An enforcement perspective on the work of Robert L. Steiner: why retailing and vertical relationships matter

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I. Introduction

The question of why economists traditionally neglect retailing and the "competition" between retailers and manufacturers is of great interest to me in my enforcement role at the Federal Trade Commission.[1] The fundamental insight of Robert Steiner's writings—which argue that such a neglect can result in mistaken applications of the antitrust laws

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AUTHOR'S NOTE: *The views expressed herein are mine and do not reflect the views of the Commission or any other Commissioner. I am grateful to advisors Avishalom Tor and Tara Isa Koslov for their assistance in preparing these comments.*

[1] For evidence of this neglect *see* Michael P. Lynch, *Why Economists Are Wrong to Neglect Retailing and How Steiner's Theory Provides an Explanation of Important Regularities* in this issue of *The Antitrust Builletin. See also* William S. Comanor, *Steiner's Two-Stage Vision: Implications for Antitrust Analysis,* in this isssue of *The Antitrust Bulletin* at section I (describing how, despite some giving early attention to vertical relationships, "economists and policy-makers had ignored these insights . . . [and] the competitive significance of vertical relationships was downplayed").

in consumer goods markets[2]—resonates with my intuitions about the market, as well as with my past experience as a state enforcement official.

Steiner's insights also continue to resonate with antitrust practitioners who look to actual market realities, rather than mere formalistic distinctions.[3] The serious dearth of economic scholarship and literature devoted to distribution issues is a problematic state of affairs, especially at a time when the input of economists is a critical factor shaping judicial and enforcement decisions in the antitrust field.

This article will summarize some of the main contributions of Steiner's work, noting its relation to recent economic research concerning the retail sector and the appropriate standards for evaluating the competitive effects of horizontal retail mergers. The article will then discuss some shortcomings of these new economic studies, most notably the failure to address implications of distribution channel interaction for vertical restraints analysis. Steiner's writings provide a unique perspective on the benefits and harms vertical restraints may generate in certain industries; however, at present, the challenging questions posed by Steiner are in need of answers. Antitrust economists should rise to the challenge and seek these answers, lest the profession risk pursuing an antitrust enforcement policy that, by default, leaves no role for procompetitive vertical enforcement.

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[2] *See, e.g.,* Robert L. Steiner, *The Third Relevant Market*, 45 ANTITRUST BULL. 719 (2000) (arguing that the Horizontal Merger Guidelines frequently neglect the role of the downstream distribution and resale market in consumer good industries) [hereinafter *Third Relevant Market*]; Robert L. Steiner, *Intrabrand Competition—Stepchild of Antitrust*, 36 ANTITRUST BULL. 155 (1991) (asserting that, contrary to the Chicago school's view, intrabrand competition is important and that its presence can often benefit consumers) [hereinafter *Intrabrand Competition*]; Robert L. Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143 (1985) (suggesting that vertical restraints voluntarily adopted by consumer good makers with market power have a significant anticompetitive potential, in contrast with the prevailing Chicago school view of vertical restraints) [hereinafter *Vertical Restraints*].

[3] *See* Eastman Kodak Co. v. Image Tech. Svcs., 504 U.S. 451, 466–67 (1992).

II. Steiner's basic distribution principles

For decades, Steiner has argued that economists who model consumer goods markets frequently neglect basic facts about distribution—a neglect that can lead to erroneous conclusions.[4]

Most economic models of consumer goods markets completely ignore retail activities, based upon an assumption that retail markets are perfectly competitive. According to this view, distribution is characterized as an undifferentiated pass-through for manufacturing costs, competitive conditions, and the like. For example, an antitrust economist might assume that a change in the cost of manufacturing a consumer good would be fully reflected in the retail price paid by end-use consumers. Steiner calls this prevailing view the "single-stage" model.[5]

But Steiner observes that, in reality, distributors and retailers face imperfect competition from their counterparts, and therefore often are able to exercise a degree of market power.[6] He also asserts that manufacturers and retailers engage in "vertical competition," by competing to perform functions such as product certification or the provision of product information.[7] Steiner posits that firms at successive stages of an industry should be defined as vertical competitors "when they can take sales, margins or market shares from each other."[8]

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[4] *See, e.g.*, Robert L. Steiner, *Marketing Productivity in Consumer Good Industries—A Vertical Perspective*, 42 J. MARKET. 60, 61–62 (1978) (describing Steiner's early formulation of the "single-stage error").

[5] *E.g.*, *id.* For a more recent formulation see Robert L. Steiner, *A Dual-Stage View of the Consumer Goods Economy*, 35 J. ECON. ISSUES 27 (2001).

[6] *See, e.g.*, Steiner, *Vertical Restraints*, *supra* note 2, at 157–58.

[7] *See* Comanor, *supra* note 1, at section II (noting, after examining Steiner's contributions to antitrust scholarship, that "[t]he essential point here is that providing product information is a critical economic function that provides a substantial return . . . and [that therefore] higher margins accrue to those providing the information.").

[8] Steiner, *Intrabrand Competition*, *supra* note 2, at 161; Steiner, *Vertical Restraints*, *supra* note 2, at 158–60; Steiner, *Third Relevant Market*, *supra* note 2, at 721–25. *See also id.* at 724 (describing vertical competition as "the contest between a manufacturer and his retailers to obtain a larger share of a brand's retail price").

Steiner therefore seeks to replace the prevailing single-stage model with a "dual-stage" model that accounts for competitive vertical relationships between manufacturers and retailers in consumer goods markets.[9]

Steiner's views on retailing and the vertical relationships within retail markets have potentially important implications for antitrust law.

III. Implications for merger policy

With respect to merger analysis, Steiner believes the federal Horizontal Merger Guidelines[10] are based largely on a single-stage approach that does not accurately reflect the workings of retail markets. According to Steiner, this single-stage approach results in a number of inadequacies when the Guidelines are applied to mergers in retail markets—in areas ranging from geographic market definition, merger-specific efficiencies and buyer power, to the use of retail prices (e.g., scanner data) for estimating manufacturing-level effects.[11] At each step, Steiner suggests, antitrust analysis of a merger in a consumer goods industry must take into account the role of the "third relevant market"—that is, "the downstream market(s) in which distribution firms resell the goods of manufacturers in the relevant product market to household consumers in the relevant geographic market."[12]

In recent years, economists finally have begun to address some of the challenges raised by Steiner's insights about the nature of retail competition and its implications for merger policy. In fact, FTC economists and others have started exploring the causes of retail price variation, acknowledging that such variation raises questions for eco-

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9 *E.g.*, Steiner, *supra* note 5.

10 U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), *reprinted at* 4 Trade Reg. Rep. (CCH) ¶ 13,104.

11 Steiner, *Third Relevant Market, supra* note 2, at 721, 735–44.

12 *Id.* at 719.

nomics generally and merger analysis specifically.[13] For example, one empirical study found that current estimates of how consumers react to retail price changes are likely to be biased, on average, toward an overestimation of retail price elasticity—meaning that, in reality, consumers may be somewhat more likely to pay higher prices instead of turning to alternative products.[14] If typical single-stage economic models use such biased consumer-level data to estimate the effects of upstream mergers, then these models, on average, may overestimate upstream price elasticity as well. In other words, upstream mergers may increase the market power of manufacturers to a greater degree than one might predict based on extrapolations from estimated con-

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[13] For a partial list see Daniel Hosken & David Reiffen, *Patterns of Retail Price Variation,* 35 RAND J. ECON. 128 (2004) (exploring various explanations for retail price variation); Daniel Levy et al., *The Magnitude of Menu Costs: Direct Evidence From Large U.S. Supermarket Chains,* 112 Q. J. ECON. 791 (1997) (most retail price changes reflect changes in retail margins, rather than changes in wholesale prices); Daniel Hosken & David Reiffen, Pricing Behavior of Multiproduct Retailers (June 2003) (unpublished manuscript on file with author) (noting that economists have not appreciated the importance of understanding the sources of retail price variation for models using retail data for econometric estimates) (earlier version available as Working Paper 225, FTC Bureau of Economics, March 1999, revised May 2001); DANIEL HOSKEN ET AL., HOW DO RETAILERS ADJUST PRICES?: EVIDENCE FROM STORE-LEVEL DATA (Working Paper 225, FTC Bureau of Economics, January 2000) (using empirical evidence from an extensive nonpublic data set to document a number of empirical regularities in retail price behavior that are at odds with traditional economic conventions, including, *inter alia*, that products appear to go on sale more often when consumer demand is *high* (e.g., eggs before Easter) and that certain brands and sizes are far more likely to go on sale than others). For additional studies see the "Working Papers" page of the FTC Bureau of Economics Web site, *available at* http://www.ftc.gov/be/econwork.htm.

[14] *E.g.,* Steven Tenn & John M. Yunn, Retail Distribution Is Ignored: Should It Be? (Working Paper 18, 2004) (unpublished manuscript on file with author) (noting the "obvious policy implications" of the finding that "on average, quantities are estimated to react more strongly to price than they actually do" for market delineation and competitive effects). *See also* DANIEL HOSKEN ET AL., DEMAND SYSTEM ESTIMATION AND ITS APPLICATION TO HORIZONTAL MERGER ANALYSIS (Working Paper 246, FTC Bureau of Economics, April 2002) (noting, *inter alia*, the difficulties involved in translating elasticities estimated with retail-level data into wholesale level elasticities).

sumer behavior. Steiner further suggests that an upstream merger sometimes "might be the spark that would facilitate a vertical deal that enabled margins to rise," at both the upstream and retail levels, to the detriment of consumers.[15]

At the same time, however, Steiner himself acknowledges that the interaction between manufacturers and retailers may, in fact, prevent the occurrence of anticompetitive effects at the consumer level when market power increases at the manufacturing level.[16] For instance, Steiner believes that the introduction of large-scale brand advertising into a category where no such advertising previously has existed can lead to an increase in the market power of manufacturers at the expense of their retailers, without any significant effect on consumers.[17] The possibility that an increase in upstream market power may not always fully translate to a comparable downstream effect is also supported by a recent economic model showing that, given a monopolistic retail sector, an upstream merger may decrease, leave unchanged, or even increase downstream consumer welfare.[18] It is also possible that the bias in current empirical estimates can sometimes lead to an underestimation of retail price elasticity, although—as noted above—the bias more commonly has the opposite effect of a retail price elasticity overestimation.[19]

Perhaps horizontal merger analysis would be more robust and realistic (albeit more uncertain at times) were it more fully to account for the unique aspects of retail markets; thus, it is encouraging to see more economists paying attention to these issues. Steiner's work and

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15 Steiner, *Third Relevant Market, supra* note 2, at 744 (referencing his own analysis of the *Toys-"R"-Us* case as an example of the ability of a "power retailer" to diminish retail competition by inducing manufacturers to adopt vertical restraints).

16 *See* Comanor, *supra* note 1, at section III.B. (discussing the implications of Steiner's insights for merger enforcement policy).

17 *See, e.g.*, Steiner, *Third Relevant Market, supra* note 2, at 743–44.

18 Luke Froeb et al., Vertical Restraints and the Effects of Upstream Horizontal Mergers (Owen Working Paper, March 27, 2002), *available at* http://mba.vanderbilt.edu/luke.froeb/papers/retail.sector.pdf.

19 Tenn & Yunn, *supra* note 14.

recent economic studies, however, have yet to provide clear guidance to identify real-world circumstances where retail sector dynamics are likely either to attenuate or exacerbate the potential anticompetitive effects of increased upstream concentration.[20] Additional, significant economic study of retail markets is needed, so that Steiner's principles can be translated into workable antitrust enforcement policies.

IV. Implications for the analysis of vertical restraints

As to vertical restraints, even more so than in the merger context, Steiner's views diverge from the dominant economic approach. Notably, Steiner repeatedly has insisted that certain vertical restraints, especially nonprice distribution restraints, frequently generate an anticompetitive effect when employed by manufacturers of powerful brands.[21] Here, Steiner's views are in sharp contrast with the Chicago school's benign view of vertical restraints.[22]

In his earlier work, Steiner argued that while vertical restraints sometimes may be efficient, they can impede the introduction of more efficient, lower-cost forms of retailing, to the detriment of con-

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[20] Thus, even an economist highly sympathetic to Steiner's ideas, who attempted to incorporate these ideas into a usable economic model, concedes that "[i]n the absence of a formal model, economists may have legitimate concerns over whether the propositions are consistent with each other and with profit maximization . . . and this may be another reason why Steiner's work has not received the attention it merits." Lynch, *supra* note 1, at section III.C.

[21] *See, e.g.*, Steiner, *Vertical Restraints*, *supra* note 2, at 145 (arguing, *inter alia*, that "[o]n the whole, but with important exceptions, vertical restraints tend to be economically injurious to society . . .").

[22] The Chicago school has long held the position that vertical restraints generally are efficient. For some representative statements of this view see ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 288 (revised ed. 1993) ("Analysis shows that every vertical restraint should be completely lawful"); RICHARD A. POSNER, ANTITRUST LAW 171–89 (2d ed. 2001) (arguing that distribution restraints are generally efficient); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

sumers.[23] In later articles, Steiner condemned vertical restraints more broadly. He asserted that vertical restraints and the elimination of intrabrand competition tend to be economically injurious to society, especially when employed by manufacturers with market power; that distribution restraints often are more harmful than price restraints; and that manufacturers may voluntarily adopt harmful vertical restraints without reaching agreement with their distributors.[24]

Most recently, he has been arguing that the combination of price and nonprice restraints—specifically, exclusive dealing arrangements plus resale price maintenance (RPM) schemes—can be especially anticompetitive. He suggests that where pervasive exclusive dealing diminishes interbrand competition, the suppression of intrabrand competition via RPM would substantially raise consumer prices. This would happen, according to Steiner, because RPM would raise retail margin and eliminate retail price cutting of leading brands, while the pervasive exclusive dealing would suppress competition from existing brands and also erect further barriers against competition from new entrants.[25]

The discrepancy between Steiner's account of vertical restraints and the more widely accepted Chicago school view appears to stem from a more fundamental contrast: Steiner believes in the concept of intrabrand "vertical competition" between manufacturers and retailers,[26] while current economic thinking tends to view firms at successive stages of an industry as fully complementary rather than

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[23] ROBERT L. STEINER, VERTICAL RESTRAINTS AND ECONOMIC EFFICIENCY (Working Paper 66, FTC Bureau of Economics, June 1982). *See also* Robert L. Steiner, *How Manufacturers Deal With the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, 65 ANTITRUST L.J. 407 (1997) (providing a more recent statement of the dangers involved in manufacturer-imposed vertical restraints when used to retard the introduction of more efficient forms of retailing into a given industry).

[24] *E.g.*, Steiner, *Intrabrand Competition, supra* note 2; Steiner, *Vertical Restraints, supra* note 2.

[25] Robert L. Steiner, Exclusive Dealing + Resale Price Maintenance: A Powerful Anticompetitive Combination (2004) (unpublished manuscript on file with author).

[26] *See supra* note 8.

competitive.[27] Steiner seeks to buttress his claim of vertical competition by providing empirical evidence of an inverse association between the margins of consumer goods manufacturers and their retailers. This inverse association occurs, for instance, where an increase in the margins of manufacturers is accompanied by a decrease in retailer margins.[28]

Steiner argues that if the functions of different firms along the vertical channel were fully complementary, as the common economic view holds, their margins would never be inversely related. Instead, an increase in the market power and margin of, say, a toy manufacturer that introduced effective national advertising, would never be accompanied by a decline of the margins of the retailers selling its toys. Empirical evidence of an inverse association, on the other hand, appears to refute the notion that vertical relationships

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[27] *See, e.g.*, Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730 n.4 (1988) (stating that "all anticompetitive effects are by definition horizontal effects"); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56 (1977) (citing various Chicago school proponents for the proposition that, as a general matter, the interests of manufacturers and retailers are aligned); William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CAL. L. REV. 933, 937–38 (noting that, because of the complementary nature of vertical relationships, "scenarios that involve a firm or firms at one level of activity using vertical restraints deliberately to confer market power on firms at an adjacent level are inherently suspect"). *See also* Steiner, *Third Relevant Market, supra* note 2, at 722 (recognizing his fundamental divergence from the accepted economic wisdom and noting that "[t]he complementary nature of firms at successive stages is a given in law and economics. The competitive dimension of the relationship is not generally recognized and is often flat out denied . . .").

[28] *See* Robert L. Steiner, *The Inverse Association Between the Margins of Manufacturers and Retailers*, 8 REV. INDUS. ORG. 717 (1993) (citing empirical evidence from his own and others' studies in the food, toys, prescription drugs, and apparel industries). *See also* MICHAEL P. LYNCH, THE "STEINER EFFECT": A PREDICTION FROM A MONOPOLISTICALLY COMPETITIVE MODEL INCONSISTENT WITH ANY COMBINATION OF PURE MONOPOLY OR COMPETITION (Working Paper 141, FTC Bureau of Economics, Aug. 1986) (an early empirical paper providing evidence of the inverse association between the margins of manufacturers and retailers).

are purely complementary, suggesting that vertical competition is real.[29]

Steiner's inverse association, however, is not universal.[30] Moreover, even where it is observed, skeptical economists might offer different interpretations. They might argue, for example, that manufacturers who engage in national advertising are expected to increase their own margins, at the expense of retailers who previously assumed all promotional costs. An "inverse" relationship between manufacturer and retailer margins would simply reflect a shifting of costs from one level to another, rather than "vertical competition" as described by Steiner. Such counter-explanations for inverse relationships between the margins of manufacturers and retailers do not necessarily disprove the existence of vertical competition. They do, however, highlight the need for further scholarship and analysis before reaching any conclusions.

Moreover, Steiner himself has recognized that the legal implications of his insights require further development. For example, he has argued that a rule of reason approach to distribution restraints is too permissive while per se treatment of price restraints may be too harsh. Steiner therefore advocated a common test for all vertical restraints: where a plaintiff has established that the manufacturer has "significant" horizontal and vertical market power, the burden should shift to the manufacturer to show that any vertical restrictions are not anticompetitive.[31] But even while calling for a universal standard for evaluating all vertical restraints, Steiner admitted that even he would not know how to frame a clear rule that would apply to both price and nonprice restraints.[32]

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[29] *E.g.*, Steiner, *supra* note 28; Steiner, *Third Relevant Market*, *supra* note 2. Steiner's work also implies a second inverse relationship between the margins of the leading national brand manufacturers and their fringe competitors. *See* Lynch, *supra* note 1, at sections III.A–III.B.

[30] *See, e.g.*, Steiner, *supra* note 28, at 731–33.

[31] *See, e.g.*, Steiner, *Vertical Restraints*, *supra* note 2, at 196–97.

[32] Robert L. Steiner, *The Effect of GTE Sylvania on Antitrust Jurisprudence: Sylvania Economics—A Critique*, 60 ANTITRUST L. J. 41, 66 (1991) (stating he "would much prefer a simple bright-line standard that applied to resale price maintenance and vertical distribution restrictions alike. But . . . would not know how to frame one at present.").

It is intuitively sensible to antitrust enforcers that even the apparently voluntary and unilateral adoption of vertical restraints, by a manufacturer with significant market power, might sometimes generate anticompetitive results.[33] And certainly, numerous other antitrust scholars besides Steiner have shown that vertical restraints can, at times, harm consumers.[34] Like these various scholarly insights, Steiner's condemnation of vertical restraints when combined with "significant" market power challenges mainstream antitrust economics.

However, Chicago school proponents repeatedly have responded to theories that articulate the harmful potential of vertical restraints by charging that such anticompetitive effects have been identified only as a theoretical matter, with insufficient guidance on how to distinguish

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[33] However, such results may be more common where the restraints are motivated by a manufacturer's need to protect the interests of large distributors. *See, e.g.*, Comanor, *supra* note 1, at section III.C. (concluding his analysis of the implications of Steiner's insights in the vertical area by asserting that the greater prospects for anticompetitive effects exist "where the essential motivation for the restraints is protecting the interests of large distributors").

[34] *See, e.g.*, William Comanor, *Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983 (1985); Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83 (1995); Warren S. Grimes, *Spiff, Polish and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CAL. L. REV. 815, 853 (1992) ("Vertical restraints are frequently harmful to competition."). *See also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 YALE L. J. 209 (1986) (describing, *inter alia*, vertical techniques that competitors successfully can employ to raise their rivals' costs and the circumstances under which success may confer on them the power to raise price); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513, n.15 (1995) (citing some of the extensive literature on the related topic of the possible harmful effects of vertical mergers). *See generally* 8 PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ch. 16 (2002) (describing the various possible effects of vertical restraints); F. M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE ch. 15 (3d ed. 1990) (same).

harmful from beneficial restraints.[35] Furthermore, Chicagoans believe that the vast majority of vertical restraints are actually efficient.[36] Therefore, claiming that errors of overenforcement (so-called Type I errors) are far more harmful than errors of underenforcement (Type II errors),[37] especially in the vertical area, they advise extreme caution in vertical enforcement, lest procompetitive conduct be discouraged.[38]

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35 *See, e.g.*, Malcolm B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive Daubert?*, 34 AKRON L. REV. 795, 795 (2001) ("Post-Chicago Economics . . . can be characterized as stressing market outcomes that could *possibly* occur, rather than outcomes that are likely to occur") (emphasis added). Thus, in the words of a leading antitrust scholar:

> The biggest danger presented by post-Chicago antitrust economics is . . . that antitrust tribunals will be confronted with antitrust solutions that they are not capable of administering. Indeed, the major shortcoming of post-Chicago antitrust analysis is its failure to take seriously problems of judicial or agency administration.

Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 269 (2001).

36 *See supra* note 22.

37 The Type I/Type II terminology has been borrowed by antitrust scholars from the behavioral sciences, where it is used to define possible errors in determining whether there is a relationship between variables in the population from which sample data are drawn. *See, e.g.*, ROBERT ROSENTHAL & RALPH L. ROSNOW, ESSENTIALS OF BEHAVIORAL RESEARCH: METHODS AND DATA ANALYSIS 38–40 (1991) (describing the basic logic of hypothesis testing and the associated errors of inference). For an early importation of these concepts into antitrust scholarship see Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1582 (1983) (defining, in the context of merger enforcement policy, Type I error as preventing desirable mergers and Type II error as permitting undesirable acquisitions, and noting, *inter alia*, that the merger laws are far more concerned with avoiding Type II errors—that is, with allowing anticompetitive mergers—than with avoiding Type I errors by preventing desirable ones).

38 This basic view was articulated as follows by one of the leading proponents of the Chicago school:

> A fundamental difficulty facing the court is the incommensurability of the stakes. . . . The central purpose of antitrust is to speed up the arrival of the long run. But this should not obscure the point: *judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not. . . .*

It is possible that Steiner's insights could provide an additional basis for sensible vertical enforcement in appropriate cases. After all, few Chicago school advocates would say that vertical restraints are never harmful. But the future of vertical restraints law will remain highly uncertain unless and until antitrust scholars make an affirmative effort to intensify and refine their empirical study of vertical effects.[39]

The uncertain future of the vertical restraints doctrine should be of particular concern to antitrust enforcers. The effect of an extreme concern on errors of overenforcement in the vertical area has been virtually to eliminate purely vertical antitrust enforcement at the federal level. Although the law in the books still appears critical of some vertical restraints,[40] business decisionmakers are aware that the risk of a

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> Enforcement of the rule against naked horizontal restraints appears to be beneficial. But suits against mergers more often than not have attacked combinations that increased efficiency. . . . *There are good theoretical reasons to believe that the costs of other enforcement efforts have exceeded the benefits.*

Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 2–3 (1984) (footnotes omitted and emphases added) (further referencing various basic texts of the Chicago approach for this proposition). *Cf.* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 124 S. Ct. 872, 882 (2004) (stating, in a case involving allegations of vertical exclusionary practices by a monopolist, that the cost of false positives counsels against an undue expansion of section 2 liability and that "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect'") (citing Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

[39] A related requirement is that antitrust economists develop formal, testable models that incorporate such findings in a tractable way. *See, e.g.*, Lynch, *supra* note 1, sections III.C.–III.D. (discussing this problem in the specific context of Steiner's ideas, from the point of view of a sympathetic economist).

[40] *See, e.g.*, Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 735–36 (1988) (noting that "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels") (emphasis in original); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408–09 (1911) (formulating the per se rule against resale price maintenance). *See also* Posner, *supra* note 22, at 189 (sadly conceding that the Court has not overruled *Dr. Miles* and that, therefore, "[t]he per se rule against resale price maintenance remains").

federal enforcement action in the vertical area is very low, and therefore may be more likely to use vertical restraints to achieve anticompetitive ends. Current antitrust doctrine greatly needs to build on the foundation laid by Steiner and other scholars. New economic learning in this area should provide us with further guidance on when specific vertical restraints are sufficiently harmful to warrant a more proactive, if still careful, enforcement approach.