of markets, and causes and effects of public regulation." Though, in an ironic twist, 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 noted that this age would be characterized by policy analysis informed by empirical evidence.[42]

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

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

42 *See, e.g.*, George J. Stigler, *The Economist and the State*, 55 Am. Econ. Rev. 1, 17 (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.

Stigler's body of work in industrial organization, which he often referred to 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,[43] an empirical assessment of block booking practices,[44] and a study of the economies of scale[45] 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 deconcentration policy in the early 1950's. This change was in response to the state of empirical evidence debunking the consensus views concerning the relationship between concentration and profitability.[46]

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 Timothy 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.[47]

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.

3. 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 of the U.S. Court of Appeals for the Seventh Circuit, a prominent Chicagoan.[48]

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

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

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

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

47 *See* Muris (2003), *supra* note 6, at 17. The seminal article from Klein & Murphy (1988), *supra* note 12, includes a detailed discussion of Coors' use of vertical restraints to solve dealer free-riding problems.

48 Easterbrook (1984), *supra* note 14.

Subsequently, several commentators have adopted this framework as a useful tool for understanding the design of antitrust rules.[49]

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 can be a powerful tool 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 anticompetitive.[50] 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 on 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 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.[51] Perhaps the most well known proponents of this position are Professors Phillip Areeda and Donald Turner who have consistently argued that

49 *See, e.g.*, Evans & Padilla (2005), *supra* note 33; 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).

50 Evans & Padilla (2005), *supra* note 33. Others have applied the error-cost framework in a similar manner. *See supra* note 49.

51 *See* Kovacic (2007), *supra* note 24.

antitrust rules should be administrable.[52] The 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.'"[53] 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.

To this point, I have argued that the Chicago School of antitrust analysis is properly characterized by these three principles:

(1) application of price theory;

(2) commitment to empiricism; and

(3) appreciation of the implications of the error-cost framework for the design of antitrust rules.

In Section III, I summarize the Roberts Court's 2007 antitrust output before arguing in Section IV that this output exhibits these three distinctive marks of Chicago influence.

III. The Roberts Court's 2006-2007 Antitrust Decisions

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 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 this output before turning to my central claim.

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A. *LEEGIN CREATIVE LEATHER PRODUCTS, INC. V. PSKS, INC.*[54]

Leegin is a typical resale price maintenance (RPM) case involving a terminated dealer. The plaintiff, PSKS, operated a women's apparel store in Texas. The defendant, Leegin, manufac-

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

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

54 Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

tures 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 U.S. Sherman Act. The trial court found Leegin's policy per se illegal under the standard set forth in the Supreme Court's *Dr. Miles* decision.[55] The jury awarded a US$1.2 million verdict which was upheld by the U.S. Court of Appeals for the Fifth Circuit.[56]

Justice Kennedy authored the Supreme Court's majority opinion, reversing the Fifth Circuit. He 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 evaluating minimum RPM under a rule of reason standard. Justice Kennedy's majority opinion offers four central points:

(1) per se analysis is reserved for restraints that, echoing the language of *Sylvania*,[57] "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 appropriate 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"[58] and "would always or almost always tend to restrict competition and decrease output."[59]

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

56 171 F. App'x 464 (5th Cir. 2006) (per curiam).

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

58 *Id.* at 49-50.

59 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)).

Measured against this standard, and after a review of the theoretical justifications for RPM and the empirical evidence concerning its competitive effects, Justice Kennedy found the case for continued application of the per se rule profoundly lacking. 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.[60] 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 therefore that the standard for applying the per se rule has not been satisfied.

In his dissent, Justice Breyer offers an enthusiastic defense of *Dr. Miles*. Unfortunately, the enthusiasm is not warranted and the defense is not supported by evidence or economic theory. While Justice Breyer begins 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.

Regarding the empirical effects of RPM, 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 between 19 and 27 percent,[61] and a statement from an FTC Bureau of Economics Staff Report to the Federal Trade Commission stating that RPM frequently increased retail prices. This evidence obviously is not sufficient to meet the "always or almost always anticompetitive" standard required for applying the per se rule.

However, the empirical evidence also presents a more fundamental flaw that is fatal to Justice Breyer's claim that this evidence is probative of anticompetitive effects—both pro-competitive and anticompetitive theories of RPM predict higher retail prices! The key question here is whether RPM reduces output. A study that looks exclusively at retail prices simply cannot disentangle the anticompetitive theories from those that predict that RPM facilitates dealer promotion and thus effectively shifts the demand curve for marginal consumers. Justice Breyer's failure to recognize this rather pedestrian economic point in his dissent

60 This argument has long been accepted in the economics literature, first introduced *in* Klein & Murphy (1988), *supra* note 12, and later formalized *in* 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 *in* Telser (1960), *supra* note 9.

61 As discussed in the Economists Brief and elsewhere, these studies do not control for anything. *See* Brief of Amici Curiae Economists in Support of Petitioner, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480).

is puzzling when one considers his experience with antitrust arguments, his reputation as a savvy antitrust analyst who almost surely understood the need for an output test, and the fact that this very point was raised in oral argument. Without any proper evidence that RPM resulted in a loss of consumer welfare, or harm to the competitive process, there is simply no plausible economic justification for the per se rule.

The dissent complains that there is no advantage to the Court from following the whims of economists who sometimes disagree with one another (or themselves over time).[62] But the disagreement between economists is over the weight that should be attributed to various explanations of RPM. Of course, there is virtually zero disagreement between economists regarding the real question at issue in *Leegin*, that is, does RPM always, or almost always, reduce output? Neither the petitioners, nor the dissent, offer the name of any economist who answers that question in the affirmative. The silence speaks volumes concerning the consensus on this point.

Justice Breyer also displays a surprising unfamiliarity with the economics of vertical restraints, adopting the argument popularized by Professor Robert Pitofsky that the discount-dealer free-riding justification for RPM is not persuasive and not likely to apply in many settings where we observe RPM.[63] To be sure, the argument that RPM prevents discount dealers from free-riding on promotional investments made by full service retailers, first analyzed by Lester Telser, does not explain the prevalence of RPM in product markets where it is highly unlikely that consumers stop first at the full service retailer and consume services before purchasing the product elsewhere.[64] But the justifications for RPM are not limited to that explanation, as noted in the majority opinion (and by extension, the brief authored by the FTC and the U.S. Department of Justice (DOJ), and the Economists' Brief).[65] A key explanation for the use of RPM is Benjamin Klein and Kevin Murphy's explanation that RPM may be used to enforce efficient contracts involving promotional services or other non-contractible elements of performance.

Breyer's response to the Klein and Murphy promotional services explanation for RPM, like the response to the state of empirical evidence, is puzzling:

62 Justice Breyer, half-joking during oral argument, noted that perhaps "counting heads" of economists should play a role in antitrust analysis.

63 Robert Pitofsky, *Are Retailers Who Offer Discounts Really Knaves? The Coming Challenge to the* Dr. Miles *Rule*, 61 ANTITRUST 63 (Spring 2007).

64 For a discussion of this point, *see* Klein & Lerner (2007), *supra* note 10, at n. 63.

65 Brief for the United States as Amicus Curiae Supporting Petitioner & Brief of Amici Curiae Economists in Support of Petitioner, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480).

"The one arguable exception consists of the majority's claim that "even absent free-riding," RPM "may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services." I cannot count this as an exception, however, because I do not understand how, in the absence of free-riding (and assuming competitiveness), an established producer would need RPM. Why … would a dealer not expand its market share as best that dealer sees fit, obtaining appropriate payment from consumers in the process? There may be an answer to this question. But I have not seen it."[66]

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 20 years.

Of course, the antitrust enterprise does not turn solely on the view of economists and economic theory.[67] The dissent offers two further defenses of the *Dr. Miles* rule that turn upon principles of stare decisis, and identifying U.S. Congressional intent in passing the Consumer Goods Pricing Act 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 earlier, 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. Further, the Supreme Court has recognized that stare decisis arguments in the antitrust context are unlike conventional statutory analysis because of the nature of Congress's delegation to the courts of the duty to define the broad and undefined language of the Sherman Act. Justice Kennedy acknowledged that the Court was not writing on a "clean slate," but recognized that reevaluation of

66 *Leegin*, 127 S. Ct. at 2733 (Breyer, J. dissenting).

67 Justice Breyer offered this reminder as a circuit court judge in *Barry Wright*, noting that:

> [U]nlike 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., 724 F.2d at 234.

precedent is appropriate in the antitrust context when a decision has been called into "serious question," as was clearly the case with *Dr. Miles*.[68]

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 had 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 rejected 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.[69]

It remains to be seen what impact *Leegin* will have on antitrust jurisprudence as Congress, presumably along with state legislatures, will likely consider legislation to revive the per se rule of *Dr. Miles*. One possible result will be a patchwork of laws on vertical RPM, which would likely impose significant costs on manufacturers attempting to navigate these standards across state lines.[70] Nonetheless, *Leegin* is not without significant benefits to manufacturers who have had to contract around the prohibition on RPM through more complex arrangements with distributors. Further, the decision reconciles previously incoherent antitrust doctrine with modern economic theory.

B. *BELL ATLANTIC CORP. V. TWOMBLY*[71]

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."[72] While some commentators have argued that *Twombly* is not likely to become very significant,[73] it undoubtedly alters the Section 1 landscape considerably by increasing

68 *See* State Oil v. Khan, 522 U.S. 3 (1997).

69 *Leegin*, 127 S. Ct. at 2724.

70 *See* Tad Lipsky & Alexi Maltas, Leegin *and the Future of Resale Price Maintenance*, eCCP Case Note (July 2007), *at* http://www.globalcompetitionpolicy.org/index.php?&id=508&action=907 (last visited Oct. 12, 2007).

71 Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007).

72 *See* A. Benjamin Spencer, Plausibility Pleading (Washington & Lee Legal Studies Paper No. 2007-17, July 30, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003874.

73 *See* Einer Elhuage, *Twombly* – The New Supreme Court Antitrust Conspiracy Case, Volokh Conspiracy Blog (May 21, 2007), *at* http://www.volokh.com/posts/1179785703.shtml (last visited Oct. 12, 2007).

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 (known as Incumbent Local Exchange Carriers or 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 the defendants' Fed. R. Civ. P. 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 Fed. R. Civ. P. 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."[74]

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*, despite the conventional rule disfavoring motions to dismiss in antitrust cases.[75] 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 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."[76] The application of the new plausibility standard to plaintiffs' claims was relatively straightforward as

74 *Twombly*, 127 S. Ct. at 1965.

75 Conley v. Gibson, 355 U.S. 41 (1957).

76 *Twombly*, 127 S. Ct. at 1966.

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*,[77] 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 shut down plants and reduce output, and detailed the mechanism by which the collusive agreement was formed (involving the use of published prices in a trade publication), monitored, and enforced.

The full implications of *Twombly* are yet to be realized. 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 for antitrust plaintiffs. 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 a 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. *CREDIT SUISSE SECURITIES (USA) LLC V. BILLING*[78]

In *Credit Suisse*, the Court dismissed a variety of antitrust claims brought by investors against underwriters from whom they had purchased securities. The plaintiff class complained that the collective initial public offering (IPO) underwriting process violated Section 1 of the Sherman Act. Specifically, the investors alleged that investment banks had entered into a conspiracy to drive up the price of less-attractive shares in the aftermarket through the use of tie-ins and so-called "laddering agreements." The investment bank defendants argued that the complaint should be dismissed on the grounds that the federal securities laws impliedly precluded application of the antitrust laws.

The Supreme Court agreed with the investment banks. In a 7-1 decision, Justice Breyer's majority opinion held that the antitrust claims against the investment banks arising from the underwriting transactions were impliedly preempted under a "clear incompatibility" standard in light of:

(1) the Securities and Exchange Commission's (SEC) regulatory authority to supervise these activities;

(2) the fact the SEC has exercised that authority;

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

78 Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007).

(3) the problems associated with simultaneous application of both the antitrust and securities laws to the underlying conduct in terms of conflicting guidance; and

(4) the fact that the underwriting activities fell "squarely within an area of financial market activity that the securities law seeks to regulate."[79]

The Court concluded that application of the antitrust claims would compromise the securities laws, reasoning that:

> "[W]here conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market."[80]

Because of the SEC's activity in this area, and its rules and regulations that prohibited the conduct in question, the Court argued that the benefits of antitrust enforcement were small.

PERHAPS MORE IMPORTANTLY, SOME COMMENTATORS HAVE ARGUED THAT *CREDIT SUISSE* MAY SIGNAL A NARROWING OF THE SCOPE OF ANTITRUST IN REGULATED INDUSTRIES IN FAVOR OF SECTOR REGULATION.

Credit Suisse has important implications for antitrust practice. As a practical matter, *Credit Suisse* avoided introducing the threat of private antitrust litigation and the specter of treble damages against investment banks participating in the underwriting process. Perhaps more importantly, some commentators have argued that *Credit Suisse* may signal a narrowing of the scope of antitrust in regulated industries in favor of sector regulation.[81] It is unclear whether *Credit Suisse* indeed signals a willingness to expand implied

79 *Id.* at 2392. Justice Stevens' concurring opinion would have reached the same result on the alternative grounds that the claims should have been dismissed on the merits. *Id.* at 2398 (Stevens, J. concurring). Justice Thomas' dissenting opinion argued that the savings clauses of the securities laws preserved antitrust remedies for securities purchasers and avoided any need to reconcile the apparent conflict between antitrust and securities law. *Id.* at 2399-2400 (Thomas, J. dissenting). Justice Kennedy did not participate.

80 *Id.* at 2396.

81 *See* Keith Sharfman, Credit Suisse*, Regulatory Immunity, and the Shrinking Scope of Antitrust*, eCCP CASE NOTE (June 2007), *at* http://www.globalcompetitionpolicy.org/index.php?&id=500&action=907 (last visited Oct. 12, 2007) (arguing that the "clearly incompatible" standard threatens to render mere regulatory overlap a sufficient condition for implied immunity from the antitrust laws).

immunity, or whether the logic of *Credit Suisse* will be limited to the specific circumstances involving the regulatory overlap between the SEC and antitrust concerning tying arrangements and laddering agreements.

D. *WEYERHAEUSER CO. V. ROSS-SIMMONS HARDWOOD LUMBER CO.*[82]

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."[83]

The jury found in favor of Ross-Simmons and awarded US$78.7 million. The U.S. Court of Appeals for the Ninth Circuit affirmed the judgment, despite Weyerhaeuser's contention that the district court erred by not including both prongs of the *Brooke Group* standard in the jury instruction.[84] The DOJ 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 Supreme 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

82 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 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).

83 Brief for the United States as Amicus Curiae, Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007) (No. 05-381) (quoting Pet. App. 7a n.8, 14a n. 30).

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

dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."[85] 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.[86] The second is that the Court espouses a view that the probability of successful predatory buying, like predatory pricing, is very low,[87] 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.[88] Finally, the Court notes that, like low output prices, higher input prices may result in increased consumer welfare as firms increase output.[89]

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*, such as, 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? Regardless, there seems to be very little dispute that the decision is correct on the merits.

I argue that these decisions, taken together, suggest an unmistakable connection to the characteristics of the Chicago School of antitrust analysis discussed earlier. So what is it about these decisions that suggests that the Roberts Court

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

86 *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)).

87 *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").

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

89 *Id.* at 1077-78.

has adopted a Chicago School approach to antitrust analysis? And, if that is the case, 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 questions.

IV. The Roberts Court and the Chicago School

The Roberts Court's productivity in the 2006-2007 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.[90] Justice Scalia is considered the Court's only true Chicago School adherent. 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.[91]

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.[92]

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 School flare. For example, consider the following excerpt from an article written by Chief Justice Roberts in 1994 addressing whether the Supreme Court, at the time, 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

90 *See* Rosch (2007), *supra* note 1 (documenting the significant experience and written output of the current justices).

91 *See* Kovacic (2007), *supra* note 24, at 67.

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

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."[93]

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 a difficult exercise to generalize any antitrust philosophy from these limited sources, and I decline to do so. Instead, I rely on the four 2006-2007 decisions themselves in support of my claim.[94]

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 several procompetitive 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."[95]

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 scholarship showing that the practice is infrequently associated with anticompetitive effects.

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

94 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 2005-2006 Term decisions are largely consistent with the claim advanced here.

95 *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").

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."[96]

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."[97]

Leegin is certainly the strongest example of Chicago School influence on the Roberts Court's recent output. The Court's reasoning is unmistakably influenced by Chicago principles. While the other decisions do not fit quite as perfectly into the Chicago framework, Chicago influence is apparent in both *Twombly* and *Weyerhaeuser*, though largely absent from *Credit Suisse*.

Twombly 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 for plaintiffs alleging conspiracy in violation of Section 1 is influenced by the error-cost analysis. As discussed above, the Court explicitly supports 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 simply an opinion about procedure with some collateral antitrust implications? I would argue that it does have consequences for antitrust. Justice Souter's opinion extends the logic of *Matsushita* and *Monsanto*, seeking to avoid false inferences of conspiracy at the pleading stage.[98] This extension itself has important antitrust implications. One

96 *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)).

97 *Id.* at 2718 (citing Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 158 (1984)).

98 Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

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.

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.[99] *Twombly* requires lower courts to evaluate market realities to determine whether they are consistent with those conditions that would support an inference of conspiracy.

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, and independent action is the likely explanation of the ILECs' parallel conduct. Applied outside the case itself, *Twombly* requires that the market conditions must be conducive to coordination and tend to exclude the possibility of independent action.

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, as well as the economic logic that predatory pricing is likely to benefit consumers, to justify adoption of the *Brooke Group* standard.[100]

99 *See* Stigler (1964), *supra* note 28; *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.").

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

I concede that *Credit Suisse* simply does not fit this framework quite as well as the other cases. One could argue that *Credit Suisse* is at least partially motivated by error-cost concerns. Indeed, the Court does mention its concern that:

> "[A]ntitrust courts are likely to make unusually serious mistakes in this respect. And the threat of antitrust mistakes … means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages)."[101]

However, the case is neither especially consistent with, nor contradicted by, the other two fundamental Chicago School principles, and presents relatively unique and idiosyncratic issues concerning the regulatory overlap between SEC regulation and antitrust law.

Nonetheless, the Roberts Court's antitrust output generally appears to embrace the Chicago School principles identified in Section 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. Nevertheless, for the most part, I believe that 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 the Chicago School and so the Roberts Court's antitrust output is merely reflective of the status quo that persisted prior to the 2006-2007 Term. While that argument is not without merit, and it is certainly true that Chicago School principles are not new to Supreme Court antitrust jurisprudence, it was unclear, prior to the last Term, 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 itself to be unique in its productivity, its willingness to engage antitrust issues, and its familiarity and expertise with the subject matter. 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.

101 *Credit Suisse*, 127 S. Ct. at 2396.

V. Some Predictions

The Roberts Court's interest in, and proclivity for, antitrust analysis raises the question of where will the Court 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*.[102] 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. To conclude, I offer some predictions on topics that the Supreme Court may take on in the near future that follow the analysis in this paper.[103]

The first prediction is that the Roberts Court will finally take on a horizontal merger case. The Supreme Court has not offered any substantive guidance on horizontal mergers in over 30 years,[104] allowing merger analysis to develop within 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 2006-2007 Term. Economic theory, and the *Horizontal Merger Guidelines*, both suggest that the structural presumptions in current 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 this troublesome area of law. 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.[105]

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

103 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.

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

105 *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").

In the same spirit, I predict the Roberts Court will overturn *Jefferson Parish's*[106] 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 eras past.[107] This is another area that matches the criteria set forth above. Economic theory suggests, and the economic literature demonstrates, an overwhelming consensus that, as with RPM, there are numerous pro-competitive explanations for tying. The empirical evidence, if 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.[108]

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 ERAS PAST.

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 date is that the consensus economic and empirical view on these issues is still emerging, as evidenced by the antitrust agencies' disagreement between themselves 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 of which militate in favor of a future grant 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 while 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 still developing, with much attention paid to anticompetitive theories that have not yet been subjected to empirical testing and, therefore, may

106 Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

107 *See* David S. Evans, *Tying: The Poster Child for Antitrust Modernization, in* ANTITRUST POLICY AND VERTICAL RESTRAINTS (Robert W. Hahn ed. 2006).

108 Evans & Padilla (2005), *supra* note 33, apply the error-cost framework to tying and reach this conclusion.

not be "ready for primetime."[109] Moreover, 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.

109 *See* Kobayashi (2005), *supra* note 20.