DONALD TURNER, VERTICAL RESTRAINTS, AND THE INHOSPITALITY TRADITION OF ANTITRUST

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It began with a public conversation between two friends and scholars.

Speaking before the New York City Bar Association in 1965, Professor Milton Handler mused aloud about the appropriate treatment of vertical restraints under the antitrust laws. Several recent cases suggested some uncertainty about whether courts and agencies would treat territorial restraints imposed by a manufacturer on distributors under a rule of reason or a rule of per se illegality. Handler’s friend, Donald Turner, had recently left Harvard Law School to become head of the Department of Justice Antitrust Division, and there was great interest in his views on territorial restraints. Handler’s view was that the new Assistant Attorney General could take one of two approaches: He could treat the restraints “hospitably in the common law tradition,” or he could impose so many conditions on their use “as to render them unavailable save in the most limited circumstances.”

Assistant Attorney General Turner responded to Handler a few months later in a 1966 speech before the New York State Bar Association: “I have a quick answer to his immediate question. I approach territorial and customer restrictions not hospitably in the common law tradition, but inhospitably in the tradi-

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tion of antitrust law.” Thus, the “inhospitality tradition” of antitrust was born.  

Turner’s clever turn of phrase now is a part of antitrust lore. The central thrust of his speech, however, has been lost to history. This is unfortunate because the term “inhospitality tradition” does little justice to Turner’s views on vertical restraints, as he protested in his speech. After stating that he approached restraints on distribution “inhospitably,” Turner continued: “But like all quick answers, that doesn’t tell you very much, and I shall try to tell you more by reflecting on some basic antitrust issues that these restrictions confront us with.”

The rest of his speech shows Turner at his best. He recognized efficiency justifications for restraints on distribution, leading him to conclude that it was appropriate to analyze them under a rule of reason. However, a “loose” rule of reason would not do. Turner believed that one could shortcut a full rule of reason by asking whether a less restrictive alternative existed that allowed realization of the efficiencies associated with a restraint. If so, he would deem the restraint illegal. After suggesting that such an analysis could be a useful shortcut for assessing restraints on distribution, he went on to argue that one could apply the analysis fruitfully to other business practices, including tying and joint ventures. For Turner, the use of a less restrictive alternatives analysis to reduce the burdens of a rule-of-reason analysis was “applying the ‘rule of reason’ in its finest and most accurate sense, namely in the development of what Kingman Brewster so happily phrased as ‘reasonable rules.’”

Turner’s willingness to consider possible efficiencies arising from non-price vertical restraints suggests he approached them reasonably, not inhospitably. Unfortunately, commentators sometimes have used the term “inhospitality tradition” so indiscriminately that they improperly taint Turner by association. Some critics have used the term narrowly to refer to an unduly hostile approach in the 1960s and 1970s to restraints on distribution; others have used it to refer to an undue hostility toward contractual restraints; and

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3 Stanley Robinson further publicized the “inhospitality tradition” when he repeated Turner’s statement while introducing a panel discussion in 1968 concerning vertical non-price restraints. Stanley Robinson, Orderly Marketing, Franchising and Trademark Licensing: Have They Been Routed by Schwinn and Sealy?, 1968 N.Y. St. B. Ass’n Antitrust L. Symp. 27, 29 (1968) [hereinafter Robinson, Orderly Marketing].  
4 Turner, Reflections, supra note 2, at 2.  
5 Id. at 3.  
6 As an academic, Turner had advocated the use of less restrictive alternative analysis to help identify classes of ties deserving of per se treatment. See Donald F. Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 62 (1958).  
7 Turner, Reflections, supra note 2, at 9.
yet others have used it more broadly to refer to courts and policy makers that were unduly hostile to efficient business practices they did not understand. At times, critics have associated a broad reading with Turner and his views, leaving one with the impression that Turner was an unsophisticated antitrust analyst who was hostile toward efficiency-enhancing business practices, especially non-price vertical restraints. In fact, Turner took a sophisticated approach to vertical restraints—and antitrust more generally—throughout his career as an academic, policymaker, and advocate.

In this article I reconsider Turner’s approach to antitrust law and policy through the lens of three cases that defined the Supreme Court’s evolving approach to non-price vertical restraints on distribution: White Motor, 10

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8 See, e.g., D. Daniel Sokol, The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality, 79 ANTITRUST L.J. 1003, 1006 (2014) (“Antitrust jurisprudence and economic analysis in the 1950s and 1960s was hostile to procompetitive interpretations of vertical restraints. Starting with Donald Turner, some have called this antitrust’s ‘inhospitality tradition.’”); Oliver E. Williamson, Economics and Antitrust Enforcement: Transition Years, ANTITRUST, Spring 2003, at 61, 64 (arguing that the government’s position in United States v. Arnold, Schwinn & Co. reflected misconceptions about economics leading it to view customer and territorial restraints “not hospitably, in the common law tradition, but inhospitably in the tradition of antitrust”); Alan J. Meese, Price Theory, Competition, and the Rule of Reason, 2003 U. ILL. L. REV. 77, 124 (2003) (arguing that the inhospitality tradition of antitrust “manifested itself in the form of extreme hostility toward any contractual restraint on the freedom of individuals or firms to engage in head-to-head rivalry”); Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1, 4 (1984) (“Donald Turner once described the ‘inhospitality tradition of antitrust.’ The tradition is that judges view each business practice with suspicion, always wondering how firms are using it to harm consumers.”); Richard Schmalensee, Thoughts on the Chicago Legacy in U.S. Antitrust, in How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust 11, 18 (Robert Pitofsky ed., 2008) (arguing that the inhospitality tradition, which applied to non-standard or unfamiliar contracting practices, not just territorial and customer restrictions, was “destroyed . . . in academic circles” by the Chicago School (citation omitted); Daniel A. Crane, A Neo-Chicago Perspective on Antitrust Institutions, 78 ANTITRUST L.J. 43, 47 (2012) (“Oliver Williamson once referred to an antitrust ‘inhospitality tradition,’ roughly coincident with the Warren Court, which ‘attributed anticompetitive purpose and effect to novel or nontraditional modes of economic organization.’”); Joshua D. Wright & Douglas H. Ginsburg, The Goals of Antitrust: Welfare Trumps Choice, 81 FORDHAM L. REV. 2405, 2423 (2013) (criticizing consumer choice standard for antitrust as “a revival of the long ago repudiated inhospitality tradition in antitrust”).

9 See, e.g., Barak D. Richman, The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal, 95 VA. L. REV. 325, 359–60 (2009). Richman argues that Turner was an adherent of “Joe Bain’s structure-conduct-performance approach to industrial organization, which suggested that vertical restraints were evidence of market power.” Id. at 359. Richman believes the inhospitality tradition “reached its zenith” under Turner, “culminating in the Department of Justice’s 1968 merger guidelines, which forbade mergers between parties with nominal market power.” Id. at 359–60.

Schwinn, 11 and Sylvania. 12 Although the Court’s treatment of non-price vertical restraints varied widely (and some would say wildly) across the three cases, Turner recognized the restraints’ potential efficiencies, and advocated for rule-of-reason treatment. His thoughts on the appropriate structure of the rule of reason as applied to vertical restraints, however, evolved as economic thinking evolved during the 1960s and 1970s. Turner initially advocated for a tightly circumscribed rule of reason, recognizing only a limited number of justifications in White Motor and Schwinn; he later argued for a more open-ended rule of reason in Sylvania in recognition of subsequent academic work suggesting that vertical restraints were not as harmful as he once believed.

His academic work had a notable influence on the Court’s 1963 decision in White Motor. In a case of first impression regarding the treatment of territorial restraints, the Court decided it did not have enough information to apply the per se rule of illegality as argued for by the government and remanded the case for further consideration of whether per se or rule-of-reason treatment was appropriate. Justice Brennan’s concurring opinion in that case, however, argued for rule-of-reason treatment of territorial restraints based in part on a Turner article identifying possible justifications for territorial restraints. In the Schwinn case, decided in 1967, AAG Turner was responsible for the government’s argument that it was appropriate to treat customer restraints under a rule of reason. Under Turner’s predecessors at the Antitrust Division, the government had argued in district court that Schwinn’s customer and territorial restraints were per se illegal. Turner departed from that position to argue for rule-of-reason treatment, a position that the Court rejected. Finally, Turner co-authored an influential amicus brief in GTE Sylvania arguing for rule-of-reason treatment of locational restraints, a position that the Court adopted, overturning Schwinn.

Turner’s work on White Motor and Schwinn also illustrates the ways in which his approach to antitrust differed sharply from those of his predecessors as AAG. Robert Bicks headed the Antitrust Division when the White Motor case was in district court; Lee Loevinger headed the Division when White Motor came before the Supreme Court, and when it tried Schwinn in district court. 13 Neither Bicks nor Loevinger had the background in economics that


13 The White Motor and Schwinn cases were appealed directly to the Supreme Court under the Expediting Act. 15 U.S.C. § 29. At the time, Section 2 of the Act mandated that an appeal of the final judgment of a district court in a government civil antitrust case lay only with the Supreme
Turner had; and neither had given substantial thought to the ways in which one might use economics to inform antitrust law or policy. In their work on *White Motor* and *Schwinn*, Bicks and Loevinger adhered to longstanding Division policy, which disregarded potential efficiencies arising from restraints on distribution to deem them per se illegal. As AAG, Turner openly departed from that policy, arguing that non-price vertical restraints should be treated under a rule of reason, one of many changes he made at the Division to make its approach to law enforcement more economically rational.

Turner’s approach to non-price vertical restraints also illustrates his approach to antitrust, which reflected a novel blend of legal, economic, and administrative concerns, as I have previously explored in the context of the Department’s horizontal merger policy under Turner. He generally believed that a consideration of all relevant facts in an antitrust analysis was a fool’s errand because of the inability of judges, economists, and lawyers to assess the net competitive effects of a business practice in a particular case. However, he had faith in the ability of economists to predict the general competitive tendencies of a practice, which could inform presumptions that would shortcut a full rule of reason. His approach to antitrust anticipated later work by others reflecting legal, economic, and administrative concerns, most notably that of Frank Easterbrook in *The Limits of Antitrust*. Indeed, an irony of Easterbrook’s work is that it criticized Turner’s “inhospitality tradition,” only to propose an approach to antitrust that closely resembled Turner’s approach.

As did Turner in his 1966 speech, I shall try to tell you more.

I. TURNER AT HARVARD

Turner’s approach to restraints on distribution reflected his approach to antitrust more generally, which he grounded firmly in economics. Turner earned a Ph.D. in economics from Harvard before earning a Yale law degree (while

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14 Turner made substantial changes to the organization and operation of the Division to ensure that cases were well grounded in economics. *See, e.g.*, MARC ALLEN EISNER, *ANTITRUST AND THE TRIUMPH OF ECONOMICS* 126–32 (1991).

15 This article expands on a prior article concerning Turner, in which I argued that he took a sophisticated, “modern” approach to antitrust as illustrated by his horizontal merger policy. *See* Mark J. Niefer, *Donald F. Turner at the Antitrust Division: A Reconsideration of Merger Policy in the 1960s*, ANTITRUST, Summer 2015, at 53. Many critics have dismissed aspects of Turner’s approach to mergers—including his issuance of the 1968 Merger Guidelines and his Supreme Court appeal of the *Von’s* merger case—as economically irrational. However, Turner clearly used the theory and empirical work available at the time to formulate clear legal and policy rules grounded in economics. *Id.* The present article complements the prior article, using his work on vertical non-price restraints to illustrate his approach to antitrust.

simultaneously teaching economics at Yale). His economics background gave him the tools to understand the contemporary economic literature as it related to antitrust law and policy. He began his academic career at Harvard Law School, where he was part of a group of lawyers and economists studying and discussing competition and monopoly. He also participated in an antitrust seminar with three members of the group: lawyer Kingman Brewster, economist Edward Mason, and economist Carl Kaysen. Their work, as well as that of group member and economist Joe Bain, appears to have substantially influenced Turner’s positions on antitrust, which reflected a blend of economics and concerns about limits on the ability of economists, lawyers, and judges to apply the law properly.

When Turner arrived at Harvard in 1954, several members of the group were publishing work on competition and antitrust policy. The group revolved around Edward Mason, whom fellow economist Bain credited with creating the field of industrial organization. Other economists in the group included Charles Kindleberger and Morris Adelman. In 1958, Bain published Barriers to New Competition, a study of the relation between market structure and performance, inspired by Mason’s work; a year later, he published Industrial Organization, a textbook dealing in part with antitrust policy. Bain’s work and that of other economists in the group had a lasting impact on industrial organization; it also influenced the lawyers in the group. Much of Bain’s work provided the empirical underpinnings for Turner’s work as an academic and a policy maker. In particular, Bain’s work suggesting that advertising could contribute to product differentiation, creating a barrier to entry that enhanced market power, would, for a time, have a notable influence on Turner’s approach to non-price vertical restraints.

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17 Nomination of Donald F. Turner to Be Assistant Attorney General, Antitrust Division, U.S. Justice Department: Hearing Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary, 89th Cong. 2 (1965); Harold B. Meyers, Professor Turner’s Turn at Antitrust, FORTUNE, Sept. 1965, at 168, 170.
18 Carl Kaysen & Donald F. Turner, Antitrust Policy: An Economic and Legal Analysis vi (1959) (noting support from the Merrill Foundation for the Advancement of Financial Knowledge). I define the group loosely as scholars associated with Harvard and MIT and concerned with competition law and policy in the mid-1950s to early-1960s, many of whom appear to have received financial support from the Merrill Foundation. Others have referred to the collective work of this group as forming the “Harvard School” of antitrust.
21 Carl Kaysen, United States v. United Shoe Machinery Corporation: An Economic Analysis of an Anti-Trust Case viii (1956).
22 Joe S. Bain, Barriers to New Competition: Their Character and Consequences in Manufacturing Industries (1956).
24 See Niefer, supra note 15.
25 See infra note 200 and accompanying text.
Among the lawyers in the group whose work influenced Turner was Kingman Brewster. In the 1950s, Brewster explored antitrust policy themes that would echo in Turner’s work as an academic and a policymaker. Although the antitrust world remembers Brewster primarily for his 1958 treatise on extraterritorial application of the antitrust laws, his lesser-known work animated Turner’s interest in exploring ways to make the antitrust laws more administrable. In *Enforceable Competition: Unruly Reason or Reasonable Rules?*, Brewster remarked on the need for lawyers to focus on “enforceable” competition, which he distinguished from “effective” competition. Brewster considered competition effective when it achieved its economic ends. He considered effective competition the domain of economists, who properly were concerned with the competitive effects of business practices. Enforceable competition properly was the domain of lawyers.

According to Brewster, competition law and policy were enforceable when they were fair and feasible, which implied the need for clearly stated rules to guide the behavior of businesses and regulating officials (i.e., judges and enforcers). The elements of fairness included (1) clearly delineated responsibilities for regulating officials; (2) accountability for regulating officials; (3) predictability of the actions of regulating officials; and (4) a sense of fault or blameworthiness attached to violations of the law. The elements of feasibility included clearly stated rules so that businesses can comply with them, and a clear, narrow mandate that does not give regulating officials powers beyond their competence. Brewster encouraged lawyers to consider notions of fairness and feasibility, writing that “[t]hese values—administrative considerations, if you will—have, it seems to me, been the neglected theme in antitrust commentary.” Taking his cue from Brewster, Turner picked up this neglected theme, with administrative considerations becoming a touchstone of his own work.

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27 Kingman Brewster, Jr., Enforceable Competition: Unruly Reason or Reasonable Rules?, 46 Am. Econ. Rev. 482, 484 (1956). In a footnote to this article, Brewster stated that it drew heavily on the work of his colleagues. Id. at 482.

28 Id. at 482–83.

29 Id. at 484.

30 Id.

31 Id. at 485. Brewster argued that to avoid ad hoc actions, it would be necessary to resort to presumptions, “even at the price of some irrational results,” echoing Turner’s later recognition of the tradeoff between administrative and error costs. Id. at 484.

32 Id. at 486.

33 Id.

34 In his “inhospitality” speech, Turner focused on developing an administrable rule of reason via use of a less restrictive alternatives analysis. Turner, Reflections, supra note 2. Turner later sent Brewster a copy of the speech with an accompanying note in which he recognized his
Others in the group considered and addressed administrative concerns in ways that appear to have influenced Turner. Economist Edward Mason articulated a sophisticated view of the distinction between per se illegality and the rule of reason. He argued that one could use economic theory to formulate inferences about the likelihood of competitive effects, thus shortcutting a full rule of reason. For Mason, there was no clear dichotomy between the per se rule and the rule of reason; rather, there was a continuum of complexity. Per se rules were grounded in a belief that only a few facts (e.g., the formation of an agreement on price) are required to infer anticompetitive effects; the rule of reason, on the other hand, requires an inquiry into a larger number of facts (e.g., the scope of the market and proffered efficiency justifications) to infer effects. That is not to say that the rule of reason should be a sweeping analysis of all relevant facts; rather, Mason believed a rule of reason inquiry should extend only to those facts required to infer effect. Although Turner did not explicitly credit Mason, this approach—limiting the extent of a rule of reason inquiry to facts sufficient to infer effect—became characteristic of Turner’s approach to antitrust policy.

Another economist in the group, Carl Kaysen, also considered administrative concerns in his work. Like Turner, Kaysen had one foot in economics and one foot in the law. Although he did not have a law degree, he assisted Judge Wyzanski for two years on the United Shoe case, which gave him substantial insight into the administration of an antitrust trial. The experience also provided him with material for his Ph.D. dissertation, which formed a large part of his treatise, United States v. United Shoe Machinery Corporation: An Economic Analysis of an Antitrust Case, published in 1956. Kaysen concluded that work by arguing for enlarging the role of government economists in developing, prosecuting, and putting on antitrust cases. He believed that if each antitrust complaint filed by the government contained an economic theory of

intellectual debt to Brewster, writing, “I thought you might be interested in it because it develops a theme which you were much taken with and for which I have acquired a growing respect. I give you specific credit for a phrase at the end of the speech. I should probably have credited you with more.” Letter from Donald F. Turner, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, to Kingman Brewster, President, Yale Univ. (Feb. 7, 1966) (on file with LBJ Presidential Library).

35 Derek Bok, another lawyer in the group, addressed administrative concerns in the context of mergers, arguing for the use of simple presumptions to make merger policy and litigation easier to administer. Derek C. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226 (1960).

36 Edward S. Mason, Market Power and Business Conduct: Some Comments, 46 Am. Econ. Rev. 471, 475–77 (1956) (“Lawyers are said to love rules and economists are certainly addicted to models. The proper use of both rules and models is a question that lies at the heart of a valid distinction between per se and rule of reason.”).


38 Kaysen, supra note 21.

39 Id. at 334–38.
the case, and each answer by a defendant was a statement of why the theory or the facts supporting it were wrong, trials would proceed more efficiently and the law would develop more rationally. 40 Such a focus on economic theory became one of the defining features of cases filed by the Antitrust Division under AAG Turner.

In 1959, Turner and Kaysen co-authored *Antitrust Policy: An Economic and Legal Analysis*, 41 a treatise that integrated the insights of the group’s economic work with the administrative themes raised by Brewster and others. 42 The primary focus of the work was the oligopoly problem, which seemed to Kaysen and Turner beyond the reach of the antitrust laws. However, the treatise included a discussion of the ways in which economics might inform antitrust case selection, prosecution, and remedies to make the entire process less unwieldy and more rational. 43 Although Edward Mason claimed that *Antitrust Policy* reflected the joint work of several scholars, 44 the treatise’s discussion of the use of economics by courts and agencies to administer the antitrust laws more efficiently was a topic that Turner later would develop more fully.

Turner’s own academic work at Harvard generally reflected his belief—that he maintained throughout his career—that a detailed case-by-case approach to enforcing the antitrust laws was unnecessarily burdensome. As did economist Mason, Turner believed that economics could shed light on the general competitive tendencies of business practices. He thought that it would be possible, using the insights of economics, to develop legal rules falling short of a full rule of reason, thereby reducing the need for a detailed, potentially misguided factual inquiry. This was clearest in his approach to horizontal mergers, where he could draw on a wealth of empirical economic evidence, developed by Bain and others, to inform his views on enforcement policy. 45

In contrast to the literature on horizontal mergers, the economic literature that Turner could draw on concerning vertical restraints was relatively insub-

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40 Carl Kaysen, *An Economist as the Judge’s Law Clerk in Sherman Act Cases*, 12 ABA SECTION OF ANTITRUST LAW 43, 49 (1958). Kaysen primarily was concerned with making the prosecution of large antitrust cases brought by the government more efficient; he expressed no clear opinion of the prosecution of private antitrust cases. However, many of his criticisms of the way the government brought large cases would apply equally to private cases.

41 KAYSEN & TURNER, supra note 18.

42 See, e.g., id. at 245 (“[W]e have hopes for substantial improvement in the fairness and effectiveness of enforcement from procedural reforms . . . ”).

43 Id. at 245–60.

44 Id. at xix n.11 (identifying the following group of lawyers and economists as contributing to the ideas presented in *Antitrust Policy*: Morris Adelman, Joe Bain, Robert Bishop, Robert Bowie, Kingman Brewster, David Cavers, Kermit Gordon, Lincoln Gordon, Carl Kaysen, John Lintner, Edward Mason, Albert Sacks, Donald Trautman, and Donald Turner).

45 See Niefer, supra note 15 (discussing Turner’s use of economics to inform merger policy).
stantial. Many economic analyses of vertical restraints at the time seem to have focused on vertical mergers, price restraints, and exclusive dealing, rather than customer or territorial restraints. Although vertical mergers, exclusive dealing, and price restraints raise many of the same competitive issues and implicate many of the same efficiency justifications, few commentators saw the connections between them or attempted to draw out the implications for contractual non-price vertical restraints. Indeed, there appear to have been few formal economic analyses of such restraints into the early 1960s. Turner’s own academic efforts analyzing vertical non-price restraints were brief, contained in two articles he published while at Harvard: The Principles of American Anti-Trust Law and The Definition of Agreement Under the Sherman Act. Both articles had a notable impact on the White Motor and Schwinn cases.

II. PROFESSOR TURNER AND WHITE MOTOR

In his 1963 article, The Principles of American Anti-Trust Law, Turner gave the simplest and clearest explanation of his approach to antitrust. He argued that a key issue facing courts was the extent to which they should rely on ‘clear rules and limited factual inquiries on the one hand and the values of looking at ‘all the relevant facts’ on the other.” He expressed concern about the ability of economists, let alone a court, to engage in the latter, which would entail a broad inquiry on a case-by-case basis. Reflecting Brewster’s belief in the need for clear rules and Mason’s belief in a limited factual in-

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46 See Lee E. Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 L. & CONTEMP. PROBS. 506, 506 n.1 (1965) (collecting cites to academic literature on vertical restraints). Preston was an economist whose 1965 work seems to have been one of the first to lay out a simple economic framework for thinking more systematically about the competitive effects of non-price vertical restraints.

47 See Alan J. Meese, Robert Bork’s Forgotten Role in the Transaction Cost Revolution, 79 ANTITRUST L.J. 953, 972 (2014). Meese argues that Robert Bork recognized the economic equivalency of partial integration by contract and complete integration. Id. at 972. Meese more generally argues that Bork in the mid-1960s anticipated the transaction-cost based efficiency justifications for vertical restraints made much later by others. See, e.g., id. at 963–64 (Bork “may have been the first author who simultaneously offered transaction cost explanations for partial integration and cited Coase’s The Nature of the Firm to support his argument.”). Apart from Robert Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 75 YALE L.J. 373 (1966), other notable works at the time that analyzed the economic benefits of vertical restraints included: Lester G. Telser, Why Should Manufacturers Want Fair Trade?, 3 J.L. & ECON. 86 (1960); and Preston, supra note 46.


50 Turner, Principles, supra note 48.

51 Id. at 10.

52 Id. at 10–11.
quity sufficient to infer effects, he argued against looking at “all the relevant facts," and in favor of “clear rules with limited factual inquiries.”53

Turner argued that economists were better equipped to identify the likely effects of general categories of business behavior, which could then inform the formulation of appropriate rules that would involve limited factual inquiries.54 To illustrate his point, Turner used the example of the territorial restraints at issue in White Motor under which a truck manufacturer mandated that distributors and dealers purchasing its trucks sell them only in manufacturer-designated territories. The district court, at the urging of the Antitrust Division, had recently deemed the restraints per se illegal.55 “Economics may have a greater capacity,” wrote Turner, “to predict consequences in terms of probabilities, of saying, for example, that territorial limitations on dealers, if generally practiced, would do harm much more often than they would do good[.]”56 As an example, Turner cited a recent economic analysis concluding that courts generally should prohibit territorial limitations, except when a failing company or new entrant found them necessary.57

Turner also expressed concern about case-by-case analysis in his widely cited article, The Definition of Agreement Under the Sherman Act, published in 1962.58 Although remembered largely for its analysis of horizontal agreements in an oligopoly setting, the article also addressed vertical agreements. As in The Principles of American Anti-Trust Law, Turner argued that some vertical restrictions might have justifications that make rule of reason treatment appropriate, using White Motor as an example. In this article, however, he more closely examined the effects of the restraints at issue. Turner argued that new or small manufacturers like White Motor might need to limit competition among dealers to offer the promise of profits as an incentive to dealers to develop and compete vigorously in local markets, thereby benefitting consumers.59 However, Turner generally doubted that vertical restrictions were necessary to facilitate efficient distribution and greater competition.60

53 Id. at 10.
54 Id. at 10–11.
56 Turner, Principles, supra note 48, at 11.
57 Id. at 11 (citing Christopher D. Stone, Closed Territorial Distribution: An Opening Question in the Sherman Act, 30 U. Cin. L. Rev. 286, 316–17 (1963)). Absent a new entrant or a failing firm, Stone believed per se treatment was appropriate. Turner, Reflections, supra note 2, at 317.
58 Turner, Agreement, supra note 49.
59 Id. at 698–99.
60 Id. at 699 (“I would be inclined to support the view that territorial limitations—in light of their obvious susceptibility to anti-competitive misuse—are more restrictive than necessary to achieve the legitimate goal . . . ”).
Turner’s academic work played a notable role in White Motor. The Antitrust Division under Acting AAG Robert Bicks had filed the White Motor case in district court, successfully arguing White’s restraints were per se illegal. At the time of White Motor’s appeal before the Supreme Court, Lee Loevinger was in charge of the Division, which continued to argue that the restraints were per se illegal, consistent with longstanding Division policy. The Supreme Court was not persuaded, remanding the case for a determination of whether the restraints were deserving of per se rather than rule of reason treatment. Turner’s work caught the attention of Justice Brennan, who cited Turner in his concurring opinion that argued for rule-of-reason treatment. The majority opinion in White Motor put a foot in the door for rule-of-reason treatment of non-price vertical restraints by the Supreme Court; Brennan’s concurring opinion, with support from Turner, pushed the door open a little further.

A. ACTING AAG BICKS AND WHITE MOTOR IN THE DISTRICT COURT

Robert Bicks, who was responsible for filing the White Motor case, had risen to become Acting AAG and then AAG almost by accident. A 1952 Yale Law School graduate, Bicks did not have any substantial professional experience when he joined the Antitrust Division in 1955 as a 28-year old Special Assistant to AAG Stanley N. Barnes, an Eisenhower appointee.61 His first assignment as Special Assistant was to serve as executive secretary for the 1955 Report of the Attorney General’s National Committee to Study the Antitrust Laws, co-chaired by Barnes.62 When Barnes left the Division in 1956, President Eisenhower named Victor Hansen, a superior court judge with no antitrust experience, to serve as AAG.63 Hansen named Bicks his second assistant,64 and Bicks became first assistant after the incumbent resigned.65 In 1959,


63 Nomination of Victor R. Hansen: Hearing Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary, 84th Cong. (first page of hearing) (1956). At the time of his appointment, Hansen was a judge on the Los Angeles Superior Court. Id. at 4. His views on antitrust were superficial at best, as his appearance before the Senate concerning his nomination illustrates. When asked to describe his view of the antitrust laws, Hansen answered, “I feel very strongly that the anti-trust laws . . . are necessary for the maintenance of our free enterprise system. That, of course, means they must be enforced. . . . That is briefly my philosophy, if that is a philosophy.” Id. at 6. See also KOVALEFF, supra note 61, at 80 (“Hansen, like Barnes, had no particular knowledge of antitrust.”).

64 KOVALEFF, supra note 61, at114.

65 Id. at 113.
Bicks became Acting AAG when Hansen resigned. Although Eisenhower nominated Bicks to become AAG, the Senate did not confirm him; instead, Bicks became AAG in a recess appointment on July 12, 1960, at the age of 33.

Bicks was young and energetic but he was not economically sophisticated. He initiated many cases—including some very well-known cases—that came to a head after he left the Division. The cases he brought, however, betrayed no special insight into economics. His work on the 1955 Attorney General’s Report, which largely summarized the case law, probably did little to enhance his understanding of economics. Moreover, there are few references to economics in AAG Bicks’s public statements, suggesting economics was not a substantial part of his antitrust toolkit. Vague discussions of competition are about as close to economic analysis as he ever got. Given his lack of a background in economics, it is not surprising that Bicks seemed to fail to appreciate the potential procompetitive justifications for vertical restraints imposed by a manufacturer on its distributors.

Bicks was not alone in his failure to appreciate the potential procompetitive benefits of vertical non-price restraints. Before World War II, neither the Division nor the FTC had challenged vertical restraints on distribution; indeed, courts had upheld their legality in private actions. In 1949, however, the Division concluded that it should treat territorial restrictions imposed by automobile manufacturers on distributors as per se illegal. Although economists had given relatively little thought to efficiencies associated with non-price

66 Id.
67 Mark J. Green with Beverly C. Moore, Jr. & Bruce Wasserstein, The Closed Enterprise System 71 (1972). Kovaleff attributes the failure of Bicks’s nomination to make it out of committee to opposition for personal reasons. Kovaleff, supra note 61, at 114.
68 By some measures, Bicks was the most active head of the Antitrust Division since Thurman Arnold. Kovaleff, supra note 61, at 114; Green et al., supra note 67, at 70–71; Anthony Lewis, Antitrust Cases Set 17-Year High, N.Y. Times, Jan. 4, 1960, at 26.
69 Bicks filed the electrical equipment conspiracy cases, for which sentencing took place during the Kennedy administration under AAG Lee Loevinger in the early 1960s. He also filed the infamous Von’s merger case, which came before the Supreme Court in 1967 during Turner’s tenure as AAG.
70 Thomas E. Kauper, The Report of the Attorney General’s National Committee to Study the Antitrust Laws: A Retrospective, 100 Mich. L. Rev. 1867, 1870 (2002). The focus of the report was “on what the law is, not what the law should be. It is more hornbook than critique.” Id. Economics was, at best, a secondary concern of the report. Id. at 1871.
71 ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition 6–7 (1977) (collecting private litigation cases).
72 Automobile Dealer Franchises, Hearings Before the Antitrust Subcomm. of the H. Comm. on Interstate & Foreign Commerce on Auto. Mktg. Legis., 84th Cong. 134 (1955) (statement of Stanley N. Barnes, Assistant Att’y Gen. in Charge of the Antitrust Div.) (suggesting that the Division would prosecute such restrictions criminally); ABA Antitrust Section, supra note 71, at 7.
vertical restraints, businesses had offered various justifications for them; the
Division, however, seems to have given little weight to them in formulating
its approach to territorial restraints. In the face of the Division’s opposition,
the automobile industry abandoned the practice.73 The Division’s concerns ex-
 tended to other industries as well, with the result that it entered into more than
20 consent decrees in a variety of industries enjoining the practice.74

Consistent with its approach at the time, the Division under Bicks filed the
White Motor case in June 1958, arguing that White Motor’s territorial re-
straints were per se illegal.75 White Motor manufactured trucks and parts,
which it sold directly to certain dealers and customers. It also sold trucks and
parts to franchised distributors, who then sold to franchised and non-
franchised dealers.76 It entered into agreements with its distributors and deal-
ers regarding prices, customers, and territories. The price agreements required
distributors to sell White Motor trucks and parts to dealers at prices fixed by
White; they also required distributors and dealers to sell parts to national,
fleet, and government accounts at prices fixed by White.77 The customer
agreements prohibited distributors and dealers from selling White trucks for
resale, i.e., distributors and dealers would not act as wholesalers.78 The territo-
rial agreements required distributors and dealers to sell White trucks only to
customers located in their assigned territory.79 The government under AAG
Bicks alleged that the agreements were per se illegal and, following limited
discovery, moved for summary judgment.80

White Motor, on the other hand, argued that its agreements promoted com-
petition. It offered a sophisticated justification for its territorial restraints,
which it said were necessary to prevent the adverse consequences of free rid-
ing, although it did not use that term. White Motor claimed its distributors and

73 Sigmund Timberg, Territorial Exclusives, 29 ABA SECTION OF ANTITRUST LAW 233, 234
(1965). As Timberg notes, the Division’s policy was a break with the courts, which prior to 1948
had upheld territorial restraints based on the ancillary restraints doctrine. Id. at 234 n.3.
74 Id. at 235 n.10 (identifying decrees); see also ABA ANTITRUST SECTION, supra note 71, at
6–7, 7 n.17 (identifying decrees); Bock, supra note 11, at 18 (noting that between 1956 and
1965, the DOJ “took action against territorial or customer restrictions in 37 cases. Products in-
olved included sewing machines, automobiles, bicycles, audio-fidelity equipment, mattresses,
bakery products, washers, aircraft, and textile products.”).
ment filed an amended complaint in March 1960. Id. Ironically, the Report of the U.S. Attorney
General’s National Committee, for which Bicks served as executive secretary, recognized
procompetitive benefits of territorial restraints, suggesting that a rule of reason should apply.
REPORT, supra note 62, at 27–29. The government under Bicks seems to have turned its back on
the report to argue for per se treatment in White Motor.
76 White Motor, 194 F. Supp. at 564.
77 Id.
78 Id.
79 Id.
80 Id.
dealers agreed to carry inventory, to maintain appropriate sales rooms and service stations, and to properly sell and service its trucks.\footnote{372 U.S. 253, 277 (1963).} In return for their investment in inventory and sales and service efforts, argued White, distributors and dealers needed protection from other distributors and dealers who had not made similar investments or efforts. Absent such restrictions, others would be able to “come into the territory and scalp the market for White trucks,”\footnote{Id. at 577.} which would undermine the incentives of distributors and dealers to invest in inventory and sales efforts. White Motor offered weaker, less sophisticated arguments for its customer and price restraints.\footnote{Id. at 587.}

Despite White’s arguments that the restraints promoted competition, the district court found them per se illegal. The court disregarded White’s contention that it would prove at trial that the manufacture and sale of trucks was a competitive business and its restraints were designed to increase rather than diminish competition. “Such considerations,” said the court, “have no materiality to the issues presently before the Court, namely, whether the admitted facts disclose per se violations of the Sherman Act.”\footnote{White Motor, 194 F. Supp. at 258.} The Court then jumped straight to Supreme Court precedent to find the price, territorial, and customer restraints per se illegal.\footnote{Nomination of Lee Loevinger to Be an Assistant Attorney General: Hearing Before the S. Comm. on the Judiciary, 87th Cong. 1 (1961).} The clear purpose and effect of the restraints, according to the court, was “to eliminate and suppress competition . . . .”\footnote{Id. at 587.

B. AAG LOEVINER AND WHITE MOTOR IN THE SUPREME COURT

By the time the \textit{White Motor} appeal came before the Supreme Court in 1962, a change in administrations had led to Lee Loevinger replacing Robert Bicks as head of the Antitrust Division. Unlike Bicks, Loevinger had a substantial career behind him before becoming AAG. At the time of his nomination by President Kennedy in 1961, he was an associate justice on the Minnesota Supreme Court.\footnote{He had also received a grant to follow the work of the Senate Antitrust and Monopoly Subcommittee on administered pricing. \textit{Id.} at 3.} Before joining the court, he had spent most of his career in private practice in Minneapolis, specializing in antitrust.\footnote{Id. at 3.} He also had government experience, having served as an attorney at the National La-
bor Relations Board, an attorney at the Antitrust Division, and a special counsel to the U.S. Senate Small Business Committee. Despite his full career as a practitioner in the private and public sectors, Loevinger managed to find time to publish several works on antitrust.

As would be expected based on his career as a practitioner, Loevinger’s publications were practical, not theoretical. They generally sought to describe antitrust laws as they were, not as they ought to be. His first substantial work, *The Law of Free Enterprise*, published in 1947, was a treatise that sought to explain the antitrust laws to the business community. Although it was a practical work, the treatise covered a great deal of the history of the antitrust laws, with a particular emphasis on their special role in American society. The material in *The Law of Free Enterprise* was the basis for many of his subsequent articles and speeches, which frequently focused on the role of antitrust in preserving the American political and economic system.

Loevinger took a very broad view of the purposes of the antitrust laws. He clearly believed that antitrust was necessary for capitalism and democracy to survive and flourish. He recognized other purposes of the antitrust laws, including assuring freedom of choice to buyers, sellers, and workers; and ensuring diffusion of economic power and diversity of economic control. He also recognized that a purpose of the antitrust laws was the promotion of economic efficiency. Despite his appreciation of the role of antitrust in promoting competition and efficiency, however, Loevinger did not have an especially deep understanding of economics. There is little indication in his writings that Loevinger thought at substantial length about the ways courts or agencies might use economics to analyze business practices, help formulate antitrust rules, or guide antitrust policy.

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89 Id.


91 Loevinger, *THE LAW OF FREE ENTERPRISE*, supra note 90, at 3 ("So it is the purpose of this book to ‘post’ the rules, to help explain some of the basic laws of our economic system. This does not refer to the ‘principles’ which are sometimes studied under the label of ‘economics.’").


93 Even while at the Division, Loevinger betrayed no special interest in the ways in which economics might inform a rule of reason analysis. The one speech in which he gave the rule of reason an extended treatment focused on the legal distinction between the rule of per se illegality and the rule of reason. At no point in his speech did he recognize the possibility that one might use economics to inform a rule of reason analysis. See Lee Loevinger, *The Rule of Reason in Antitrust Law*, 19 ABA SECTION OF ANTITRUST LAW 245 (1961) [hereinafter Loevinger, *Rule of Reason*].
Loevinger briefly addressed vertical restraints in work he published before becoming AAG. He believed that the law of vertical non-price restraints was unsettled.94 In The Law of Free Enterprise, he noted that courts had permitted vertical restraints between a manufacturer and a sales “agent.”95 On the other hand, there appeared to have been cases that permitted vertical restraints without inquiring into whether the manufacturer imposed the restraint on a true agent.96 His view of the law was that horizontal or vertical restraints were per se illegal except as between a principal and its agent.97 In later work, however, he seemed to believe that vertical restraints could be beneficial, as when they impose service or quality standards on retailers, and courts should treat them under a rule of reason.98 Based on his writings and speeches, it does not appear as though Loevinger attempted to reconcile these two views.

Loevinger had a chance to help clarify the law of territorial restraints when he headed the Antitrust Division during the Supreme Court appeal in White Motor. As AAG, he had expressed approval of the lower court decision, which encompassed a finding of per se illegality for White Motor’s price fixing and its customer and territorial restraints.99 On appeal, however, White Motor did not challenge the district court’s holding that White’s price fixing was per se illegal; as a result, only its territorial and customer restraints were before the Court. The government continued to argue before the Supreme Court that the effects of White’s non-price restraints were identical to the effects of horizontal agreements the Court had deemed per se illegal in the past. The government conceded that there might be some interbrand competition for White’s trucks, but it argued that courts had never found interbrand competition to justify an agreement to limit intrabrand competition.100

94 Defendants in White Motor turned this work against the government when the case came before the Supreme Court, noting an apparent inconsistency between Loevinger’s prior writings and the government’s position before the Supreme Court. White Motor argued that Loevinger conceded in The Law of Free Enterprise that the law was unsettled; the government, however, took the position before the Supreme Court that the law was settled and the restraints at issue clearly per se illegal. Brief for Appellant in Opposition to Appellee’s Motion to Affirm at 6–7, White Motor Co. v. United States, 372 U.S. 253 (1963) (No. 54).
95 Loevinger, The Law of Free Enterprise, supra note 90, at 114.
96 Id. at 115.
97 Id.
98 Loevinger, Antitrust and the New Economics, supra note 90, at 565–66 (distinguishing horizontal from vertical agreements, arguing that “there may be good reasons why manufacturers or distributors should be able to require retailers to maintain standards of service or quality, even though they are not similarly privileged as to price generally.”).
99 Loevinger, Rule of Reason, supra note 93, at 248 (arguing it is appropriate to treat a division of markets between competitors as per se illegal (citing United States v. White Motor Co., 194 F. Supp. 562 (N.D. Ohio 1961))).
100 Brief for the United States at 19, White Motor Co. v. United States, 372 U.S. 253 (1963) (No. 54).
The government argued that the Sherman Act was equally concerned with the loss of inter- and intrabrand competition. In a sweeping statement, it claimed that “[t]he [Sherman] Act is based upon the philosophy that the most efficient distribution of trucks, as of any other product, will result from intrabrand competition between sellers of one brand (in this case, White trucks) in addition to competition between those sellers and the dealers in other brands or models.”\textsuperscript{101} The government also insisted that an examination of the potential procompetitive benefits of the restraints would be futile. “Each of White’s justifications,” it said, “involves a matter of almost irresolvable dispute.”\textsuperscript{102} Thus, the government argued that practical considerations as well as Sherman Act policy considerations should lead the Supreme Court to deem the restraints per se illegal.

Justice Douglas, writing for the Court, did not buy the government’s argument that price fixing was “an integral part” of White Motor’s distribution system such that the Court should automatically deem the customer and territorial restraints per se illegal under \textit{Bausch}.\textsuperscript{103} Instead, the Court judged the customer and territorial restraints standing alone, making \textit{White Motor} a case of first impression.\textsuperscript{104} Douglas rejected the government’s argument that the Court should extend to vertical agreements the rule of \textit{Timken Roller Bearing}\textsuperscript{105} that a horizontal agreement among competitors to divide territory was per se illegal.\textsuperscript{106} Douglas distinguished the two, noting that vertical territorial agreements may not always stifle competition.\textsuperscript{107} As a result, “We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a ‘pernicious effect on competition and lack . . . any redeeming virtue’ and therefore should be classified as per se violations of the Sherman Act.”\textsuperscript{108} Although Douglas barely discussed the customer restraints, he concluded that summary judgment was inappropriate in this case, holding that the legality of the customer and territorial restraints should be determined after a trial.

\textsuperscript{101} \textit{Id.} at 22.
\textsuperscript{102} \textit{Id.} at 30.
\textsuperscript{103} \textit{White Motor}, 372 U.S. at 260. Justice White was recused, \textit{id.} at 264; Justice Brennan wrote a concurring opinion, \textit{id.}; and Justice Clark wrote a dissenting opinion that was joined by Chief Justice Warren and Justice Black, \textit{id.} at 275.
\textsuperscript{104} \textit{Id.} at 261.
\textsuperscript{105} \textit{Timken Roller Bearing Co. v. United States}, 341 U.S. 593 (1951).
\textsuperscript{106} \textit{White Motor}, 372 U.S. at 261.
\textsuperscript{107} \textit{Id.} at 263.
\textsuperscript{108} \textit{Id.} (alteration in original) (citation omitted).
C. The Supreme Court Decision and Professor Turner’s
*The Meaning of Agreement*

The more interesting portion of the *White Motor* decision was Justice Brennan’s concurring opinion, in which Turner’s work played a prominent role. Although less than coherent, Brennan’s opinion made the case for rule-of-reason treatment for territorial and customer restraints. Whereas Douglas simply said the Court did not know enough to deem the restraints per se illegal, Brennan went a step further to argue that the Court knew enough to treat them under a rule of reason. For support, he appealed to the justifications for territorial restraints that Turner had identified in *The Definition of Agreement Under the Sherman Act*.109

Oddly, the government—not *White Motor*—had cited Turner’s discussion of restraints on distribution in *The Definition of Agreement Under the Sherman Act* in its Supreme Court brief.110 The government noted Turner’s argument that territorial restraints might induce dealers within a territory to compete more aggressively to produce lower rather than higher prices, but it argued, as did Turner, that territorial limitations were more restrictive than necessary, with territories of “primary responsibility” a reasonable alternative to the closed territorial system of *White*.111 The appeal to Turner was an embarrassing misstep for the government as *White Motor* turned Turner’s work against the government. In concluding its oral argument before the Court, counsel for *White Motor* emphasized the justifications noted by Turner and the government, arguing that the government had raised the prospect of justifications, yet it would not allow *White Motor* to introduce any such evidence.112 The prospect of such justifications, argued *White Motor*, indicated that the Court should judge the restraints under a rule of reason.

109 Brennan’s opinion of the customer restraints at issue was much less interesting. He simply noted *White Motor*’s proffered justifications and found them wanting, largely because they seemed logically inconsistent or could be achieved by less restrictive alternatives. *Id.* at 272–75. Justice Clark’s dissenting opinion is notable largely for its outrage. *Id.* at 276 (deeming the restraints “one of the most brazen violations of the Sherman Act that I have experienced in a quarter of a century.”).


112 In his argument before the Court on behalf of the government, Solicitor General Archibald Cox conceded that a territorial restraint could prompt aggressive sales efforts within the territory, citing Turner. Oral Argument at 4, *White Motor*, 372 U.S. 253 (No. 54). Cox also conceded that territorial restraints might be justified in the case of a new or failing firm. *Id.* at 15. Gerhard Gesell, arguing for *White Motor*, noted Cox’s concessions, arguing that there was no difference between a new firm entering a market and an existing firm seeking to compete more aggressively. Gesell then noted that the government’s proposed rule of per se illegality was inappropriate because it would shut off any inquiry into such justifications for territorial restraints. *Id.* at 18–19.
The government’s argument seems to have resonated with Brennan. He determined that the anticompetitive effects of the restraints were great enough that they deserved per se treatment absent any justifications. When he considered whether there were any justifications, Brennan found them in Turner’s work. He cited Turner’s argument that a new entrant or a firm marketing a new product might it find necessary to guarantee some territorial “insulation” to acquire and retain distribution outlets. He then noted that it might be useful in a rule-of-reason analysis to inquire into whether the restraint was more restrictive than reasonably necessary, again citing Turner’s article, as well as case law. Brennan also found support in the case law for the notion that territorial restraints may be necessary to ensure that a manufacturer’s product “was adequately advertised, promoted, and serviced.” He concluded that the government would prevail unless it was proven that the dealers and distributors could not compete with White Motor absent the restraints.

Brennan’s concurring opinion, with its partial reliance on Turner, previewed the issues that would play out in Schwinn and ultimately in Sylvania.

III. AAG TURNER AND SCHWINN

AAG Victor Hansen was responsible for filing the Schwinn case. Given Hansen’s lack of antitrust experience and the Division’s longstanding policy, it is not surprising that the government argued for per se illegality of the vertical restraints at issue. Lee Loevinger headed the Antitrust Division by the time the case came to trial, and the argument that Schwinn’s restraints were per se illegal fit within his view of the law. Turner was AAG when the gov-

\[\text{\footnotesize 113 White Motor, 372 U.S. at 265.}\]
\[\text{\footnotesize 114 Id. at 269.}\]
\[\text{\footnotesize 115 Id. at 270.}\]
\[\text{\footnotesize 116 Id. at 269–70.}\]
\[\text{\footnotesize 117 Id. at 275.}\]

Brennan also argued that White Motor’s territorial restraints were “a form of restraint upon alienation, which is therefore historically and inherently suspect under the antitrust laws.” Id. at 265. In making this argument, Brennan seemed to be addressing an argument that the government made in its motion to affirm the district court decision. Brief of the United States, White Motor, 372 U.S. 253 (No. 54). Although he considered the territorial restraints a form of “restraint on alienation,” Brennan did not believe that was sufficient to conclude that the restraints were per se illegal, stating: “That proposition does not, however, tell us that every form of such restraint is utterly without justification and is therefore to be deemed unlawful per se.” Id. at 265. This was an argument the government raised in Schwinn before the Supreme Court to support application of a rule of “presumptive illegality” to the customer restraints at issue. Like Brennan in White Motor, the government in Schwinn did not believe that the mere fact that the restraint was a restraint on alienation was sufficient to support a rule of per se illegality; the Court in Schwinn, however, believed that it was sufficient to support per se illegality.

\[\text{\footnotesize 118 See supra note 63 and accompanying text.}\]
\[\text{\footnotesize 119 See supra notes 72–74 and accompanying text.}\]
ernment argued the Supreme Court appeal. The transition from Loevinger to Turner resulted in a significant change in the position of the government, which argued before the Court that the restraints should be judged under a rule of reason. Not only did AAG Turner break with his predecessors, he broke with more than a decade of Antitrust Division policy. Unfortunately, he was less than successful before the Supreme Court, with the Court rendering a decision that—through no fault of Turner’s—was widely ridiculed, ultimately leading to the *Sylvania* decision, which overruled *Schwinn* ten years later.

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Although Orrick generally was aware of developments concerning *White Motor* and *Schwinn*, there is little indication in his papers at the JFK Presidential Library or in any of Orrick’s reported statements that he gave substantial thought to vertical non-price restraints. Indeed, the little evidence there is suggests Orrick was inclined to treat the restraints as harshly as the Division had under AAG Bicks. See Some Suggested Answers to Questions for Discussion at Brookings Roundtable (undated) (on file with JFK Presidential Library) (“As for vertically engendered customer and territory restrictions, the law is still uncertain, although the Division takes the position that such restrictions are illegal.”). Orrick focused more intently on improving the Division’s organization and functioning than on formulating or reformulating substantive antitrust policy. See *Eisner, supra* note 14, at 124–26 (describing Orrick’s efforts to bring order to Division operations). Orrick left the Division in 1965 to return to private practice.
A. AAG Loevinger and Schwinn in the District Court

Filed by the government in 1958, the Schwinn case arose out of agreements between bicycle manufacturer Schwinn and its distributors and dealers. Schwinn sold bikes to franchised and non-franchised dealers, directly and through a system of distributors. Some sales were outright; others were under an agency or consignment agreement. The government alleged that Schwinn (1) agreed with its dealers to fix the price of its bicycles, and (2) agreed with its distributors to restrict sales of its bicycles to only franchised dealers, and to restrict the territories in which they could sell Schwinn bicycles. The government argued that both sets of agreements were part of one nationwide agreement such that proof of the agreement to fix prices proved the entire conspiracy, rendering the customer and territorial restraints per se illegal under the Court’s Bausch decision.

In district court, the government failed to prove an overall conspiracy to fix prices, which meant the customer and territorial restraints were not automatically deemed per se illegal. Although the court could have stopped there, it agreed at the request of the parties to consider fully the restraints on price, customers, and territories, standing alone. The court rejected the price fixing charge. It also rejected the charge that the customer restraints were illegal, finding that, because Schwinn’s distributors were its agents, Schwinn had “the right to dispose of its own goods in the same manner as if the goods were in its own warehouse . . . .” Moreover, Schwinn could bar its franchised retailers from selling to non-franchised retailers because, by agreeing to represent Schwinn in selling to the public, the franchisees had given up the right to sell products “to another retailer who may not have adequate service or may not otherwise meet the approval of Schwinn.”

Turning to the territorial restraints, the district court made a distinction that would loom large in the Supreme Court appeal. When Schwinn took and shipped a direct order from a dealer, paying a commission to its distributor, or when a distributor took an order from a dealer and had Schwinn ship directly to the dealer, the distributor was acting as Schwinn’s agent. As such, Schwinn was entitled to allocate its distributors, i.e., its agents, particular territories as it saw fit. On the other hand, when a distributor purchased its inventory

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123 Id. at 329.
124 Id. at 331–32.
125 Id. at 332.
126 Id.
127 Id. at 334.
128 Id.
129 Id. at 342.
from Schwinn and resold it to the public, it was acting “as an owner and not as an agent or salesman for Schwinn.” In that case, the distributors were independent businesspersons and the allocation of territories among them was “horizontal in nature,” and a violation of Section 1. The distinction between goods sold outright and goods sold on an agency basis, however, was not a distinction the government had argued for; it was a creation of the district court.

B. AAG TURNER AND SCHWINN IN THE SUPREME COURT

The shape of the Schwinn case changed substantially when it came before the Supreme Court. First, Schwinn did not challenge the district court’s finding that its territorial restrictions on distributors that purchased its products were per se illegal. Second, the government did not challenge the district court’s finding that Schwinn did not engage in per se illegal price fixing, hence it did not argue that the customer restrictions were per se illegal under Bausch. Finally, the government’s case under Turner focused on the legality of Schwinn’s customer restraints, which the government now argued should be treated under a rule of reason rather than a rule of per se illegality.

When President Johnson nominated Turner in 1965 to become AAG, vertical non-price restraints were receiving no small amount of attention. In addition to appealing Schwinn, the DOJ was investigating or litigating other vertical restraints cases; Congress also was considering legislation concerning restraints on distribution. Given this attention, Turner was compelled to expand on and refine the views he had expressed as an academic. He continued to advocate for rule-of-reason treatment of customer and territorial restraints, stating in his “inhospitality” speech that he had “no doubt” that they could make distribution more effective. However, he continued to believe that the restraints were beneficial in limited circumstances. In particular, he focused

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130 Id.
131 Id.
133 Id.
134 Id.; Brief for the United States at 21–22, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (No. 25) (“We are mindful that a somewhat different theory was originally urged by the government at the trial of this case—namely, that the outlet limitation was illegal per se as part of a scheme for fixing the retail prices of Schwinn bicycles.”).
135 The Division was considering and litigating restraints on distribution in United States v. Sealy, Inc., 388 U.S. 350 (1967). The U.S. Senate was considering legislation that would enhance the ability of manufacturers and distributors to use territorial restraints. See Distribution Problems Affecting Small Business: Hearing Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary, 89th Cong. 1085 (1966) (discussing S. 2549) [hereinafter Hearing, Distribution Problems].
136 Turner, Reflections, supra note 2, at 3.
137 Id. at 6.
on the time-limited need of a manufacturer to guarantee high enough prices to a distributor to compensate for the risk associated with a new seller or a new product.\footnote{138 Id.}

As AAG, Turner expanded on his views that non-price vertical restraints could be anticompetitive. In addition to arguing that they eliminated competition between dealers, Turner now also argued that they could enhance barriers to entry. Restricting territories increases dealer profits, which, Turner argued, may result in increased services, advertising, or other promotions. He believed that differences between sellers of similar products in service or advertising facilitated by territorial restrictions could allow manufacturers to differentiate their products from one another,\footnote{139 Throughout his tenure as AAG, Turner expressed deep concern about the competitive effects of product differentiation promoted by advertising. This concern was rooted in his work as an academic. See, e.g., Kaysem & Turner, supra note 18, at 74–75. However, Turner’s concerns seemed to heighten when he became AAG. Turner delivered two speeches largely condemning advertising. In both, he argued that advertising that promoted differentiation was such a threat to competition that it would be appropriate to rule out promotional efficiencies as a defense to a merger, and it would be appropriate to remedy monopolization by imposing a limit on a firm’s advertising expenditures. See Donald F. Turner, Advertising and Competition, 26 Fed. B.J. 93, 96 (1966); Donald F. Turner, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Advertising and Competition: Restatement and Amplification, Prepared for Delivery Before the Annual Advertising Government Relations Conference (Feb. 8, 1967) (on file at DOJ Main Library). Turner’s Special Economic Assistant, Oliver Williamson, also seems to have had concerns about the competitive consequences of advertising. Turner’s files contain a speech prepared for delivery by Williamson to the Harvard Business School Association. Oliver E. Williamson, Special Econ. Assistant to the Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Advertising and Competition, Prepared for Delivery Before the Harvard Business School Association, 36th National Business Conference (Apr. 14, 1967) (on file with LBJ Presidential Library). In the prepared text, Williamson argued that it might be appropriate for the government to (1) subsidize consumer information, and (2) restrict advertising by firms that have gained market power through violations of the Sherman Act. Id. at 7. Turner’s position on advertising seems to have created substantial controversy among the business community. See Publishers Urged to Aid Advertising, N.Y. Times, Nov. 15, 1966, at 40 (reporting an advertising executive’s response at an industry conference to Turner’s initial speech: “This speech is a clear statement of theory directly opposed to my beliefs, and I hope to yours.”); Philip H. Dougherty, Advertising: A Reassuring Antitrust Word, N.Y. Times, Feb. 9, 1967, at 65 (reporting that since Turner’s first speech, “there had been waves on the surface of the advertising sea”); Philip H. Dougherty, Advertising: On Government Restrictions, N.Y. Times, Feb. 12, 1967, at 14 (reporting on Turner’s second advertising speech before the Annual Advertising Government Relations Conference; noting his gratitude toward the audience, when he said, “At least they didn’t shoot me.”); Philip H. Dougherty, Report Answers Criticism of Ads, N.Y. Times, Apr. 3, 1967, at 24 (reporting on a study that was prompted by Turner’s views, funded by the Association of National Advertisers, which criticized arguments linking advertising to diminished competition).} making it more difficult for new entrants to succeed, thus diminishing competition and increasing prices.\footnote{140 Although Tur-}
ner backed away from this argument after leaving the Division, concerns about advertising—prompted in part by the work of Joe Bain—played a significant role in his analysis of product differentiation and market power during his tenure at the Division.\^{141}

Turner was not shy about stating that in *Schwinn* he had chosen to depart from Division policy and the position it had taken a mere two years before, in *White Motor*. Before *Schwinn* was argued in the Supreme Court, he hinted at a change in the government’s position on territorial restraints. In his first speech as AAG, he argued that it was appropriate for the government to formulate and publicize clear antitrust rules, using the per se rule advanced in *White Motor* as an example of a situation in which the government might change and make public its revised view.\^{142} When asked after the Court’s *Schwinn* decision why he changed the government’s position to argue for rule-of-reason treatment, Turner flippantly responded that “I suppose the simple answer to that would be that we didn’t get very far in *White Motor* with arguing for a per se rule, and it was a little early to try it again.” He continued, more seriously, “But that was not in fact the real reason. The position we advanced in the *Schwinn* case accurately reflects our current view. I am quite sure that I would have taken that position even if the *White Motor* case had not been decided so shortly before.”\^{143}

Under Turner, the government argued that the Court should analyze Schwinn’s customer restraints according to a structured rule of reason, which

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141 Hearing, *Distribution Problems*, supra note 135, at 1087 (citing BAIN, supra note 22).


143 1968 N.Y. ST. B. ASS’N ANTITRUST L. SYMP. 30–31 (1968). However, as was characteristic of Turner, he did not believe he had a monopoly on the truth. He was open to the possibility of other justifications for non-price vertical restraints, characterizing his views as tentative. Turner, *Reflections*, supra note 2, at 6. He recognized that “we don’t know everything,” which left the door open for defendants to argue that restraints on distribution were justified in circumstances other than the narrow ones he identified. Hearing, *Distribution Problems*, supra note 135, at 1091. This was in keeping with his humility about the ability of lawyers and economists to assess complicated business arrangements.

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it termed a rule of “presumptive illegality.” This was not a rule of per se illegality; rather it allowed for consideration of potential procompetitive effects. Nor was this a full rule-of-reason analysis; rather it called for shifting the burden of persuasion to defendants if the restraint at issue was facially anticompetitive. As Turner later put it,

It is quite possible and it seems to me quite appropriate to ask yourself, even though a strict flat per se rule is inappropriate, whether you cannot define rules short of a broad inquiry into everything—which never leads you anywhere, by the way—in terms of presumptions—that this will be unlawful unless, or this will be lawful unless.

This is what the Government was attempting to do in the Schwinn case and what we have attempted to do in some other areas, and as I say, it can properly be said that we are not applying for a rule of reason in the sense of a rule that asks for an unbounded inquiry.

But my answer to that is, so what, why should we?

When the restraints at issue have a “gravely anticompetitive character,” argued the government, a defendant must do more than simply come forward with evidence to justify it; the defendant must “persuade the court that the practice is reasonable.” That is, rather than placing the burden on the plaintiff to demonstrate that a facially anticompetitive restraint is unreasonable, a court should place the burden on the defendant to demonstrate that the restraint is reasonable. The government argued that the burden of persuasion should be “a heavy one.”

The government cited four reasons that Schwinn’s restraints were gravely anticompetitive and hence deserving of treatment under its rule of presumptive illegality. First, the intended effect of the outlet restraint was to restrict competition, which was contrary to the purpose of the antitrust laws. Second, the restraint affected price, “the central nervous system of the econ-

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144 Several Department of Justice employees appear to have been involved in drafting or reviewing the Supreme Court brief, including Richard Posner, then an Assistant to the Solicitor General, who argued the case before the Court, and Oliver Williamson, then a Special Assistant for Economics at the Antitrust Division. Grimes, supra note 12, at 150–51 nn.27 & 28; Williamson, supra note 8, at 64. Posner and Williamson have different views about the extent to which the government’s position in Schwinn reflected the prevailing view of the economics profession of the time, with Posner arguing the government’s view was consistent with mainstream economics and Williamson arguing the contrary. See Oliver E. Williamson, Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach, 127 U. PA. L. REV. 953, 983 n.101 (1979). Regardless, it is clear that the ideas expressed in the brief reflected those of Turner, who can be fairly considered the intellectual father of the brief.

145 Robinson, Orderly Marketing, supra note 3, at 36.

146 Brief for the United States, supra note 134, at 26.

147 Id. at 38–39.
omy.”

Third, Schwinn enforced the restraints in joint efforts with its dealers and distributors to cut off retail discounters, which resembled an illegal boycott. Fourth, the restraint, which limited the persons to whom a distributor or dealer could sell, was a restraint on alienation, “contrary to notions of policy rooted in the common law and long relied upon in giving content to the general language of the Sherman Act, particularly in regard to restrictions upon distribution that affect price.” The government used the “restraint on alienation” argument to support application of its rule of presumptive illegality, not to support a rule of per se illegality.

The government argued that the anticompetitive effects of the outlet restraint were substantial. Schwinn designed the restraints to keep its distributors and dealers from selling Schwinn products to discount houses that would sell to the public at lower prices. Limiting the number of competing outlets by preventing such sales would “impair the amount and vigor of competition.” Moreover, Schwinn’s intent was to provide each franchisee with a protected market to prevent “vigorous price competition in the retail sale of Schwinn bicycles.” “That a restraint so designed offends the policy of the Sherman Act,” stated the government, “requires no elaboration.” Finally, Schwinn sought to convince consumers that it was the “Cadillac of bicycles,” which would differentiate its products from those of its competitors, insulating its products from competition and enabling it to charge a premium price. As a result, competition from other brands was unlikely to offset the outlet restraint’s adverse effects.

Although the government recognized two potential procompetitive effects of the customer restraints, it argued neither was applicable in the case of Schwinn. First, consistent with views Turner had expressed previously, the government recognized that vertical restraints could facilitate distribution by limiting intrabrand competition to permit a distributor to recoup startup costs. This was most compelling when there might be some uncertainty about whether consumers would accept a new manufacturer or product. In that situation, distributors might need some protection from competition to compensate for the risk of carrying a new product and to recoup investments

148 Id. at 39.
149 Id. at 39–40.
150 Id. at 39.
151 Id. at 30–31.
152 Id. at 31.
153 Id. at 34–35.
154 Id. at 36–37 (arguing that Schwinn’s attempt to create a premium brand image through advertising would insulate it from competition, which would allow it to “enjoy considerable market power” and raise the price of its products).
155 Id. at 41–42.
156 Id. at 42.
in inventory, promotion, or new facilities. However, the government argued that Schwinn was an established dealer with many willing distributors; hence it had no obvious need to attract distributors by protecting them from competition through customer restraints.

Second, the government recognized that vertical restraints could facilitate product marketing by protecting goodwill or by ensuring adequate service. This was not an argument that Turner had emphasized in his prior writings or speeches. The government argued, however, that there was little reason to recognize the argument in this case. First, there was no evidence that Schwinn was cutting off distributors or retailers who damaged its goodwill. The evidence also showed that bicycles were not so complex that it was necessary to require that retailers provide service to protect goodwill. Second, less restrictive alternatives to the outlet restraints, such as franchising or recommending service providers, could ensure adequate service. The primary rationale for the outlet restraint, argued the government, was to create a high-price image for Schwinn bicycles, differentiating its products and enhancing barriers to entry.

The Supreme Court’s Schwinn decision was less than coherent. It considered the customer and territorial restraints on products sold outright to distributors to be restraints on alienation, and hence per se illegal; however, it took a more tolerant view of restraints on products sold on an agency basis to customers. With respect to restrictions on agency sales, the Court stated, “[W]e are not prepared to introduce the inflexibility which a per se rule might bring if it were applied to prohibit all vertical restrictions of territory and all franchising . . . .” It then analyzed the restraints on agency sales under a rule of reason, finding them legal. In short, the Court applied two different tests to behavior that in principle had similar economic effects, which resulted in two different outcomes.

In reaching its decision, the Court rejected three key government arguments. First, it rejected the argument that it should treat the customer re-

157 Id. at 41–42.
158 Id. at 42.
159 Id. at 44–46.
160 Id. at 44.
161 Id. at 45.
162 Id.
163 Id. at 46.
164 The view that there should be a distinction between goods sold outright and goods sold on an agency basis was not unheard of. See, e.g., supra note 90 and accompanying text.
166 Id. at 380 (“The Government does not here contend for a per se rule as to agency, consignment, or Schwinn-Plan transactions . . . .”).
straints under a rule of presumptive illegality. The Court made short work of this argument, dismissing it in a footnote. Unfortunately, the Court did not offer any guidance as to how to apply the rule of reason in the case of agency sales. Second, it rejected the government’s argument that the Court should confine its rule-of-reason analysis to the effects of the restraints on intrabrand competition. The Court instead looked at “the product market as a whole” to find that the restraints on goods transferred via an agency agreement were necessary to respond to competition from other brands. Third, it dismissed the Government’s argument that Schwinn designed its restraints to create the image that it was the “Cadillac” of bicycles and thereby enjoy market power. The Court concluded that the effect of the restraints was “to preserve and not to damage competition in the bicycle market.”

Although the Court seemed to have noticed the government’s “restraints on alienation” argument, it twisted the argument in ways unintended by the government. According to the Court, the government argued that the customer restraints were “restraints upon alienation which are beyond the power of the manufacturer to impose upon its vendees and which, since the nature of the transaction includes an agreement, combination or understanding, are violations of § 1 of the Sherman Act.” The government, however, did not argue that the Court should deem the customer restraints illegal because they were “restraints on alienation.” Rather, the government argued that because the customer restrictions were restraints on alienation and thus were “contrary to notions of policy deeply rooted in the common law,” the Court should review the restraints under a rule of presumptive, not per se, illegality. When the Court dismissed the government’s request for a rule of presumptive illegality, it also should have dismissed the “restraints on alienation” argument.

The reaction to the Supreme Court’s Schwinn decision was immediate and clearly unfavorable. Critics identified three significant shortcomings. First, Schwinn’s per se rule departed from the White Motor decision, which called

\[167\] Id. at 374 n.5 (“We do not consider this additional subtlety which was not advanced in the trial court. The burden of proof in antitrust cases remains with the plaintiff, deriving such help as may be available in the circumstances from particularized rules articulated by law—such as the per se doctrine.”).

\[168\] Id. at 381 n.7 (finding that Schwinn bicycles competed with other brands, stating that it did not “regard Schwinn’s claim of product excellence as establishing the contrary.”).

\[169\] Id. at 382.

\[170\] Id. at 378.

\[171\] Brief for the United States, supra note 134, at 38–39.

\[172\] See, e.g., William H. Orrick, Jr., Marketing Restrictions Imposed to Protect the Integrity of ‘Franchise’ Distribution Systems, 36 Antitrust L.J. 63, 69 (1967) (noting the illogic of applying one rule to agency relationships and another to outright sales); Robert Pitofsky, The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Colum. L. Rev. 1, 6 (1978) (“The Schwinn opinion attracted an avalanche of scholarly criticism, few defenders, and some ingenious judicial avoidance in the lower federal courts.”) (citations omitted).
for an examination of business justifications before deeming a vertical restraint per se illegal.\(^{173}\) Second, the distinction between outright sales and consignment sales elevated form over substance.\(^{174}\) Third, the decision would lead to a shift in business behavior toward inefficient business methods, which ironically would disadvantage small merchants.\(^{175}\) Looking to the future, some commentators feared the difference in treatment between outright and consignment sales would be resolved by courts deeming all vertical restraints, whether on outright or consignment sales, per se illegal.\(^{176}\)

Despite its shortcomings, the *Schwinn* decision had one beneficial effect: It prompted a substantial body of scholarship on the effects of non-price vertical restraints. Whereas before *Schwinn* the literature on vertical restraints focused on vertical integration through mergers, exclusive dealing, and pricing,\(^{177}\) the post-*Schwinn* literature more expressly addressed customer and territorial restraints. That scholarship contributed to the Court’s *Sylvania* decision, which overturned *Schwinn* ten years later, and to an apparent evolution in Turner’s thinking.

IV. ADVOCATE TURNER AND *SYLVANIA*

Turner again played a key role in the Supreme Court’s non-price vertical restraints jurisprudence when he co-authored an influential amicus brief in *Sylvania* that highlighted the post-*Schwinn* scholarship. Filed on behalf of the Motor Vehicle Manufacturers Association (MVMA), the brief argued for rule of reason treatment of locational restraints on distribution. When the case came before the Court in 1977, Turner was back at Harvard, having left the Antitrust Division in 1968. By this time, Turner’s view on the appropriate form of the rule of reason seems to have changed. His brief for the MVMA

\(^{173}\) Orrick, *supra* note 172, at 64 (stating that the Court “overruled the four-year-old *White Motor* case, refusing to look at the ‘economic and business stuff’ out of which the restrictions were fashioned.”) (citations omitted).

\(^{174}\) *Id.* at 69 (noting that the Court in *Masonite* stated that under the Sherman Act, “the result must turn not on the skill with which counsel has manipulated the concepts of sale and agency but on the significance of the business practices in terms of restraint of trade.”) (citations omitted); Donald I. Baker, *Vertical Restraints in Times of Change: From *White* to *Schwinn* to Where?*, 44 *Antitrust* L.J. 537, 537 (1975) (Justice Fortas’ *Schwinn* decision “is an exercise in barren formalism. . . . It is artificial and unresponsive to the competitive needs of the real world.”).

\(^{175}\) Orrick, *supra* note 172, at 70–71 (*Schwinn* may lead to vertical integration, which “will only accelerate the disappearance of the small independent merchant in the face of competition from vertically-integrated giants. . . . In addition to the substantial economic burdens shifted from the distributor to the supplier in connection with the use of an agency method of distribution, certain legal burdens are shifted as well.”).

\(^{176}\) *Id.* at 71–72 (fearing a ruling that would “overrule what remains of the *White Motor* decision and *Schwinn* itself, leaving a policy of *per se* illegality of any and all territorial and customer restrictions.”).

\(^{177}\) See *supra* notes 46–47.
did not argue for a rule of presumptive illegality as in Schwinn. It appears as though he reconsidered his prior views in light of subsequent scholarship suggesting that non-price vertical restraints were less harmful than he once believed, leading him now to conclude that a “loose” rule of reason was appropriate. The Supreme Court ended up taking the same position.

A. THE DISTRICT COURT AND NINTH CIRCUIT DECISIONS IN SYLVANIA

Sylvania arose out of a dispute between a television manufacturer, GTE Sylvania, and one of its franchised dealers, Continental T.V. Sylvania sold products from its factories directly to franchised dealers. To limit the number of locations at which dealers sold its products, Sylvania prohibited sales at a location it had not authorized. Continental decided to sell Sylvania products in an unauthorized location, which violated Sylvania’s policy, prompting Sylvania to terminate Continental as a franchised dealer; Continental, in turn, sued Sylvania, alleging that the location restriction was a per se violation of Section 1 of the Sherman Act.

Following the Supreme Court’s Schwinn decision, the district court instructed a jury that if Sylvania exercised control over the goods it sold to its franchised distributors after parting with title, the jury must find a violation of Section 1 regardless of the reasonableness of the location restrictions. Given that Sylvania conceded it had exercised control, the jury inevitably found the restrictions to be a per se violation of Section 1.

Sylvania appealed, arguing that the jury instructions were inappropriate. The Ninth Circuit reversed, holding that the district court should have instructed the jury to assess Sylvania’s location clauses under a rule of reason. It offered three reasons for refusing to apply Schwinn’s per se rule. First, many cases had upheld restraints that were more restrictive than Sylvania’s restraints. Second, Schwinn’s restraints differed from Sylvania’s in their effect on intrabrand competition. Schwinn’s restraints eliminated intrabrand competition by prohibiting sales to customers outside a dealer’s territory; Sylvania’s restraints, on the other hand, permitted sales to any customers, thus

178 GTE Sylvania Inc. v. Continental T.V. Inc., 537 F.2d 980, 983 (9th Cir. 1976).
179 Id. at 985.
180 Id.
181 Id. at 986.
182 Id. at 988.
183 In particular, courts had routinely upheld exclusive dealerships that allowed a manufacturer to guarantee a franchised dealer that there would be no competing dealers in the franchised dealer’s territory. The Ninth Circuit characterized the case law by saying, “There is a veritable avalanche of precedent to the effect that, absent sufficient evidence of monopolization, a manufacturer may legally grant such an exclusive franchise, even if this affects the elimination of another distributor.” Id. at 997 (collecting cases). If such restrictions were allowable, Sylvania’s less restrictive restraints should not be per se illegal. Id. at 997–98.
allowing for some intrabrand competition. Finally, Sylvania’s restraints might have promoted competition. The court emphasized that the locational restraint may have been necessary for Sylvania to attract a sufficient number of dealers to survive, averting the loss of a competitor, thus making the market more competitive.

B. Turner’s Amicus Brief and the Supreme Court Decision in Sylvania

Sylvania offered a weak economic defense of its restraints when Continental’s appeal made it to the Supreme Court. Instead of stressing the procompetitive effects of locational restraints, Sylvania followed the logic of the Ninth Circuit decision and attempted to distinguish its restraints from Schwinn’s restraints. It emphasized that the restraints were necessary for it to continue producing television sets. Only by giving its franchisees “elbow room” by spacing out dealers would Sylvania attract dealers willing to invest in facilities, a full product line, customer service, and advertising, enabling it to remain in business to compete with other television manufacturers. Although it ultimately prevailed, Sylvania managed to do so without fully articulating the economic rationale underlying locational restraints. Instead, Turner’s brief on behalf of the MVMA made the economic case.

Unlike the Ninth Circuit, the Supreme Court could not distinguish Schwinn’s customer restraints from Sylvania’s locational restraints. The Court found that Schwinn’s language was broad enough to apply to Sylvania’s restrictions, and it could not find “a principled basis for distinguishing Schwinn” from the case before it. Indeed, the Court said:

In intent and competitive impact, the retail-customer restriction in Schwinn is indistinguishable from the location restriction in the present case. . . . The fact that one restriction was addressed to territory and the other to customers is irrelevant to functional antitrust analysis and, indeed, to the language and broad thrust of the opinion in Schwinn.

Thus, the Court dismissed Sylvania’s and the Ninth Circuit’s attempts to distinguish Schwinn.

184 Id. at 990.
185 Id. at 991. The Ninth Circuit buttressed its decision by referring to precedent, concluding, “We have discovered no reported cases wherein a location clause has been struck down for illegality. In fact, and to the contrary, it has been widely assumed that location restrictions were reasonable restraints of trade, and therefore lawful, ever since Boro Hall Corp. v. General Motors Corp., 124 F.2d 822 (2d Cir. 1942), cert. denied, 317 U.S. 695 . . . (1943).” Id. at 992–93 (citations omitted).
188 Id. at 47.
Rather than apply Schwinn, however, the Court overruled it. It characterized Schwinn as “an abrupt and largely unexplained departure from White Motor . . . , where only four years earlier the Court had refused to endorse a per se rule for vertical restrictions.”\textsuperscript{189} It noted that there had been substantial scholarly criticism, and that the lower courts had sought to limit the reach of Schwinn.\textsuperscript{190} Moreover, a substantial amount of scholarship demonstrated the benefits of non-price vertical restraints. “Economists,” the Court said, “have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers.”\textsuperscript{191} The Court also noted that manufacturers’ interests are aligned with consumers’ in seeing that distribution is as efficient as possible.\textsuperscript{192} It concluded that the Schwinn distinction between sale and non-sale transactions was not sufficient to justify application of a per se rule in one case and a rule of reason in the other case.\textsuperscript{193}

The Court’s economic case for non-price vertical restraints echoed the MVMA brief. Although Turner co-authored the brief with attorney Lloyd Cutler, its heavy emphasis on the economics of locational restraints suggests Turner had the stronger hand in drafting. To a large extent, Sylvania’s and the MVMA’s briefs were complementary: Sylvania made the case for rule-of-reason treatment based on its own experience, and the MVMA brief made the case based on scholarly work regarding the underlying economics of franchising and locational restraints. The MVMA brief, however, seems to have had greater influence on the Court’s decision.\textsuperscript{194} Justice Powell, author of the majority opinion, was impressed enough with the MVMA brief that he wrote a note to Tyler Baker, his law clerk, stating, “My recollection is that the brief filed by Wilmer Cutler is the single most helpful brief in this case. No doubt you have drawn on it heavily. If not, I commend it to you.”\textsuperscript{195} Baker also was impressed with the brief, later recalling that it “was head and shoulders above anything else we had. It really was a masterful brief that was clearly written and yet had all the policy arguments included.”\textsuperscript{196}

The MVMA brief discussed the efficiency justifications for territorial restraints at length, citing economic and legal commentary that the Court cited in its opinion.\textsuperscript{197} The brief started with the basic proposition that a manufa-

\textsuperscript{189} Id.
\textsuperscript{190} Id. at 47–48.
\textsuperscript{191} Id. at 54–55.
\textsuperscript{192} Id. at 56.
\textsuperscript{193} Id. at 57.
\textsuperscript{194} Andrew I. Gavil, Sylvania and the Process of Change in the Supreme Court, Antitrust, Fall 2002, at 8, 11, 13 n.31.
\textsuperscript{195} Id. at 11.
\textsuperscript{196} Id. at 13 n.31.
turer and consumers have an interest in efficient distribution, citing the work of Robert Bork and Richard Posner.\textsuperscript{198} If the cost of distributing products to consumers is high, manufacturers lose sales and profits and customers pay too much for reduced service. In the case of distribution of a complex, expensive, and long-lived product like a motor vehicle, customers want to buy at a convenient location, they want sufficient information before making a purchase, and they want post-purchase service at a convenient location.\textsuperscript{199} According to the MVMA brief, locational restraints were an appropriate way of preventing free riding by distributors, which would undermine a manufacturer’s ability to provide customers with adequate service at the lowest price possible. Given that locational restraints benefited manufacturers and consumers, argued the MVMA, it was appropriate to treat the locational clauses at issue under a rule of reason.

The MVMA brief represented an evolution in Turner’s views on non-price vertical restraints. One of Turner’s defining characteristics throughout his career was his willingness to reconsider old positions when new evidence suggested they had become untenable. Following the \textit{Schwinn} decision, an extensive body of literature developed concerning the effects of vertical non-price restraints, of which Turner took note. As an academic and policy maker, he had focused on the need of manufacturers to compensate dealers and distributors for the risk of carrying a new line of products. The MVMA brief, on the other hand, also recognized the need for pre- and post-sale services associated with a complex, long-lived, and mobile product, taking note of the extensive economics literature on the subject that largely had developed since the \textit{Schwinn} decision.

Turner also took note of the post-\textit{Schwinn} literature that reconsidered the effect of advertising and product differentiation on competition. As an academic and policy maker, Turner had placed great emphasis on the potential anticompetitive effects of advertising, which might facilitate product differentiation, enhancing barriers to entry and increasing the likelihood of an exercise of market power.\textsuperscript{200} The MVMA brief, however, dismissed “the supposed evils of ‘product differentiation’,”\textsuperscript{201} reflecting an evolution in the views of Turner and the economic profession regarding advertising and differentiation.

\textsuperscript{198} Brief for Motor Vehicle Manufacturers Association as Amicus Curiae at 5–6, \textit{Continental T.V.}, 433 U.S. 36 (No. 76-15) [hereinafter MVMA Brief].
\textsuperscript{199} \textit{Id.} at 7–9.
\textsuperscript{200} Turner’s views were consistent with those of Joe Bain. See, e.g., \textit{Bain}, supra note 22, at 216–17; \textit{Kaysen & Turner}, supra note 18, at 7475. \textit{See supra} note 139.
\textsuperscript{201} MVMA Brief, supra note 198, at 14 nn.20–21. Indeed, the MVMA brief specifically criticized the work of AAG Turner’s economic advisor, William Comanor, whose work on vertical customer and territorial restrictions had provided support for the government’s position in \textit{Schwinn}, as well as support for the government’s policy with respect to legislation. \textit{Id.} at n.21.
The brief also recognized the importance of providing information to consumers, particularly about complex products.\textsuperscript{202}

Given that the post-\textit{Schwinn} economics literature had expanded the set of the likely procompetitive effects and contracted the set of likely anticompetitive effects of locational restraints, Turner seems to have adjusted his views accordingly. Turner had advocated a tightly circumscribed rule of reason for analyzing vertical restraints in \textit{Schwinn}. The MVMA brief, on the other hand, did not advocate any particular form of the rule of reason; instead, it seemed to argue for a completely open-ended rule of reason.\textsuperscript{203} However, as was characteristic of Turner, the MVMA brief suggested that further judicial experience with particular types of vertical restraints might lead to the identification of “talismanic” considerations that might help guide a rule of reason analysis.\textsuperscript{204} For Turner, who was forever seeking to circumscribe the rule of reason, the search for a means of reducing the costs of analyzing non-price vertical restraints under the antitrust laws would continue.\textsuperscript{205}

The ultimate outcome in \textit{Sylvania}, establishing a rule of reason for non-price vertical restraints, was due in no small part to the efforts of Donald Turner. Throughout the Court’s evolving approach to non-price vertical restraints—which was tentative in \textit{White Motor}, muddled in \textit{Schwinn}, and finally clearer and more economically rational in \textit{Sylvania}—Turner was a persuasive voice for rule-of-reason treatment. His scholarly work concerning \textit{White Motor} articulated clear, if limited, rationales for non-price vertical restraints, which caught the attention of the Supreme Court. His efforts as a policy maker overturned Antitrust Division policy, replacing a longstanding policy of per se treatment and arguing for rule-of-reason treatment before the Court in \textit{Schwinn}. Finally, his efforts as an advocate in \textit{Sylvania} brought to-

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\item[202] Id. at 16–20.
\item[203] Turner, of course, was representing a client, which may have constrained his ability to express his own opinion. The MVMA brief, however, generally seems consistent with Turner’s thinking on non-price vertical restraints.
\item[204] One puzzle is that the MVMA brief did not advocate for a structured rule of reason based on presumptions, which was uncharacteristic of Turner. Whether this omission was due to the wishes of Turner’s client or Turner’s own belief that presumptions should not apply to \textit{Sylvania}’s restraints is an open question. In light of Turner’s subsequent advocacy for a rule of presumptive legality, one possibility is that he was still trying to sort out his own views on whether presumptions could or should play a role with respect to the restraints at issue. Several commentators noted the Court’s failure in \textit{Sylvania} to give any guidance regarding the structure of the rule of reason as applied to non-price vertical restraints. \textit{See, e.g.}, Pitofsky, supra note 172, at 11 (arguing failure to provide guidance on application of the rule of reason, “will surely breed further confusion and litigation in this area.”).
\item[205] Turner later expressed an even more benign view of non-price vertical restraints when he suggested that territorial or customer restraints should be “presumptively lawful, and unlawful only if plainly attributable to dealer coercion.” Donald F. Turner, \textit{The Virtues and Problems of Antitrust Law}, 35 \textit{Antitrust Bull.} 297, 302 (1990).
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gether the most compelling legal and economic arguments in favor rule-of-reason treatment, playing a key role in the Court’s decision. Although many factors contributed to the outcome in *Sylvania*, and it is possible that the Court would ultimately have arrived at the same conclusion absent Turner’s role, it seems likely that the road to rule-of-reason treatment for non-price vertical restraints would have been longer if not for Turner’s efforts.

V. TURNER’S INHOSPITALITY AND EASTERBROOK’S HOSPITALITY

Turner’s contributions to antitrust extend well beyond his work advocating for rule-of-reason treatment for vertical restraints. Perhaps his most important contribution was to emphasize the use of economics to formulate clear, administrable rules that reduced the need for an extended factual inquiry into the competitive effects of a business practice. An example of this was the rule of presumptive illegality he proposed in *Schwinn*, formulated as a way of circumventing an extended factual inquiry. This search for a middle ground between simple per se rules and a more complicated inquiry into economic effects via the use of presumptions informed by economics was a constant theme of Turner’s work. It also anticipated the work of Frank Easterbrook, who used the “inhospitality tradition” as a jumping off point for his own work advocating the use of presumptions informed by economics to limit the scope of a rule-of-reason analysis. The parallels between the approaches of Turner and Easterbrook are remarkable.

A. EASTERBROOK’S THE LIMITS OF ANTITRUST

The term “inhospitality tradition” has become a multipurpose epithet. Some commentators have used the term to criticize 1960s and 1970s vertical restraints law and policy. Others have used the term more generally to criticize antitrust as unduly hostile to efficiency-enhancing business practices. Still others have used the term as a catch-all, encompassing every shortcoming of antitrust. Unfortunately, characterizations of the inhospitality tradition often bear little resemblance to anything that one reasonably can ascribe

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206 See, e.g., William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, 41 ANTITRUST BULL. 505, 528 (1996) (citing Turner and arguing that the DOJ “embraced an adamantine hostility to vertical contractual restraints in cases such as *United States v. Arnold, Schwinn & Co.*”).

207 Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 8 (1997) (“Traditionalists approach non-standard contracts such as ties ‘inhospitably;’ and thus are more likely to conclude that such agreements are anticompetitive . . . .”).

208 See supra note 8.
Commentators sometimes attribute the broader and indiscriminate reading to him, improperly leaving one with the impression that Turner was unduly hostile toward the efficiency benefits of vertical restraints.

The most famous critic to have invoked the inhospitality tradition is Frank Easterbrook, who attacked the purported failures of antitrust in *The Limits of Antitrust*, published in 1984. Easterbrook used his own characterization of Turner’s “inhospitality tradition” as a jumping-off point for his sweeping criticism of antitrust. He also addressed many of the issues that Turner addressed in his inhospitality speech. Easterbrook directly criticized the Sealy case, which Turner obliquely referenced in his speech. He also criticized the use of “less restrictive alternatives,” the main theme of Turner’s speech.

Running throughout Easterbrook’s article is criticism of judicial treatment of vertical restraints, which were a focus of Turner’s speech. Many of Easterbrook’s criticisms of antitrust still hold; many have become moot as courts and agencies have adopted his positions.

The most important and lasting contribution of *The Limits of Antitrust* is that it set out a simple “error-cost” framework for analyzing antitrust rules. According to Easterbrook, courts and agencies should judge antitrust rules by the extent to which they minimize the sum of error and administrative costs. Error costs include the cost of prohibiting business practices that are beneficial (false positives) or permitting practices that are harmful (false negatives). Administrative costs are the costs of “the system itself,” which

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210 Easterbrook, supra note 8.

211 Id. at 4.

212 Id. at 21 (referring to *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), as an “exercise in formalism” that improperly condemned a joint venture as per se illegal).

213 Turner, *Reflections*, supra note 2, at 7–9 (discussing application of a less restrictive alternatives analysis to a joint venture).

214 Easterbrook, supra note 8, at 8–9 (arguing that it is too easy for a court to be convinced that the existence of alternatives can justify condemnation of an efficient practice).

215 See, e.g., id. at 6 (arguing the inhospitality tradition “has led to the condemnation—often under a per se rule—of horizontal agreements by the dozen as well as tie-ins, resale price maintenance, vertical territorial and customer restrictions, patent pools, block booking, and a host of other business practices.”).


218 Easterbrook, supra note 8, at 16.
include the costs of gathering and assessing evidence to determine whether a practice is harmful or beneficial. A key implication of the framework is that there is a tradeoff between error costs and administrative costs. One can reduce the error costs by gathering more evidence about the practice. Gathering and assessing more evidence, however, increases administrative costs. Given this tradeoff, the best liability rule concerning a practice—the one that is most efficient in the sense that the total costs to society are the smallest they can be—is the rule that minimizes the sum of error and administrative costs.

Easterbrook argued that the “inhospitality tradition” produced excessive error costs. According to him, the core of the inhospitality tradition was its skepticism that business practices could be efficient and beneficial to consumers. This led judges “to view each business practice with suspicion, always wondering how firms are using it to harm consumers.” Reflecting their skepticism, judges allowed a practice only if was convinced that the practice was necessary. As Easterbrook put it, the tradition required that “[i]f the defendant cannot convince the judge that its practices are an essential feature of competition, the judge forbids their use.” Easterbrook also argued that economists had fallen prey to the inhospitality tradition, leading them to attribute anticompetitive effect to practices they did not understand. Although our understanding of a business practice might evolve over time, cases involving a practice would arise before anyone—judges, lawyers, or economists—fully understands the practice. This ignorance, coupled with the inhospitality tradition’s inherent suspicion, frequently led judges improperly to condemn beneficial business practices as per se illegal.

Although a shift away from per se illegality might represent an advance, Easterbrook did not believe the rule of reason was a panacea. According to Easterbrook, as economists came to understand business practices, they and judges eventually came to see some harmful practices as potentially beneficial. This led judges to reassess practices formerly condemned as per se illegal under a rule of reason. The rule of reason, however, had its own problems. As applied by courts, it frequently called for consideration of a laundry list of factors to determine whether a practice was beneficial or harmful. This was a recipe for an extended, potentially fruitless inquiry. “When everything is rele-

\footnotesize{\begin{enumerate}
  \item Id.
  \item Id. at 4.
  \item Id.
  \item Id. (citing Ronald Coase, who asserted, “If an economist finds something . . . that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of understandable practices tends to be rather large, and the reliance on a monopoly explanation frequent.”).
  \item Id. at 5–7.
  \item Id. at 10.
\end{enumerate}}
vant,” wrote Easterbrook, “nothing is dispositive.”225 The result, he believed, was endless discovery, making antitrust litigation excessively costly. The rule of reason might reduce error costs—but as applied by courts it substantially increased administrative costs.

In The Limits of Antitrust, Easterbrook proposed to navigate error costs on the one hand and administrative costs on the other via presumptions. To address the administrative costs of the rule of reason arising from the ignorance of judges, lawyers, and economists, Easterbrook proposed the use of several presumptions to filter out practices likely to be beneficial.226 To address the error costs of per se rules resulting from the inhospitality tradition, Easterbrook proposed that the presumptions err on the side of permitting harmful practices, i.e., on the side of permitting false negatives.227 Easterbrook believed the costs of false negatives were relatively small because anticompetitive practices were likely to be remedied the market.228 The costs of false positives, on the other hand, were relatively large because once a court condemns a beneficial practice, stare decisis kicks in, resulting in judicial sanctions for anyone who uses the practice, thereby deterring use of the practice.229

In a sense, Easterbrook in The Limits of Antitrust answered the “inhospitality” tradition with his own “hospitality” tradition, replacing skepticism of new or unexplained business practices with acceptance, and trusting that the market was better than the judiciary at containing the effects of business practices that harmed consumers.230

B. THE IRONY OF EASTERBROOK’S INVOCATION OF TURNER’S “INHOSPITALITY TRADITION”

Easterbrook’s invocation of Turner’s “inhospitality tradition” in The Limits of Antitrust was remarkably ironic. Easterbrook sought to overturn the inhospitality tradition he attributed to Turner. To do so, he proposed the use of presumptions grounded in economics to give structure to the rule of reason, an approach to antitrust that Turner had proposed in his inhospitality speech and that characterized a good part of Turner’s professional work.

225 Id. at 12.
226 Id. at 14.
227 Id. at 15.
228 Id.
229 Id. at 2–3 (asserting that “judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.”).
230 See also Crane, supra note 8, at 47 (referring to antitrust’s “hospitality tradition,” which “captures the balance of sympathetic perspectives, characteristic of all manifestations of the Chicago School, to unfettered business freedom, including the freedom to merge vertically and horizontally and engage in aggressive conduct toward rivals.”).
Turner’s speech introducing that term addressed many of the issues Easterbrook addressed in his article. Turner set up a discussion of the rule of reason in his speech by considering non-price vertical restraints on distribution. He conceded that such restraints may be beneficial, but he believed that to be true in only a small number of situations (namely, the entry of a new firm or the introduction of a new product). Given that the restraints might be beneficial, per se illegality would be inappropriate; but given how rarely he believed the restraints to be beneficial, Turner at the time argued that a “loose” rule of reason would be inappropriate.231 As was Easterbrook, Turner was skeptical about the utility of an unstructured rule of reason. To address its shortcomings, Turner proposed that a judge applying the rule of reason ask whether the restraints at issue are more restrictive than necessary to achieve a legitimate purpose. “For what is the point,” he said, “of insisting, to use one of Mr. Justice Brandeis’ more unfortunate phrases, on ‘a definite factual showing of illegality’ if a restraint that is anticompetitive on its face serves little or no useful purpose?”232 That is, why not shortcut the rule of reason and reduce administrative costs by using a presumption?

There are other echoes of Turner’s approach to antitrust throughout The Limits of Antitrust. As did Easterbrook, Turner believed it was difficult for economists, let alone judges, to determine accurately whether a practice was harmful or beneficial.233 As did Easterbrook, Turner believed that the administrative costs associated with an open-ended rule of reason were excessive. His recognition of both of these problems led Turner to formulate his own version of Easterbrook’s error-cost approach many years before The Limits of Antitrust. Turner captured the tradeoff between error and administrative costs in a 1963 article when, discussing the formulation of antitrust rules, he wrote, “Underneath is a conflict between the desirability of making sound decisions in the economic sense in each case, and the desirability of establishing a workable and tolerable system of legal administration and enforcement.”234 Turner was referring to avoiding error costs when he referred to “[m]aking sound decisions in an economic sense”; and he was referring to reducing administrative costs when referring to “establishing a tolerable system of legal administration and enforcement.” In one sentence, Turner articulated a core theme of The Limits of Antitrust more than two decades before Easterbrook’s article.

231 Turner, Reflections, supra note 2, at 3.
232 Id. at 4.
Turner’s 1963 answer to the tradeoff between error costs and administrative costs was remarkably similar to Easterbrook’s 1984 answer. As did Easterbrook, Turner believed antitrust rule formulation did not need to be a debate about whether to classify a particular practice as per se illegal or subject it to a rule of reason analysis. There was an “extensive middle ground” between those two cases involving the use of presumptions. As did Easterbrook, Turner recognized that a rule of reason incorporating presumptions could reduce the overall costs of enforcing the antitrust laws. As Turner put it,

[wh]en considerations of judicial administration are taken into account, rules or presumptions which shut off or restrict factual inquiries may well be appropriate even though the proposed proof is economically relevant to the question whether a particular course of conduct will improve or promote competition or at least not materially impair it.

Although Turner and Easterbrook used essentially the same framework to analyze antitrust rules, their legal and policy conclusions were very different. The primary difference concerned the nature of the presumptions a judge should use. Easterbrook expressed a clear preference for presumptions that would limit the likelihood of false positives, which followed from his belief that the market was better at containing an exercise of market power than judicial action. Indeed, one of the many contributions of Easterbrook’s work was its emphasis on the relative strengths of the market and courts as mechanisms for disciplining market power.

Turner may have recognized echoes of his own work in The Limits of Antitrust when he later modestly said that Easterbrook’s was “a strong article.” Turner agreed with Easterbrook that minimizing the sum of error and administrative costs was a proper aim of antitrust rules, but he noted that the real question is how best to achieve that. Turner took issue with the exact presumptions that Easterbrook advocated to deal with error and administrative costs, suggesting that Easterbrook was overconfident in the utility of his proposed presumptions. Easterbrook’s presumptions, said Turner, may not necessarily be appropriate “in the sequence and with the degree of decisiveness that he proposes for them.” Moreover, Turner seemed to take issue with the notion that the market was better than courts at disciplining an exercise of market power, contrary to one of Easterbrook’s fundamental arguments in favor of erring on the side of false negatives. Turner did not express excessive

235 Id.
236 Id.
238 Id.
239 Id. at 801.
concerns with false positives, arguing that, "[u]nregulated markets do not ade-
quately deal with anticompetitive conduct, and despite disputes among econo-
mists and the complications of some economic issues, judges have become
better at assessing them." 240

The differences between Turner and Easterbrook were empirical in nature.
They agreed that it was appropriate to judge antitrust rules by their resulting
error and administrative costs. They differed on which rules would minimize
those costs; in particular, they differed in their opinion of the type of presump-
tions that were appropriate to guide a rule-of-reason analysis to minimize er-
ror and administrative costs. Easterbrook’s interpretation of the empirical
evidence led him to advocate for presumptions implying a less aggressive
approach to antitrust enforcement. Turner’s interpretation of the evidence led
him to advocate for presumptions implying a more aggressive approach. De-
spite these differences, it is clear that Turner anticipated the error-cost frame-
work that Easterbrook used to address the “limits” of antitrust. Unfortunately,
Turner’s efforts seem to have been lost to antitrust history due, in part, to a
failure to appreciate that he and Easterbrook were working within the same
general analytical framework.

VI. CONCLUSION

Donald Turner’s “inhospitality” remark too often has been misinterpreted
or misused in ways that obscure his contributions to antitrust. Some commen-
tators have gone so far as to argue that attacks on efficient business practices
motivated by the inhospitality tradition peaked under AAG Turner. 241 That
view is inaccurate with respect to enforcement efforts at the Antitrust Divi-
sion. Aggressive antitrust arguably peaked under Robert Bicks in the late
1950s, with Loevinger in the early 1960s continuing the aggressive enforce-
ment campaign initiated by Bicks. 242 Rather than a peak, Turner’s tenure as
AAG from 1965 to 1968 was an inflection point that marked the start of a
more economically rational approach to antitrust. As soon as he took office,

240 Id.
241 Richman, supra note 9, at 359–60.
242 See KOVALEFF, supra note 61, at 157 (“Despite the fact that it was during the Kennedy-
Johnson terms . . . that such top scholars as Lee Loevinger and Donald F. Turner headed the
Antitrust Division, the Democratic record pales when compared to that of the preceding adminis-
tration. In the 1960s, antitrust was all but forgotten. . . . Actions bravely begun in the mid-1950s
were either dropped or were settled in ways that did little to stimulate competition.”); DAVID M.
that Turner emphasized “further developing and sharpening antitrust law where there were ambi-
guities, rather than simply compiling a good won-lost record.”); KATZENBACH, supra note 121, at
69 (“Loevinger’s Republican predecessor, Robert Bicks, had filed a number of cases in the clos-
ing months of the Eisenhower Administration and received praise for his courage from the liberal
press, but he left us with a number of lemons, many of which [Attorney General Kennedy] had to
dismiss.”).
Turner began reining in cases and policies that his less economically sophisticated predecessors had initiated or implemented. The *Schwinn* case, for example, was filed by Turner’s predecessors under a per se theory, which during Turner’s time at the Division the DOJ withdrew to argue for rule-of-reason treatment. In many other instances, Turner sought to reshape or dismiss cases or policies that his predecessors failed to ground in solid legal and economic analysis.

A closer look at Turner’s record indicates that he approached business practices under the antitrust laws reasonably, not nearly as inhospitably as some critics charge. Turner carefully considered the pro- and anticompetitive effects of business practices. When he believed that economics permitted generalizations about the likely effects of a practice, he sought to use them to formulate clear antitrust rules to reduce the need for extensive fact-finding. In the *Schwinn* case, for example, he argued for a rule of presumptive illegality for the customer restraints at issue that attempted to find a middle ground between per se illegality and a rule of reason. As economics theory and evidence developed, Turner altered his views accordingly: In the case of *Sylvania*, he abandoned his rule of presumptive illegality when the economics literature made it clear that the benefits of non-price vertical restraints were larger and the harms smaller than had been believed. Indeed, later in his career, he went so far as to argue for a rule of presumptive legality for non-price vertical restraints.

Turner’s willingness to reconsider and publicize his positions in light of new evidence was consistent with his desire to engage the antitrust community in debate. An openness to new views and a willingness to re-examine old positions were characteristics Turner valued in others; they also were characteristics of Turner’s own approach to antitrust. He was an empiricist, not an ideologue. In his first speech as AAG, he argued that it was appropriate for the government to formulate and publicize clear antitrust rules. Doing so

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243 For an overview of AAG Turner’s attempt to bring economic rigor to the Antitrust Division’s activities, see EISNER, supra note 14, at 126–32; Welborn, supra note 242, at 165–69; Williamson, supra note 8, at 62–63.

244 See, e.g., Richard A. Posner, *A Program for the Antitrust Division*, 38 U. Chi. L. Rev. 500, 533 (1971) (noting that Turner staffed an “Evaluation Section” that was “to check the excesses of the enthusiastic trail lawyer, and to assure a modicum of uniformity and consistency of policy.”).


246 Donald F. Turner, *Mr. Justice Clark: A Personal Note*, 46 Tex. L. Rev. 3, 4 (1967) (remembering former head of the Antitrust Division, Attorney General, and Supreme Court Justice Tom Clark, for whom Turner clerked, as “[o]pen-minded, far more dispassionate than most men can be, willing to re-examine positions earlier taken, he has been a judge in the best sense of the word.”).
would encourage dialogue among the community of antitrust lawyers, economists, commentators, and policy makers that might lead to the development of opposing evidence or views that might prompt the government to reconsider its views. 247 Through this iterative process, he hoped that antitrust law and policy might improve. In his own words, he hoped for improvement in antitrust law “by a process of successive approximations.” 248

Among the ways in which Turner sought to improve antitrust law was by cabining in the rule of reason, reflecting his skepticism about the ability of courts and agencies to assess accurately the competitive effects of a particular business practice on a case-by-case basis. Although economics might be able to say something about the general tendency of a practice to be pro- or anticompetitive, Turner had little faith in the ability of economics to say anything about the effects of a particular practice in a particular case. He also doubted the ability of lawyers to do so. In recognition of these limits, he advocated for the use of presumptions grounded in economics to guide the rule of reason. Even if such an approach might yield false positives or negatives, Turner believed the benefit of a more limited factual inquiry might outweigh such errors. Easterbrook’s influential error-cost framework clearly paralleled Turner’s work.

The core of Turner’s work as an antitrust scholar, policy maker, and advocate was the search for economically informed rules to guide courts, agencies, and businesses. 249 Recent developments in economics seem to have opened up rather than restricted the range of business practices that may yield competitive harm. This is especially true of vertical restraints, for which economists in recent years have developed a number of theories suggesting they may be

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247 In his first speech as AAG, Turner said that he believed the Division should, to the extent it can, formulate legal rules to reduce the likelihood of irrational or discriminatory enforcement of the antitrust laws. Moreover, it was wise for an agency to publicize its rules as a way of engaging in a dialogue with the public. Turner used the example of territorial restraints to illustrate his approach. If the Division decided on an appropriate rule, it would publicize it, which might prompt debate about whether the proposed rule was the right one. “We would then be in position to reconsider our views;” said Turner, “and we would indeed do so.” Turner, supra note 142, at 190.

248 Id. at 191.

249 Shortly after leaving the Antitrust Division, Turner reiterated his belief in a “reasonable” rule of reason:

It has been my view, as you know, that further rationalization of the body of antitrust law depends heavily on the progressive formulation of rules that sharply circumscribe the scope of factual inquiries in any particular case. The choice is not between per se on the one hand and unbounded factual inquiry on the other. Between these two extremes lie many alternatives whereby the legality of specific practices may often if not usually be suitably disposed by, for example, making them presumptively unlawful, subject to carefully prescribed defenses. Three years as an enforcement official have reinforced these views.

harmful. Unfortunately, the predictions of these theories can be sensitive to small changes in their assumptions. Absent evidence on whether a theory and its assumptions fit a particular practice in a specific factual setting, it can be difficult to use theory to guide an analysis of the practice’s effects. In the face of many possible theories of harm, it is worth remembering Turner’s emphasis on rule formulation, grounded in empirical evidence, which might limit the extent of factual inquiry required to assess effects.

It also is worthwhile to recall Turner’s emphasis on the important role that economists can play in the process of rule formulation. When asked in 1967 about the role of economists at the antitrust agencies, he indicated that they should actively be involved in rule formulation. “[M]y own belief,” said Turner, “is that the role of the economist will be principally in assisting [the agencies] to determine what relatively simple rules make overall economic sense and will produce, most of the time, an appropriate result.” In the 40 years since then, economists have played a substantial role in rule formulation, most notably by helping lawyers identify business practices that have been more appropriately treated under a rule of reason rather than a rule of per se illegality. Over time, however, as the list of business practices that are subject to rule of per se illegality has decreased, the list of business practices subject to rule of reason treatment has increased. This suggests that the greater payoff to antitrust law and policy currently lies in economists identifying “talismanic” considerations that Turner hoped courts and policy makers could use to inform presumptions to better guide the rule of reason. The search for reasonable rules—a preoccupation of Turner throughout his career—remains as relevant as ever.

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251 Since Turner, others also have made the case for economic research that bears on rule formulation. See, e.g., id. at 63 (“It is trite to conclude with a call for more empirical research [regarding vertical restraints], but the demand is acute. Practitioners in all countries, including those in the United States, are begging for clarity in this area.”); see also David Eisenstadt & James Langenfeld, The Role of Economics in Truncated Rule of Reason Analysis, ANTITRUST, Summer 2014, at 52.

252 MVMA Brief, supra note 198, at 47.

253 An Interview with the Honorable Donald F. Turner, Assistant Attorney General in Charge of the Antitrust Division, 34 ANTITRUST L.J. 113, 116–17 (1967).

254 MVMA Brief, supra note 198, at 47.