The Burger Court and Economic Rights

Lino A. Graglia
THE BURGER COURT AND ECONOMIC RIGHTS*

Lino A. Graglia†

One immediate effect of President Nixon’s first appointment to the United States Supreme Court was to transpose the names of the Chief Justice from Earl Warren to Warren Earl. That there were other significant effects, at least in regard to constitutional law, is less clear. Warren Earl Burger served as Chief Justice of the United States from 1969 to 1986. The replacement of one Justice, even a Chief Justice, by another does not of course in itself necessarily produce a shift in Court policy. It was thought that the appointment of Warren Burger signaled a change from the enthusiastic activism of the Warren era, but he joined a Court that still included Justices Brennan, Douglas, Marshall and Black, the engines of that activism.

Burger was soon to be joined, however, in 1970, by his friend and fellow Minnesotan, Harry A. Blackmun—a man whose career has demonstrated, even more clearly than Burger’s, that if it is conservatives you are looking for, Minnesota is not a good place to look. In 1972, Burger was joined by two more Nixon appointees, Justices Lewis F. Powell and William H. Rehnquist. As of then, at least, it might be meaningful, it seems, to speak of a Burger Court, but the Nixon appointees were of course still a minority, and they could do no more than dissent as a block in some important early cases.¹

In 1975, Gerald Ford, our only non-elected President, appointed John Paul Stevens to replace William O. Douglas, who had finally come, after 36 years, as close as he could to dying in office. Gerald Ford’s most memorable deed in his long service in the House of Representatives was his attempt to impeach Justice Douglas.² As a mischievous fate would have it, he found himself in a position to replace Douglas when the time came that even Douglas could hang

---

* Copyright © THE BURGER COURT: A RETROSPECTIVE (Bernard Schwartz, ed. Oxford University Press, 1998 forthcoming). This paper is a revised and expanded version of the talk, given at the Burger Court Conference at the University of Tulsa College of Law on October 2, 1996.
† A. Dalton Cross Professor of Law, University of Texas School of Law.
on no longer. As if to ensure that his tenure in office would be of no real con-
sequence, however, President Ford replaced Justice Douglas with John Paul
Stevens, whose position on most issues proved to be not very different from
that of Douglas.\textsuperscript{3} The only other change in the Court’s membership during
Burger’s tenure was the replacement of Potter Stewart with Sandra Day
O’Connor in 1981. This was also of no great consequence except that it ended
the historic practice of referring to Court members as “Mister Justice.”

The most important thing, surely, to be said about the Burger Court is that
it failed almost totally to bring about the change that was expected of it. If our
purpose here is to appraise the accuracy of the subtitle of the 1983 book \textit{The
Burger Court: The Counter-Revolution that Wasn’t},\textsuperscript{4} I can only conclude that it
was all too accurate. Far from ending, or even curbing, the judicial imperialism
established by its predecessor, the Burger Court brought rule by judges to new
heights. It had taken President Franklin Roosevelt only a few appointments to
ensure that the Constitution would never again give the New Deal the least bit
of trouble. Federal laws were never again invalidated for lack of legislative
authority,\textsuperscript{5} and property\textsuperscript{6} and contract rights\textsuperscript{7} no longer presented an obstacle
to state or federal economic regulation.

There was every reason to believe that a few appointments to the Court by
President Nixon, who ran on a platform of curbing judicial power, would be
sufficient to work a similar revolution. Many of the most dramatic Warren
Court innovations, such as \textit{Miranda v. Arizona},\textsuperscript{8} after all, were by a close vote
and seemed expressions of a counterculture era that surely would quickly pass
away. Such justices as Black and Douglas, vestiges of the upheavals of the
1930s and 1940s, and Brennan and Marshall, vestiges of the moral euphoria of
the 1960s and early 1970s, could not be expected to come along again. The
Constitution, one could confidently predict, would soon cease to prohibit state
laws providing for prayer in the schools or seeking to suppress pornography;
defendant’s guilt, not the manner in which evidence of guilt was obtained,
would again become the central issue in criminal trials; the Court’s wildly am-
bitious move in 1968 from prohibiting racial segregation to requiring racial
integration\textsuperscript{9} would certainly come to a halt.

Amazingly, none of this was to be. Not a single one of the controversial
innovations of the Warren Court was reversed during the Burger era. On the
contrary, additional innovations, as in the creation of a constitutional right to an

\begin{itemize}
\item \textsuperscript{3} The nomination of Robert Bork, which might have been of some consequence, was urged upon Ford
by conservatives, but an election was coming in which he feared for his chances, rightly as it turned out.
When a Republican politician is concerned about an election, it means a move to the left, but in this instance,
as almost always, it did Ford, and certainly the rest of us, no good.
\item \textsuperscript{4} \textit{THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T} (V. Blasi ed. 1983).
\item \textsuperscript{5} Until \textit{United States v. Lopez}, 514 U.S. 549 (1995); see Lino A. Graglia, \textit{United States v. Lopez:
\item \textsuperscript{6} \textit{But see text accompanying note 21.}
\item \textsuperscript{7} \textit{But see “The Contracts Clause,” infra, pp. 7-13.}
\item \textsuperscript{8} 384 U.S. 436 (1966).
\item \textsuperscript{9} \textit{See Green v. County Sch. Bd. of New Kent County}, 391 U.S. 430 (1968).
\end{itemize}
abortion and the requirement of busing for school racial balance, continued to issue forth. The Warren Court had apparently so solidly established the superiority of policymaking by judges on the basis of principle over policymaking by mere politicians subject to electoral constraints, that the return of basic social policy issues to the ordinary political process could no longer be expected. The system of government by elected representatives, largely on a state-by-state basis, created by the Constitution had permanently evolved, it seemed, into something like its opposite: government by majority vote of a committee of nine lawyers, unelected and holding office for life, making policy for the nation as a whole from Washington, D.C.

The basic defect of the Constitution’s scheme of government, as most academics and other liberal intellectuals see it, is that it leaves decision making on basic issues of social policy in the hands of the American people. The function of constitutional law, in their view, is to remedy this defect, and the constitutional law of the last four decades, at least, has performed this function. The first thing to understand about the constitutional law that resulted is that it has very little to do with the Constitution. The notion that the Justices arrive at their rulings of unconstitutionality by interpreting the Constitution is almost purely fictional. This is evident enough from the fact that there is so little that the Justices even purport to interpret. The vast majority of rulings of unconstitutionality purport to be based on a single sentence in the Fourteenth Amendment and, indeed, on four words, “due process” and “equal protection.” It does not require jurisprudential sophistication to realize that the Justices do not decide a vast array of difficult issues of social policy by studying those words. Without the Fourteenth Amendment, constitutional law would largely go away, and we would have to get by as best we can with representative self-government in a federalist system.

The next and final thing to understand about the constitutional law of the last several decades is that it has not been random in its political impact. Warren Court activism served almost without exception to move policy choices to the left. It would be only a small exaggeration to say that the A.C.L.U., the paradigmatic constitutional litigator of our time, never lost in the Warren Court, even though it did not always win. It either obtained from the Court a policy choice rejected in the political process or it was left where it was to try again on another day. For conservatives or traditionalists, on the other hand, a “victory” in the Court meant only that they would be permitted to continue, for the present at least, to fight for their policy choice in the ordinary political process.

The left, almost by definition, is not interested in protecting—it is more interested in undermining—economic rights. The Warren Court’s hyperactivism in creating and protecting what it saw as “civil rights” was, therefore, matched

---

by its total lack of interest in protecting property and contract rights. In this, as in virtually all other aspects of constitutional law, the Burger Court made very little difference.

CONSTITUTIONAL ECONOMIC RIGHTS

Economic Substantive Due Process

The Supreme Court once saw the protection of economic rights as its primary function. Indeed, beginning in the 1890s, it created the doctrine of “substantive due process” to authorize itself to invalidate as “unreasonable” restrictions on economic freedom of which it disapproved.13 The economic substantive due process, or Lochner,14 era came to a dramatic end, however, with the Court’s 1937 decision in West Coast Hotel Co. v. Parrish,15 upholding a state minimum wage law—and illustrating, incidentally, that good constitutional law can permit very bad social policy. The Warren Court certainly had no interest in reviving economic substantive due process, and the Burger Court’s interest was no greater.

The Nixon Justices were no doubt more sympathetic, or at least less antagonistic, to private property interests, than, say, Black and Douglas, but they were no more willing to revive economic substantive due process. They purported to be generally committed to a policy of judicial restraint, and found this restraint easiest to exercise—least likely to result in criticism from colleagues or academics—where business or property interests were involved. Far from seeking to revive economic substantive due process, they were willing to put further nails in its coffin. The Court very rarely reviewed a challenge to a business regulation, and then only, as in New Orleans v. Dukes,16 to reverse a court of appeals decision that upheld the claim. In Dukes, the Court not only unanimously upheld the regulation, but overruled Morey v. Doud,17 the one decision since 1937 that had invalidated a business regulation. In Dukes as in Morey, the “unreasonableness” claim was stated in equal protection rather than due process terms, but as the Court recognized by citing substantive due process cases, that is a distinction without a difference.18

Just Compensation

The two other major sources of economic rights in the Constitution are, of course, the Contracts Clause of Article I, Section 1019 and the just compensa-

---

15. 300 U.S. 379 (1937).
tion or Takings Clause of the Fifth Amendment,20 said to be applicable to the states, strangely enough, by reason of "incorporation" in the Due Process Clause of the Fourteenth Amendment. The Takings Clause has become a matter of heightened interest in recent years by reason of the Supreme Court's upholding just compensation claims in no fewer than four cases.21 The Burger Court upheld such claims, however, only in two cases, both of little significance.

In *Loretto v. Teleprompter Manhattan CATV Corp.*,22 the Court held that a New York statute requiring landlords to permit local cable companies to attach cable equipment to their buildings constituted a taking of property that required compensation. A physical invasion was involved, even if one of no economic consequence.23 On remand, the lower court found that a one-time payment of one dollar, which is the payment the New York statute required, would be adequate compensation.24 In the second case, *Kaiser Aetna v. United States*,25 the claimant dredged and deepened a large pond and built a channel connecting it to the sea.26 The government could not require the grant of public access to the pond, the Court held, without exercising the power of eminent domain and paying just compensation.

The Burger Court's two most significant Takings Clause decisions continued the Warren Court's trend of giving the clause a very limited construction. In *Hawaii Housing Authority v. Midkiff*,27 the Court upheld a statute that permitted the state to condemn private property by eminent domain in order to transfer it to other private owners, even though the Takings Clause apparently permits property to be taken only "for public use." Reaffirming and perhaps extending an earlier decision,28 the Court held that "the 'public use' requirement is [] coterminous with the scope of a sovereign's police powers."29 This amounts to saying, of course, that there is no "public use" limitation on the eminent domain power.

The other significant Burger Court decision on the Takings Clause is *Penn Central Transportation Co. v. New York City.*30 When the Penn Central Railroad's predecessor built Grand Central terminal on Park Avenue in New York, the Court held that the property was taken for "public use" because it was "for the purpose of transportation of passengers."31 The Court thus held that the Takings Clause could be used to regulate private businesses under the guise of "public use."32

---

20. U.S. CONST. amend. V: "[N]or shall private property be taken for public use without just compensation."


23. See id. at 420.


In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), however, it is interesting to note, the Court found that a California statute requiring shopping mall owners to permit distribution of leaflets on their property did not constitute a taking even though physical invasion was no less involved than in *Loretto*. See William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 17 (1995) ("not every physical intrusion constitutes a taking").


26. See id. at 167.


York City in 1913, it made what later proved to be the serious mistake of making it architecturally significant and very attractive. The terminal was built with the expectation that a tower would later be placed above it. By the time it came to do that a half-century later, however, New York City had created a Landmarks Preservation Commission, which prohibited building over the terminal on the ground that it would mar the view of what had become a classic example of French Beaux Arts architecture. The prohibition would cost the company millions of dollars in annual revenue for which New York City did not offer just compensation. The Court denied the company’s claim for compensation, however, on the ground that no taking had occurred. New York City had not, after all, occupied or claimed title to the terminal; it was able to appropriate the property to its own use without touching it, by merely prohibiting its owner from putting it to the owner’s best use.

Perhaps the major value of a requirement of just compensation is that it serves to ensure a measure of fiscal responsibility by government. The need to pay for a benefit induces government to seek it only when its value to the community exceeds its costs. This makes it possible, at least in theory, to pay the losers from a move with part of the gains of the winners, leaving the losers whole and the community better off. As New York City’s Landmarks Preservation Commission did not operate under any such restraint, one may surmise that many if not most of the restrictions it imposed could not withstand a cost/benefit analysis and had the effect of making the city as a whole poorer.

The Commission’s regulation of Penn Central was likely the paradigm of a confiscatory, welfare-reducing restriction. It would seem, therefore, an excellent candidate for a requirement of compensation, if there is to be any such general requirement. The Court denied compensation, however, without stating—indeed, acknowledging its inability to state—a general rule. It explicitly denied that it was adopting the rule that a taking cannot occur without physical possession or occupation, but it is difficult to explain the result in Penn Central on any other grounds.

The Contracts Clause

The principal specific protection of economic rights in the original Constitution was the provision prohibiting the states from enacting any “Law impair-
ing the Obligation of Contracts."\textsuperscript{37} The central defect, if not an inherent contradiction, of democracy, as the Framers saw it, was that debtors—mainly farmers in those days—would always be far more numerous than creditors. If the people could make the laws, they surely would quickly discover that they held it in their power to free themselves from debt by simply enacting any one of a variety of debtor-relief measures.\textsuperscript{38} This had indeed been the experience in many states under the Articles of Confederation, and it provided an important impetus for the constitutional convention.\textsuperscript{39} The Framers therefore inserted the Contracts Clause in the Constitution, the only important limitation on state power, at least in terms of litigation, in the original Constitution. The Framers saw little need for federal protection of civil rights as we understand them—the Constitution, after all, repeatedly recognized and protected slavery\textsuperscript{40}—but they saw a clear need to protect the bankers.

The paucity of constitutional limitations on state power meant that Chief Justice John Marshall, the Court's first hyperactivist, the right-wing William Brennan of his day, had little to work with in order to substitute his policy preferences for those of the people of the states. One of his responses to this was his invention of the “dormant” or “negative” Commerce Clause, purporting to find in the grant of the commerce power to Congress a grant of power to judges to invalidate state commercial and financial regulation more or less at will.\textsuperscript{41} In a pinch, all else failing, Marshall simply resorted to “natural law,”\textsuperscript{42} which has the happy facility, of course, of meaning whatever its discoverer wants it to mean: all that is required is a willingness to assume that one has access to sources of authority unavailable to ordinary mortals. Insofar, however, as Marshall wished to appear to be enforcing something actually in the Constitution, it had to be the Contracts Clause, which he therefore proceeded to expand and distort beyond all recognition. He used it, for example, to prohibit Georgia from canceling a massive corrupt land transaction\textsuperscript{43} and to prevent New Hampshire from restructuring the governing board of a college.\textsuperscript{44}

Marshall’s successor, Chief Justice Taney, cut back on what Marshall had made of the Contracts Clause,\textsuperscript{45} but it remained a major source of constitution-
al litigation, often in connection with municipal financing, through the nine-
teenth and early twentieth centuries. It met a sudden and dramatic demise, how-
ever, in 1934, in the depths of the Great Depression, in Home Building & Loan
Association v. Blaisdell. Farmers unable to make mortgage payments were
being driven from their farms to wander homeless with their families and few
possessions in a world without jobs. Some of them, insubordinately cognizant of
the sanctity of contract rights, were proposing to shoot judges and sheriffs who
ordered or executed mortgage foreclosures. Minnesota, deciding that something
had to be done, enacted a mortgage moratorium law, precluding or delaying
foreclosures despite defaults. Bankers challenged the law, bringing to the
Court at last exactly the sort of debtor-relief measure the Contracts Clause was
meant to prohibit, perhaps the most clearly unconstitutional law to come to the
Court in its history.

The Blaisdell case presents a clear illustration of the fundamental problem
of constitutionalism, namely that the attempt to govern the living by the dead
hand of the past can be a very bad idea. It is simply not possible to improve on
a political arrangement in which the policy issues of today are decided by the
people of today in light of current knowledge and circumstances, and not neces-
sarily in accord with the views of people who are no longer with us. Perceiving
the obvious wisdom of this, the Court in Blaisdell upheld the Minnesota law,
although only by a five-to-four vote, thereby losing its best, if not its only,
opportunity to hold unconstitutional a law that really was. This required the
Court, however, to explicitly divorce constitutional law from the intent of the
Framers and, therefore, from the Constitution, leaving it simply a vehicle for
enactment of the policy views of the Justices.

The Court denounced as patently invalid the view that “the great clauses of
the Constitution must be confined to the interpretation which the framers, with
the conditions and outlook of their time, would have placed upon them . . .” This, however, is not an argument for a method of interpretation
not dependent on the Framers’ (and ratifiers’) intent—there is no such meth-
od—but an argument against constitutionalism. The argument can be justified
as pro-democratic when used, as in Blaisdell, to escape or permit escape from a
constitutional restriction and thereby return a policy issue to the political pro-
cess. Unfortunately, Blaisdell’s argument against original intent has since been
used, not to eliminate, but to multiply constitutional restraints and thereby justi-
fy judicial activism, the invalidation as unconstitutional policy choices that the
Constitution does not prohibit. The result of Blaisdell’s explicit divorcing of
constitutional law from the Constitution, therefore, has been not to enhance, but
to limit the right of self-government, not to free us from government by the
dead, but to subject us to rule by electorally unaccountable judges who are all too much alive.

The result of Blaisdell was to remove the Contracts Clause as a significant obstacle to state policymaking. Surely the most important, if not the only, contribution by the Burger Court to the protection of constitutional economic rights is that it partially revived the Clause by using it to invalidate state laws in two decisions. The first, United States Trust Co. of New York v. New Jersey, involved the Port Authority of New York and New Jersey, an agency created by a compact between the two states to construct and operate interstate bridges, tunnels, and other transportation facilities. The Authority raised funds for its projects by selling bonds backed by the revenues from its profit-making facilities. To facilitate bond sales, the states covenanted with the Authority that it would not be required to use any part of its revenues to subsidize deficit-generating commuter rail facilities.

Each state, however, thereafter passed a law explicitly abrogating the covenant, and a bondholder sued, claiming a violation of the Contracts Clause. In a four to three decision, the Court for the first time in many decades upheld a Contracts Clause claim. The Court did not overrule Blaisdell, of course, or purport to restore the Contracts Clause to anything like its former full vigor. On the contrary, the Court was explicit that states may impair the obligation of contracts, despite the Clause. The impairment, however, the Court said, must be "reasonable and necessary to serve an important public purpose." That is, an impairment will be permissible whenever a majority of the Justices decide, on a purely ad hoc basis, to permit it. Getting the matter exactly backwards, the Court stated that the Contracts Clause is particularly restrictive when it is a state's own contracts that are involved.

Justice Brennan, joined by Justices White and Marshall, issued a long and bitter dissent, outraged that the Court should deviate from its mission of advancing liberal causes in order to protect an economic right. Under the functional judicial review he favored, one asks not whether a challenged policy choice is disallowed by the Constitution—it almost never is—but whether it involves an issue which the judge feels should be taken from the political process in order to impose a resolution more to the left. Unsurprisingly, Brennan concluded that the "financial welfare" of bondholders was "being adequately policed by the political process[]" and therefore not in need of judicial protection. The significance of United States Trust is not that the Court laid down

---

51. See id. at 4.
52. See id. at 4-5.
53. See id.
54. See id. at 3.
55. See id. at 16.
56. United States Trust, 431 U.S. at 25.
57. See id. at 16.
58. See id. at 33 (Brennan, J., dissenting).
59. Id. at 61.
a new rule of law—it did not lay down any rule—but simply that it relied on the Contracts Clause to invalidate a state law, apparently restoring it to some, even if an unpredictable, constitutional role.

The following year, in Allied Structural Steel Co. v. Spannaus, a second state law fell to a Contracts Clause challenge, this time by a five to three vote and in a case involving only a private contract. Justice Blackmun, the author of the Court's opinion in United States Trust, did not participate. A Minnesota statute operated to increase the rights of employees under a private employer's pension plan, subjecting the employer to greater liability. The Court again held that states may impair the obligation of contracts, despite the Constitution, but "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." Here, the law was found not to deal with a broad problem, to operate in an area already subject to regulation, or to work only a temporary alteration in a contractual relationship, and it applied to only a few employers, all factors that operated against its validity. The impairment, therefore, was found not to be sufficiently justified. Again in dissent, Justice Brennan, showing an attachment to the Framers' original intent that is not evident in some of his other opinions, found that no Contracts Clause claim was even involved, because the statute was not a debtor relief measure.

These two decisions mark the end, however, of the surprising Contracts Clause revival, at least as of now. In 1983, two more cases involving the Clause came to the Court, and in each the claim was rejected. In Energy Reserves Group, Inc. v. Kansas Power & Light Co., Kansas passed a law prohibiting a natural gas company from taking advantage of a price increase that it was entitled to under the terms of its sales contracts. Under United States Trust Co. and Spannaus, the Court said, a Contracts Clause claim requires a plaintiff to show that a law has "operated as a substantial impairment of a contractual relationship." Such a showing does not invalidate the law, however, but merely requires the state to show that the law serves a significant and "legitimate public purpose,” imposes "reasonable conditions," and is "of a character appropriate to the public purpose." Where the state is not itself a contracting party, Justice Blackmun's opinion for a unanimous Court said, "[a]s is customary in reviewing economic and social regulation . . . courts properly defer to a legislative judgment as to the necessity and reasonableness of a particular measure.”

61. See id. at 244 (citing United States Trust Co., 431 U.S. 1, 22 (1977)).
62. MINN. STAT. ANN. §§ 181B.01-.17 (West 1993).
63. Allied, 438 U.S. at 243.
64. See id. at 251.
65. See id. at 257.
67. See id.
68. Allied, 438 U.S. at 244.
70. Id. at 22-23.
claims based on private contracts, reducing them to the status of claims based
on economic substantive due process.

The Court found that in the circumstances of a price-regulated industry, the
impairment of contract obligations caused by the Kansas law was not "substan-
tial." The Court added gratuitously, over the protest of Justices Rehnquist
and Powell, that in any event, the law served a legitimate purpose by reasonable
means. While the decision may not necessarily be inconsistent with United
States Trust—though it does seem inconsistent with Spannaus—it certainly
further restricts the limited revival of the Contracts Clause that decision seemed
to signal.

Finally, in 1983 in Exxon Corp. v. Eagerton, a unanimous Court upheld
against a Contracts Clause claim an Alabama law that prohibited oil and gas
producers from passing on a tax increase to their customers, as they were per-
mitted to do under their contracts. The Court held, reasonably enough it
seems, that the challenged law, unlike the laws in United States Trust and
Spannaus, created a rule of general applicability; it was not specifically directed
to altering contract obligations and affected them only incidentally.

In a decision handed down one year later, the Court delivered the further
discouraging news to Contracts Clause claimants that the Due Process Clause of
the Fifth Amendment does not make the Contracts Clause, unlike the Equal
Protection Clause, applicable to the federal government. Only the due pro-
cess requirement applies to federal law, which the Court said, imposes a less
rigorous standard. The Supreme Court has not made any later Contracts
Clause decisions. It seems fair to conclude that the Burger Court’s one innova-
tion or deviation as to constitutional economic rights is unlikely to prove of
continuing importance.

ANTITRUST

Although the Burger Court era was rather uneventful in terms of constitu-
tional economic rights, it was little short of revolutionary in terms of economic
rights under the antitrust laws. Although antitrust is supposedly a matter of stat-
tutory, not constitutional, law, the difference is not as great as might appear. The
Supreme Court once noted that the Sherman Act, the basic antitrust statute, "has
a generality and adaptability comparable to that found to be desirable in con-
stitutional provisions." That is, it too, is essentially devoid of content. Both

72. See id. at 416.
74. See id.
75. See id. at 191.
78. See id. at 719-20.
antitrust and constitutional law are essentially common law subjects, created by the Supreme Court almost entirely out of whole cloth. Antitrust decisions are theoretically subject to congressional revision, but that rarely happens, and constitutional law, too, it seems, is sometimes subject to change by ordinary legislation. The 1965 Voting Rights Act, for example, "overruled" a Supreme Court decision upholding literacy tests, and more recently, the Religious Freedom Restoration Act, purportedly "overruled" the Court's decision that religious practices are not generally exempt from the application of ordinary law.

The Warren Court

The Burger Court inherited from its predecessor a body of antitrust law that had been inflated almost to the bursting point. The Warren Court essentially took the position that it was not competent to determine the competitive consequences of challenged business arrangements. One can hardly quarrel with that premise, but it should lead, one would think, to the conclusion that very few business arrangements can be held illegal, because not found to be anticompetitive. In the euphoria of an era, encompassing the 1960s, however, that believed that more law, government, and coercion was a prescription for social progress, it led to the opposite conclusion, that nearly all challenged business arrangements, no matter how apparently reasonable, efficient and productive, were illegal per se, that is, illegal without inquiry into either their anticompetitive effects or their procompetitive justifications.

By the time the Warren Court finished its work, the so-called per se offenses encompassed nearly all of antitrust. They included horizontal price fixing agreements, whether setting minimum or, more questionably, maximum prices; resale price maintenance agreements, again whether setting minimum or, more questionably still, maximum prices; group boycotts or concerted refusals to deal; tie-in arrangements and, in effect, exclusive dealing, and most surprisingly and questionably, all agreements between manufacturers and dealers restricting the dealers' freedom in the distribution of the

84. See United States v. Topco Assoc., 405 U.S. 596, 609-10 (1972). "[C]ourts are of limited utility in examining difficult economic problems." Id. at 609 (post Warren, but reflecting Warren Court attitudes).
If it is a desideratum of law that results be predictable, antitrust law approached the ideal; the rule could not have been more simple and clear: plaintiff always wins. As Justice Potter Stewart put it, dissenting in a merger case, "[t]he sole consistency that I can find is that under . . . [merger law], the Government always wins."93

Local price-cutting by large national companies to the injury of smaller competitors was likely to be condemned as illegal price discrimination under the Clayton Act, as amended by the Robinson-Patman Act,94 and as an attempt to monopolize by predatory pricing under Section 2 of the Sherman Act.95 An illegal conspiracy under Section 1 of the Sherman Act could be found on the basis of a company’s dealing with a wholly-owned corporate subsidiary, i.e., a company could be found guilty of conspiring with itself.96 Summary judgment for defendants was virtually eliminated as a possibility,97 giving antitrust law, with its mandatory treble damages and attorneys’ fees, almost unlimited potential as a tool of extortion, a potential that was frequently realized. In sum, instead of protecting and encouraging competition, antitrust law often operated to make competition dangerous.

A New Era Begins

All of this was changed and changed drastically by the Burger Court.98 After being expanded to the point of encompassing almost every business transaction, antitrust has now been shrunk to the point of almost disappearing. Like labor law, antitrust is in danger of becoming—and in both cases clearly to the common good—a subject largely of historical interest.

The dawning of a new antitrust day was indicated by the Court’s 1974 decision in United States v. General Dynamics Corp.99 in which the apparently firm rule that the government always wins in merger cases was broken. In the past, merger cases were decided almost entirely on the basis of market shares, with the definition of the relevant market typically being manipulated so as to maximize defendant’s market share and, therefore, the merger’s vulnerability. In General Dynamics, however, the Court looked behind the numbers to market and economic realities and found that the merger was not likely to have the anticompetitive consequences the market share alone might suggest.100 It is possible to distinguish General Dynamics on its facts from earlier cases, but the vigorous dissent of Justice Douglas, joined by Justices Brennan, White and

98. But see Richard A. Posner, The Antitrust Decisions of the Burger Court, 47 ANTITRUST L. J. 819, 819 (1978) (“the Burger Court’s impact . . . has been relatively small”).
100. See id.
Marshall, from the Court's rejection of market share as determinative corroborated that the law had changed direction.

With the Court's 1977 decision in *Continental TV, Inc. v. GTE Sylvania,* the change in direction became undeniable and almost total. Perhaps the high point of the Warren Court's drive to expand antitrust liability was its literally incredible—neither the lower courts nor most commentators could bring themselves to believe it—1967 decision in *United States v. Arnold, Schwinn & Co.* In a 1911 decision, *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* the Court held, over the dissent of Justice Holmes, that the Sherman Act applied to vertical (i.e., buyer-seller) as well as horizontal (i.e., competitor) agreements; and specifically, that the Act prohibited manufacturer-dealer agreements setting a minimum dealer resale price. The Court mistakenly believed that such agreements were the result of and equivalent to a price-fixing conspiracy among dealers. In *Schwinn,* the Court extended the *Dr. Miles* prohibition of vertical price agreements to every type of vertical restraint on a dealer's resale of goods. All manufacturer-dealer agreements confining dealers as to location, territory, or class of customers were declared illegal *per se.*

Although *per se* rules are supposed to make the law clear and certain, the effect of *Schwinn* was to make it impossible for manufacturers to protect their legitimate interests in the distribution of their goods without inviting treble damage suits by disgruntled or simply litigious dealers. The Sherman Antitrust Act, enacted to combat the Standard Oil Trust and other national monopolies, had degenerated into a dealer protection statute. Antitrust had been reduced from a protector of competition in national markets to a species of tort law. The more and the worse the law, however, the better it is for lawyers, and few things were better for antitrust lawyers than *Schwinn.*

The Burger era coincided with an era of growing skepticism about the benefits of government regulation. Nobel laureate Milton Freidman and other economists at the University of Chicago preached the gospel of free markets. George Stigler, another future Nobel laureate at Chicago, focused the analysis on microeconomics or price theory, concluding that the effects of government regulations of business are generally counter-productive. Aaron Director, Edward Levi, and later Ronald Coase, also a Nobel laureate, brought the new learning into the Chicago Law School, beginning the modern era of the

102. See id. at 48 n.13.
104. 220 U.S. 373 (1911).
105. See id. at 408-09.
106. See *Schwinn,* 388 U.S. at 367.
107. See id. at 367-68.
economic analysis of law.\textsuperscript{110} Robert Bork,\textsuperscript{111} who studied at the Chicago Law School, and Richard Posner,\textsuperscript{112} who still teaches there, applied economic analysis to all aspects of antitrust, the most obviously economic area of law, and found much to criticize.

Bork and Posner argued that the purpose of antitrust was, or should be, protection of consumer interests, not the often anti-consumer interests of small business.\textsuperscript{113} They convincingly demonstrated that many, if not most, antitrust doctrines were based on a misunderstanding of the economic and business purposes and effects of various commercial practices and arrangements.\textsuperscript{114} As a result, the doctrines often served to hinder rather than advance efficiency and, therefore, to increase costs and harm consumers. They pointed out, for example, that because manufacturers have an interest in the efficient distribution of their products, their efforts to limit competition among their dealers are likely to be for efficiency purposes. Such limits are rarely, if ever, a means of gaining monopoly power, the power to raise the market price of a product by restricting its supply. Vertical restrictions on distribution, therefore, Bork and Posner concluded, should not only not be illegal \textit{per se}, but should not be illegal at all;\textsuperscript{115} purely vertical agreements should not be a concern of antitrust.

Bork and Posner are also extremely skeptical that it is possible to achieve monopoly power by so-called exclusionary or predatory practices or any form of single-firm (non-collusive) conduct except by obtaining government-imposed limitations on competition.\textsuperscript{116} In their view, therefore, antitrust should prohibit little if anything more than pure and simple, or \textit{"naked"—i.e., not involving any integration of operations or facilities—horizontal price-fixing agreements and horizontal mergers that result in a very high (say, two-thirds) market share.}\textsuperscript{117}

In \textit{Sylvania}, the Court with only Justices Brennan, White, and Marshall dissenting, explicitly overruled \textit{Schwinn}'s rule of \textit{per se} illegality for vertical

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Bork, \textit{supra} note 111, at 407 (asserting "that competition must be understood as the maximization of consumer welfare"); Posner, \textit{supra} note 112 at 19 (stating that "antitrust enforcement is an inapprop"riate method of trying to promote the interests of small business"); Robert H. Bork, \textit{Legislative Intent and the Policy of the Sherman Act}, 9 J.L. & ECON 7-14 (1966) (stating that Congress's motivation in enacting antitrust regulation was to promote consumer welfare).
\item See Bork, \textit{supra} note 111, at 407 (arguing for "intervention in [government] ... regulatory processes to extend the competitive ethic as broadly as possible").
\item See Bork, \textit{supra} note 111, at 405-06 ("The law should be reformed so that it strikes at . . . a) The suppression of competition by horizontal agreement . . . b) Horizontal mergers creating very large market shares . . . .").
\end{enumerate}
\end{footnotesize}
non-price restrictions. The decision marked a decisive turning point in antitrust not only because of what it held but, even more important, because it represented an almost complete acceptance by the Court of the Chicago School approach to antitrust. The writings of Bork and Posner were cited and relied upon throughout Justice Powell’s opinion for the Court. The Court agreed, most fundamentally, that antitrust cannot be “divorced from market considerations,” that is, that it should be used to serve only economic—protection of consumer welfare—not social or political, ends.

No business practice or arrangement should be condemned, the Court said, unless shown to have an adverse economic effect. Per se rules of illegality are applicable, therefore, the Court concluded, only to practices known to have a “pernicious effect” on competition and to be without “redeeming virtue.” This is not typically the case, the Court found, with vertical non-price restrictions. Although they limit or end intrabrand competition—competition among dealers in a particular brand of a product—they can increase interbrand competition—competition with other brands. They do this by permitting dealers to engage in costly promotions or provide needed services without having to fear that a competing dealer can “free ride” on their efforts by not making the expenditures and thus being able to sell the product at a lower price.

It happens that except for naked agreements not to compete, very few, if any, business practices or arrangements meet Sylvania’s strict specifications for a per se rule. If followed consistently by the Court, the result would be very few per se rules, Plaintiffs would be required to show in every case that a challenged arrangement has a net anticompetitive effect, something they are rarely able to do. The result would be, and to a large extent has been, very much less antitrust liability and litigation.

The Court’s statement on per se rules has not been consistently followed, however, not even in Sylvania itself. The Court accepted the Chicago view that as monopoly power is rarely achievable through restrictions on one’s dealers, such restrictions should be assumed to be efficiency increasing. The Court nonetheless explicitly refused to overrule the Dr. Miles per se rule for vertical price restraints, even though, as Bork and Posner have shown, such restraints are quite similar in purpose and effect to vertical non-price restraints.

Nor did the Court hold that vertical non-price restrictions were necessarily legal, but only that they were not illegal per se. They are therefore to be tested by the so-called rule of reason and prohibited only if shown to be net anticompetitive. Because of the difficulty of proving anticompetitive effects,
however, the practical effect of a rule of reason approach is much the same as a rule of *per se* legality. Although *Sylvania* did not go quite all the way with the Chicago School, it left little doubt that the Chicago approach, highly skeptical of most of antitrust, would receive a sympathetic hearing in cases involving other antitrust areas.

*Price-fixing Agreements*

The promise of *Sylvania* has largely been kept. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Court refused to apply a *per se* rule even to a combination of competitors—composers and other music copyright owners—that had the effect of eliminating almost all price competition in the sale of music performance rights. An agreement among competitors is not necessarily illegal, the Court said, merely because it “literally” involves price-fixing. It is illegal only if it is shown to be “plainly anticompetitive” and very likely without “redeeming virtue.” This amounts to saying that there is no *per se* rule, that no arrangement or practice (other than a naked agreement not to compete) can be condemned as illegal without examining its actual competitive effects and justifications.

If applied consistently, the *Broadcast Music* approach would be a welcome development in antitrust. The supposed distinction between *per se* and rule of reason offenses has been a source of endless confusion. It should be abandoned in favor of the simple rule that only naked agreements not to compete are necessarily illegal. Antitrust is based on the assumption, whether or not correct, that competition is a good thing; arrangements that have no purpose or effect other than to end competition are therefore necessarily prohibited. All other arrangements, however, those that involve some integration of operations or facilities and therefore have possible efficiency justifications, cannot be condemned without investigation of their competitive effects and justifications.

Consistency, however, is too much to ask of the Supreme Court. In *Arizona v. Maricopa County Medical Society* in 1982, the Court condemned as illegal *per se* a physician-created health care arrangement that clearly involved the creation of a new product or service and had possible efficiency justifications. The four to three decision may be seen as an aberration, however,
the result of a temporary return to power of the antitrust enthusiasts—Justices Brennan, White, Marshall, and Stevens—made possible by the absence of a full Court. An illegal price-fixing agreement was also found the following year in NCAA v. Board of Regents of the University of Oklahoma, involving the joint sale to television notebooks of rights to broadcast college football games. It was found, however, only after a thorough analysis of competitive harms and justifications.

**Tie-ins**

In any listing of the least defensible of Warren Court antitrust decisions, *Fortner Enterprise, Inc. v. U.S. Steel Corp.* must rank high, carrying the supposed *per se* rule against tying arrangements to a new extreme. The rule was established by judges, at first in patent cases, on the mistaken notion that a monopolist of one product, say a motion picture projector, could obtain an additional monopoly, say of motion picture films, by requiring buyers of the first (the "tying") product to also buy from the monopolist all they need of the second (the "tied") product. Economic analysis shows that while such an arrangement might facilitate price discrimination—charging more to users who have greater use for the tying product as measured by greater use of the tied—it will not multiply or expand monopoly power. Indeed, price discrimination can reduce the evil of monopoly power by permitting the monopolist to increase output above the level that would be most profitable if he were required to charge all buyers a single price. Price discrimination allows a seller to charge a low (though still profitable) price to marginal users of a product without having to lower the price to high-demand users.

The notion that a tie-in is a device for increasing monopoly power is even more clearly mistaken where the two products are used in fixed proportions. A monopolist of bolts, for example, cannot gain additional monopoly profits by requiring each bolt purchase to also purchase a nut. Bolts and nuts are merely components of a single product, a fastening device, and no additional monopoly profit can be made by becoming the sole supplier of more than one component of a single product.

In *Fortner*, one division of U.S. Steel, the Homes Division, sold prefabricated houses, and another division facilitated these sales by providing low-cost financing for the houses and related development expenses. Fortner, a developer who had negotiated a very favorable deal with U.S. Steel’s struggling Homes Division, claimed that the homes were of inferior quality. Instead of bringing a mere breach of contract action for damages, his imaginative lawyer added an

133. See Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917).
135. See id.
antitrust claim for treble damages and attorney’s fees, claiming that U.S. Steel had tied the sale of houses to the sale of credit.

The idea that U.S. Steel had monopoly power in credit (money) and was using it to monopolize prefabricated housing was absurd, but the beauty of per se rules is that they make reality irrelevant. Finding no tie, the district court granted, and the court of appeals affirmed, summary judgment for U.S. Steel. The Supreme Court, in an opinion by Justice Black, the paradigmatic southern populist, reversed and sent the case back for further investigation of U.S. Steel’s alleged monopoly power over money. After bouncing around in the baffled lower courts for eight years, the case returned to an embarrassed Supreme Court in 1977. In Fortner I, the Court quickly disposed of it by finding that no monopoly-expanding tying arrangement was involved because U.S. Steel did not have monopoly power in credit, the alleged tying product. It is not illegal, the Court stated, to sell high-priced homes with the aid of low-priced credit, which is all that was involved. This reasoning applies equally to most or all alleged fixed-proportion ties. It is difficult to see, in any event, how a buyer, such as Fortner—rather than a competitor of the seller—can claim to be injured by an arrangement he voluntarily entered into, presumably because it was the best available.

Fortner II appeared to mean that the requirement of monopoly power in the alleged tying product—without which, by definition, there could be no tie—was now to be taken seriously. As a result, the per se rule as to tie-ins was very much weakened. In the Burger Court’s next and last tie-in case, Jefferson Parish Hospital District No. 2 v. Hyde in 1984, four Justices voted to eliminate the per se rule entirely. The majority purported to retain it, but weakened it still further by holding that a 30 percent share of the relevant market did not indicate a sufficient degree of power to make the (supposed) per se rule applicable.

Boycotts

Boycotts or concerted refusals to deal are the final practice that had traditionally been listed, along with price-fixing, horizontal market division, and tie-ins, as illegal per se. In Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., however, the Court in effect eliminated the per se

---

137. See Fortner Enter., Inc. v. United States Steel Corp., 404 F.2d 936 (6th Cir. 1968).
138. See Fortner Enter., 394 U.S. at 495.
140. See id. at 610-11.
142. See id. at 35.
rule as to boycotts by holding, as it had regarding price-fixing in *Broadcast Music*, that not every arrangement that could be described as a concerted refusal to deal was necessarily illegal.\textsuperscript{145} It is not necessarily an antitrust violation, the Court held, for a group of retailers to exclude a competitor from an efficient joint wholesale buying arrangement. Such conduct is illegal only when "characteristically likely to result in predominantly anticompetitive effects."\textsuperscript{146} The result, again, would seem to be to make an investigation of the effects of and justifications for a challenged arrangement relevant in all or nearly all cases.

**Monopolization**

An apparent peculiarity of antitrust, i.e., antimonopoly, law is that it does not in fact prohibit monopolies. One reason is that some monopolies are the result of government grants such as patents, and the government cannot usefully prohibit with one hand what it bestows with the other. Another reason is that some markets cannot support more than one efficient company, making monopoly inevitable, the "natural monopoly" situation. Finally, some monopolies may result from exceptional competitive skill—good products sold at low prices—which antitrust seeks to encourage, not condemn. The law, therefore, prohibits not monopoly as such, but only monopolization, the obtaining or retaining of monopoly power by objectionable conduct,\textsuperscript{147} for example, by some mergers.

Another peculiarity is that antitrust, at least since the breakup of the Standard Oil\textsuperscript{148} and American Tobacco\textsuperscript{149} companies in 1911, has involved few monopolization cases, which may indicate that the need for this body of law is easily overstated. Most peculiar, surely, is that the most important of these few cases have nearly all been lower court decisions.\textsuperscript{150} The Supreme Court, it seems, has largely avoided, perhaps wisely, addressing the subject. The most famous and important of monopoly cases, virtually the bible of monopolization law for more than four decades, was *United States v. Aluminum Company of America*,\textsuperscript{151} decided in 1945 by the Second Circuit in an opinion by Judge Learned Hand, a judge who generally merited his impressive name, although not in this case. The Second Circuit heard the case pursuant to a special act of Congress\textsuperscript{152} after Supreme Court review of the district court decision in defendant's favor was precluded by lack of a quorum.\textsuperscript{153}

\textsuperscript{145} See *id.* at 285.
\textsuperscript{146} See *id.* at 296.
\textsuperscript{147} See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) ("The offense of monopoly... has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident...")..\textsuperscript{148} See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).
\textsuperscript{149} See *American Tobacco Co. v. United States*, 221 U.S. 106 (1911).
\textsuperscript{151} 148 F.2d 416 (2nd Cir. 1945); *See also United Shoe Mach. Corp.*, 110 F. Supp. at 295.
\textsuperscript{153} See *Aluminum Co. of Am.*, 148 F.2d at 421 ("declaring that a quorum of six justices qualified to hear
Although the *Alcoa* decision, as it is known, was made before the Warren Court era, it was very much in its spirit in that its effect was to make monopoly, or even a very large market share, at least in an important industry, illegal *per se*. *Alcoa* was condemned, incredibly, not for restraining output in order to increase market price, the basic objection to monopoly power, but for the "exclusionary practice" of expanding output in order to meet an increasing demand, a demand it did much to stimulate. Apparently, it should have held output down in order to let prices rise and reap monopoly profits so as to give less efficient companies a better chance to enter the industry. If justice requires treatment according to preexisting law, not law made up for the occasion, few defendants have been treated more unjustly than *Alcoa*. The result of the decision was to make vigorous competition by large companies dangerous, ushering in an era of "soft competition." Antitrust thus became and remained until the time of the Burger Court a body of law that served less to protect than to deter competition.

The Burger era saw an unusual number of monopolization cases, most notably the government's suit against *IBM*, followed by a dozen private suits, but with one peculiar exception, none was decided by the Supreme Court. Perhaps the most significant monopolization decision of the era was *Berkey Photo, Inc. v. Eastman Kodak Co.*, a 1979 decision by the Second Circuit. Although decided by the court that decided *Alcoa*, the tenor of the two decisions could hardly be more different. The *Alcoa* decision was now described as "cryptic" and a "litigant's wishing well" and all but explicitly overruled. The fact that Kodak dominated nearly all aspects of the photography industry—film, processing, cameras—did not require it, the court said, to refrain from vigorous competition or take steps to aid small competitors. Even monopolists, the court now made clear, may vigorously compete.

Plaintiff *Berkey Photo* filed a petition for certiorari, but the Supreme Court, inexplicably, declined to hear the case, permitting the Second Circuit's decision to stand. The only expression of a view from the Supreme Court was in an opinion by Justice Rehnquist, joined by Justice Powell, dissenting from the Court's denial of certiorari. They apparently would have been even more emphatic than the Second Circuit in insisting that antitrust favors hard competition. They found it "little less than bizarre" and "difficult to fath-

---

154. *Aluminum Co. of Am.*, 148 F.2d at 423.
157. 603 F.2d 263 (2d Cir. 1979).
158. *Id.* at 273.
160. *Id.* at 1094.
om” that a claim could be based, as it was in part in this case, on a monopolist’s failure to assist its competitors.

Having declined to take a real monopolization case, the Court, in its inscrutable wisdom, decided five years later to take a specious one, Aspen Skiing Co. v. Aspen Highlands Skiing Corp. Defendant Ski Co. owned and operated skiing facilities on three mountains in Aspen, Colorado; plaintiff Highlands owned and operated a ski facility on a fourth mountain. In the 1950s, the parties had entered an agreement to sell a multi-day all-lifts ticket, whereby customers could with one ticket ski on any of the four mountains. This arrangement, obviously subject to objection on antitrust grounds as price fixing, was challenged by the attorney general of Colorado in a suit that was settled by a consent decree. The current case involved, however, not the creation of this questionable arrangement, but its termination in 1977, when Highlands declined to continue the arrangement on the terms that Ski Co. offered.

Highlands then sued Ski Co. for illegal monopolization, and obtained a $2,500,000 jury award, automatically trebled to $7,500,000 plus attorney’s fees. Reverting to its bad old habits, the Court apparently saw the case as a morality play involving a small company mistreated by a bully, and unanimously affirmed the judgment. A company, even a monopolist, the Court agreed, has no “general duty” to help a competitor. The Court thought it highly significant, however, that the case involved not a refusal to help but a refusal to continue to help. That the case was wrongly decided should be sufficiently clear from the fact that it almost surely would have been decided differently if Ski Co. had not entered into the arrangement with Highlands in the first place. One may be generally skeptical of the validity of a rule that makes it illegal to terminate what one is not legally required to begin. It did not appear that Highlands would have been better off if Ski Co. had never entered into the arrangement with Highlands in the first place. It is clear, therefore, that its complaint was not that it was injured by Ski Co., but that it ceased to be benefited.

Highlands lacked a valid monopoly claim, in any event, because Aspen was not the relevant geographical market. Aspen is a “destination” ski resort, competing with many other such resorts on a national and international basis. The elimination of Highlands would not, therefore, have given Ski Co. monopoly power over the price of skiing. The district court escaped this obvious and dispositive conclusion by finding that Aspen constituted a “submarket,” a finding with no basis in economic reality. The Supreme Court escaped it by finding that the market definition question was not presented, but that does not

161. Id.
163. See id. at 595, 598.
164. See id. at 599.
165. Id. at 586.
166. See id. at 610.
167. See Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1513 (10th Cir. 1984) (discussing the district court’s use of the submarket classification).
make the Court's finding of monopolization any less invalid. *Aspen* would appear to stand for the proposition that every refusal by a dominant company to help a competitor provides the basis for an antitrust suit unless it is justified as efficient to the satisfaction of a judge. That is not a workable rule, however, and probably not the rule of *Aspen*, which likely will be treated as *sui generis*, more an atavistic foray into tort or social welfare law than an application of antitrust law.\(^{168}\)

**Attempt to Monopolize — Predatory Pricing**

Section 2 of the Sherman Act prohibits attempts to monopolize as well as monopolization. Since the attempt offense does not, like the completed offense, require a showing that the defendant is a monopolist, it has been a much more fertile source of litigation. The most common basis for the attempt offense is a charge of "predatory pricing," that is, the use of excessively low prices, however defined, to drive less wealthy competitors into bankruptcy, thereby gain monopoly power. Economic analysis indicates, however, that in general such a tactic is not economically rational, and therefore unlikely to occur.\(^{169}\)

A competitor can drive an equally efficient competitor (one with the same costs) into bankruptcy only by pricing below cost. This, however, involves incurring present losses, usually at a much greater rate than the competitor,\(^{170}\) for future (and therefore to be discounted by the interest rate) gains. The strategy can succeed only if competitors are driven out and the losses involved can be recouped from future monopoly profits, all of which is highly speculative. Competitors may be able to stay in the market by obtaining funds from customers—who would be harmed by monopoly—or from capital markets.\(^{171}\) Even if driven into bankruptcy, competitors often reenter the market after reorganization, and with reduced fixed costs. Most important, having achieved monopoly by bankrupting competitors, the monopolist will be able to recoup his losses from monopoly profits only in the unlikely event that his monopoly prices do not encourage new entry or reentry.

The conclusion that predatory pricing is irrational in principle as a monopolizing technique is apparently corroborated by the fact that there are few, if any, examples of its successful use.\(^{172}\) Further, since low prices are generally

\(^{168}\) See Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 375 (7th Cir. 1986) (stating that *Aspen* does not impose on a lawful monopolist a "general duty to help its competitors").


\(^{170}\) A company with a 75 percent share of the market, for example, will lose money three times as fast as a company with a 25 percent share.

\(^{171}\) See, e.g., Easterbrook, supra note 169, at 269-70 ("Investors should be willing to back the intended victim, because it would be the more profitable survivor . . .").

\(^{172}\) See Ronald H. Koller II, *The Myth of Predatory Pricing: An Empirical Study*, 4 Antitrust L. & Econ. Rev. 105, 112 (Summer 1971) (finding only four successful predation cases: three "to precipitate a merger or collusion" and one "to eliminate a rival").
beneficial to consumers and an objective of antitrust, there is an obvious danger in making them the basis of an antitrust offense. If predatory pricing is not a serious problem, as appears to be the case, the best policy, may be simply to ignore it. The loss to competition involved, if any, will likely be outweighed by the gain of removing a possible deterrent to competition. That, at least, was the conclusion of the Chicago school.

In 1975, Professors Phillip Areeda and Donald Turner of the Harvard Law School, authors of an extremely influential antitrust treatise,173 published an article recommending an approach to predatory pricing claims less absolute than the Chicago approach, but which proved in practice to have very much the same effect.174 They recommended, first, that questions of defendant's alleged intent to injure plaintiff should play no role in attempt to monopolize or monopolization cases. Showing a supposed evil intent to injure plaintiff had been the traditional means by which failed small companies won jury sympathy awards against larger companies. Because competition necessarily injures rivals, however, an intent to injure cannot validly be the basis of an antitrust claim.

Predatory pricing claims should turn, instead, Areeda and Turner argued, simply on the relationship between the alleged predatory price and defendant's costs. A price should not be considered predatory unless it is below some measure of costs, and the proper measure is marginal cost, the additional cost of producing the last unit. A price is profitable—that is, makes a contribution to revenue—and economically rational, even if below full cost, as long as it exceeds marginal cost. Pricing at or above marginal cost, therefore should not be considered predatory. Since marginal cost data are ordinarily not available, average variable cost should be used as a proxy.

Some variant of the Areeda-Turner approach has been adopted in every circuit.175 In 1986 in Matsushita Electric Industrial Co. v. Zenith Radio Corp.,176 the Supreme Court indicated its acceptance of the Areeda-Turner view that a predatory price is a price "below some appropriate measure of cost."177 Citing and quoting Robert Bork and other Chicago analysts, the Court also expressly endorsed the view that predatory pricing claims should be greeted with great skepticism.178 Predatory pricing, it said, is "by nature speculative,"179 "rarely tried and even more rarely successful."180 The effect of the Areeda-Turner approach to predatory pricing, at least partly endorsed in Matsushita, has been largely to eliminate attempt to monopolize suits based upon predatory pricing claims. Such suits had been a major source of private

175. See, e.g., Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983); Williams Iglis and Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86 (9th Cir. 1975).
177. Id. at 585 n.8.
178. See id. at 589.
179. Id. at 575.
180. Id. at 589.
Summary Judgment Made Available to Defendants

The Matsushita decision is also important in that the Court affirmed a district court grant of summary judgment to defendants. This illustrated and endorsed another major change in antitrust law, the availability of summary disposal of antitrust claims. Indeed, Matsushita shows not only that summary judgment is now available to antitrust defendants, but that it may be granted even in the face of complicated and contested facts when economic analysis indicates that a claim is without merit.

Resale Price Maintenance

As already noted, antitrust long ago degenerated from a means of protecting a competitive national economy to a species of dealer-protection law. The demise of Schwinn in Sylvania left resale price maintenance or vertical price-fixing as the only per se illegal vertical arrangement. Although the Court in Sylvania declined to overrule the Dr. Miles per se rule as to resale price maintenance, it has largely achieved the same effect by making claims of illegal resale price maintenance very hard to prove. In United States v. Colgate & Co., the Court effectively overruled Dr. Miles by holding that a manufacturer may control his dealers’ resale price by simply telling them what it should be and that they will be cut off if they fail to comply. In that situation, the Court said, quite illogically, the “contract, combination, or conspiracy” (or “agreement”) requirement of Section 1 of the Sherman Act is not met. The manufacturer was said to have acted “unilaterally” even though he explicitly sought and successfully obtained the cooperation of his dealers.

Though Colgate in effect overruled Dr. Miles, it was in turn also effectively overruled, though never explicitly, by later decisions that found the agreement requirement met by manufacturer conduct—the identification and termination of noncomplying dealers—that Colgate supposedly allowed. In Monsanto Co. v. Spray Rite Service Corp., however, the Burger Court apparently restored the so-called Colgate doctrine to full vigor. The fact that a manufacturer has demonstrated “a strongly felt concern about resale prices” does not prove, the Court said, that he had obtained illegal “agreements” from dealers as to resale prices. And, as Colgate held, absent proof of an agreement there is no liability under Dr. Miles. Minimum care by manufacturers to avoid obtaining express statements of agreement on resale prices from deal-

181. 250 U.S. 300 (1919).
182. Id. at 307.
185. See id. at 763.
186. Id.
187. See id. at 753.
ers should be enough, it seems, to permit them to effectively control resale prices without antitrust liability.\footnote{188}

\textit{No Single-firm "Conspiracy"}

The Burger Court eliminated another basis of antitrust liability in \textit{Copperweld Corp. v. Independence Tube Corp.},\footnote{189} by holding, contrary to indications in prior decisions, that a business firm cannot be found guilty of conspiring with itself.\footnote{190} Specifically, no illegal contract, combination, or conspiracy can be found under Section 1 of the Sherman Act on the basis of a corporation's dealings with its incorporated wholly-owned subsidiaries.\footnote{191}

\textit{The Robinson-Patman Act}

The Robinson-Patman Act was enacted in 1936,\footnote{192} in the depths of the Great Depression, when competition, like capitalism itself, was held in low esteem. It prohibits certain price discriminations or differences that have or may have anticompetitive effects. Although purportedly an antitrust statute, in practice it has had less to do with protecting competition than with protecting small businesses from the competition of larger ones. It has therefore long been a favorite target of antitrust skeptics.\footnote{193} Wide recognition of its anticompetitive effects led to its being very little enforced by the government during the Burger Court era, and in the few cases brought by private parties, the Court generally limited the reach of the act. In \textit{Gulf Oil Corp. v. Copp Paving Co., Inc.},\footnote{194} the Court held that the act did not apply to a company with wholly intrastate operations, because it extended only to activities "in" interstate commerce and not, like the Sherman Act, also to activities that merely "affect" interstate commerce.\footnote{195}

In \textit{J. Truett Payne Co. v. Chrysler Motors Corp.},\footnote{196} the Court made clear that a plaintiff does not establish a Robinson-Patman claim by merely showing that his supplier made lower price sales to his competitors. Plaintiff must also show that defendant's conduct violated the act—\textit{i.e.}, was anticompetitive—and that plaintiff was injured as a result of its anticompetitive effects. Finally, in \textit{Falls City Industries, Inc. v. Vanco Beverage, Inc.},\footnote{197} the Court read the act's "meeting competition" defense very broadly and further indicated that the requirement of showing an injury to competition, not just to the plaintiff, a show-
ing difficult to make, must be taken seriously. 198

CONCLUSION

The Burger Court had little impact on economic rights as a matter of constitutional law. The most interesting development was its use of the Contracts Clause to invalidate state laws in two cases in successive years. The limited significance of this partial revival of the Clause is indicated by the fact that no claim based upon it has prevailed in the nearly two decades since. In regard to economic freedom under the antitrust laws, however, the work of the Burger Court has been little less than revolutionary. The Court rendered major decisions in almost every antitrust area, and the result almost always was to increase business freedom and reduce antitrust liability. The Court took an area of law that had become a cancerous growth on the body of American commerce and business, restricting competition and spawning expensive and extensive litigation, and returned it to something like its original purpose, which was to remove, not impose, restraints on commerce and trade.

The Burger Court so thoroughly revised almost every aspect of antitrust law as to leave relatively little for its successor to do. There have been only a few major antitrust decisions in the past ten years, and they have mostly confirmed and continued the work of the Burger Court. 199

198. See id. at 451.