Product Disparagement under the Sherman Act, Its Nurturing and Injurious Effects to Competition, and the Tension between Jurisprudential Economics and Microeconomics

Kevin S. Marshall
PRODUCT DISPARAGEMENT UNDER THE SHERMAN ACT, ITS NURTURING AND INJURIOUS EFFECTS TO COMPETITION, AND THE TENSION BETWEEN JURISPRUDENTIAL ECONOMICS AND MICROECONOMICS

Kevin S. Marshall*

I. INTRODUCTION

This article addresses market conduct involving the disparagement of a rival or its product. Such conduct may have one of two polar-opposite effects on the competitive marketplace. To the extent that the disparagement is truthful and informative, it nurtures and fosters an environment within which competition may thrive. To the extent such disparagement is intentionally false and deceptive, it desecrates the hallowed efficiencies for which competition is so highly touted.

The purpose of this article is to illustrate and discuss these polar-opposite effects from a purely microeconomic perspective.¹ To meet these ends, this article first cites and

* Kevin S. Marshall is an Assistant Professor of Law at the University of La Verne's College of Law, Ontario, California. Dr. Marshall received a B.A. in economics from Knox College, Galesburg, Illinois in 1982, a Juris Doctorate from Emory University School of Law in 1985, a Masters in Public Affairs from the University of Texas at Dallas in 1991, and a Ph.D. in political economy from the University of Texas at Dallas in 1993. Professor Marshall teaches courses in antitrust, law and economics, remedies, and contracts.

1. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 3-4 (5th ed. 2001) ("Microeconomics deals with the behavior of individual economic units. ... More precisely, it is about the allocation of scarce resources. For example, microeconomics explains how consumers can best allocate their limited incomes to the various goods and services available to purchase. It explains how workers can best allocate their time to labor instead of leisure, or to one job instead of another. And it explains how firms can best allocate limited financial resources to hiring additional workers versus buying new machinery, and to producing one set of products versus another.").

231
explains the United States Supreme Court's definition of "antitrust injury." Next, this article explains and applies microeconomics to anticompetitive conduct. Then, the article illustrates the clash between anticompetitive conduct, as defined within a microeconomic framework, and anticompetitive conduct defined by jurisprudential economics. This article also explains the term jurisprudential economics, which refers to the judicial application of economic theory within an analytical framework driven by stare decisis, as exemplified by Judge Easterbrook's recent opinion in Sanderson v. Culligan International Co., in which he postulates that product disparagement "is not actionable under the antitrust laws." Finally, this article concludes that the intentionally false disparagement of a rival's goods or services is injurious to competition and constitutes unlawful activity under either §1 (when in combination with others) or §2, or both, of the Sherman Antitrust Act.

2. See infra Part II.
3. See infra Part III.
4. See infra Part IV.
5. Sanderson v. Culligan Int'l Co., 415 F.3d 620 (7th Cir. 2005).
6. Id. at 624.
7. See infra Part V. Section 1 of the Sherman Act states:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
Section 2 states:
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
Id. § 2.
II. ANTITRUST INJURY

Antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful."8 It is regarded as synonymous with "injury to competition"9 and is frequently understood to result in curtailed output and higher prices.10 To understand "injury to competition," it is necessary to understand the fundamental underpinnings of microeconomics' theoretical model of competition. Although the term "antitrust injury" may be characterized as an action that results in curtailed output and higher prices, the following analysis demonstrates that the term is much richer. It illustrates that whenever market conduct impairs one or more of the requisite antecedent conditions of the perfectly competitive economic model,11 competition is thereby injured.

In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,12 the United States Supreme Court "christened"13 the following

11. See infra Parts III.A, D.
13. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 3.03, at 81 (2002) ("Although the Brunswick christened this requirement 'antitrust injury,' the concept is older. It is reflected in criticism of the lower court decision in Brunswick itself, as well as in some applications of the 'target area' test for standing." (footnote omitted)). See also id. § 3.03, at 81 n.15 ("While the antitrust injury test is not the same as the older 'target area' test, it developed largely through earlier target area cases. In those cases, plaintiffs were ruled ineligible for § 4 damages despite injury caused by the defendant's action, on the ground that they were outside the 'target area' meant to be protected by the antitrust laws. For example, in Reilbert [sic] v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), cert. denied, 411 U.S. 938 (1973), employees of a merged firm were denied damages when they were fired following reorganization resulting from an allegedly illegal merger. Despite the fact that the firings would not have occurred without the merger, the court held that the employee's interest was not one 'which the prohibition of [certain mergers] was clearly intended to protect. . . . If there has been a wrong, appellant cannot show that it results from the lessening of competition. Termination of employment will often occur whether a merger is legal or illegal.")
prima facie element of any antitrust damages claim: "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." The Supreme Court clarified that an antitrust plaintiff not only has the burden of establishing an injury-in-fact, but also of proving an antitrust injury—an injury to competition.

Approximately nine years after Brunswick, in Cargill, Inc. v. Monfort of Colorado, Inc., the Supreme Court reiterated that a private plaintiff seeking antitrust relief must show a threat of antitrust injury. Supplementing its holding in Brunswick, the Cargill Court provided that "a showing of loss or damage due merely to increased competition does not constitute such injury." By citing and restating its reasoning in Brunswick, the Court made clear that antitrust injury was now a permanent fixture upon the antitrust jurisprudential landscape: Brunswick holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The

Id. at 731. Accord Carlson Cos. v. Sperry & Hutchinson Co., 507 F.2d 959, 962 (8th Cir. 1974) ("Any acquisition is likely to create some injury. But it is only anti-competitive injury which § 7 was intended to eliminate ... ."); Billy Baxter v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971).

15. Id.; see also 1 AREEDA & HOVENKAMP, supra note 13, § 3.03, at 77.
17. Id. at 122.
18. Subsequent to the Court's decision in Brunswick and prior to its decision in Cargill, the Supreme Court confirmed the importance of showing antitrust injury under § 4 of the Clayton Act. In Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982), the Court found that "a health-plan subscriber suffered antitrust injury as a result of the plan's 'purposefully anticompetitive scheme' to reduce competition for psychotherapeutic services by reimbursing subscribers for services provided by psychiatrists but not for services provided by psychologists." Id. at 483. The Court further noted that antitrust injury "as analyzed in Brunswick, is one factor to be considered in determining the redressability of a particular form of injury under § 4." Id. at 483 n.19. Similarly, in Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983), the Court applied the Brunswick test. Id. at 539-40.
kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." The logic of Brunswick compels the conclusion that the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury.19

Brunswick and Cargill clearly established that an antitrust injury is a required element of proof in most, if not all, private federal antitrust lawsuits.20 Both define an antitrust injury as an injury of the type the antitrust laws were intended to prevent.21 Thus, since the Supreme Court had previously held that "the antitrust laws . . . were enacted for the protection of competition,"22 it logically follows that the "injury should reflect the anticompetitive effect"23 resulting from a violation of the antitrust laws.

III. MICROECONOMIC ANALYSIS OF CONDUCT INJURIOUS TO COMPETITION

A. The Perfectly Competitive Model—A Paradigm for Identifying Conduct Injurious to Competition

Instruction on the requisite antecedent conditions24 underlying the perfectly competitive model not only dramatically simplifies the task of understanding antitrust precedent, but also provides an analytical framework for identifying anticompetitive conduct independent of precedential constraint. Once the requisite antecedent conditions for competition to thrive are identified and

19. Cargill, Inc., 479 U.S. at 116-17 (citation omitted).
20. See 1 AREEDA & HOVENKAMP, supra note 13, §3.03, at 77-87.
21. See supra notes 12-14 and accompanying text.
23. Id. at 489.
24. The requisite antecedent conditions may also be referred to as fundamental assumptions or underlying assumptions.
understood, the jurist, the antitrust practitioner, and the economic analyst are in a superior position from which to analyze anticompetitive conduct that may trigger statutory liability.

The requisite antecedent conditions of the perfectly competitive model consist essentially of the following:

1. The existence of numerous buyers and sellers, each acting independently and rationally.
2. Each buyer and seller consumes or produces such a negligible amount of the total output that no one buyer or seller can influence price by the amount they either consume or produce.
3. There are no barriers to entry or exit with respect to consumer or producer markets.

25. See David C. Colander, Microeconomics 242 (5th ed. 2004) (outlining the "necessary conditions for perfect competition" to thrive).

26. See Edwin Mansfield & Gary Yohe, Microeconomics 356-57 (11th ed. 2004) ("The firm in a perfectly competitive market has so many rivals that competition becomes impersonal in the extreme. . . . A competitive firm faces so little of the market demand curve that its effective demand curve is horizontal at whatever price the market will bear. A competitive firm can only decide the output that it would like to supply to the market at a given price."); Pindyck & Rubinfeld, supra note 1, at 328 ("In a perfectly competitive market, the large number of sellers and buyers of a good ensures that no single seller or buyer can affect its price. The market forces of supply and demand determine price.").

27. See Mansfield & Yohe, supra note 26, at 426, 433-34 ("Unlike the case of monopolistic competition, the supply side of an oligopoly market is composed of a few firms. . . . Conditions in oligopolistic industries tend to promote collusion, since the number of firms is small and the firms recognize their interdependence. The advantages to the firms of collusion seem obvious; increased profits, decreased uncertainty, and a better opportunity to prevent other's entry."); Pindyck & Rubinfeld, supra note 1, at 430 ("In [competitive] markets, each firm could take price or market demand as given and largely ignore its competitors. In an oligopolistic market, however, a firm sets price or output based partly on strategic considerations regarding the behavior price or output based on strategic considerations regarding the behavior of its competitors.").

28. Steven E. Landsburg, Price Theory and Applications 634 (6th ed. 2005) ("[T]he economist assumes that people are rational."); see also infra note 40 (discussing rational choice as an equimarginal principle).

29. See Mansfield & Yohe, supra note 26, at 290 ("[P]erfect competition requires that each participant in the market, whether a buyer or a seller, be so small in relation to the entire market that he or she cannot affect the product's price."); Pindyck & Rubinfeld, supra note 1, at 252 ("Because each individual firm sells a sufficiently small proportion of total market output, its decisions have no impact on market price. . . . The assumption of price taking applies to consumers as well as firms.").

30. See Mansfield & Yohe, supra note 26, at 290 ("Perfect competition also
4. All market participants (i.e., all buyers and sellers) are fully informed of all relevant economic and technological data;\textsuperscript{31}

5. All products are homogeneous, or rather, constitute interchangeable substitutes for each other;\textsuperscript{32} and

6. The forces of supply and demand are free to determine the quantity of output in a relevant market, as well as to determine a market-clearing, competitive price with respect to the same.\textsuperscript{33}

Microeconomic theory teaches that if these conditions are met, the perfectly competitive model will create efficiencies in

requires that all resources be completely mobile. Each resource must, in other words, be able to enter or leave the market with ease and to switch from one use to another without fuss or bother."); PINDYCK & RUBINFELD, supra note 1, at 253 ("[F]ree entry (exit), means that there are no special costs that make it difficult for a new firm either to enter an industry and produce or to exit if it cannot make a profit. As a result, buyers can easily switch from one supplier to another, and suppliers can easily enter or exit a market.").

31. See MANSFIELD & YOHE, supra note 26, at 290-91 ("[P]erfect competition requires that consumers, firms, and resource owners have perfect knowledge of the relevant economic and technological data. Consumers must be aware of all prices. Laborers and owners of capital must be aware of how much their resources will bring in all possible uses. Firms must know the prices of all inputs and the characteristics of all relevant technologies. And in its purest sense, perfect competition requires that all of these economic decision-making units have an accurate knowledge of the past, the present, and the future."); PINDYCK & RUBINFELD, supra note 1, at 595 ("[W]e have assumed that consumers and producers have complete information about the economic variables that are relevant for the choices they face.").

32. See MANSFIELD & YOHE, supra note 26, at 405 (noting that in perfectly competitive situations the goods sold are "completely homogeneous from one seller to another"); PINDYCK & RUBINFELD, supra note 1, at 252-53 ("Price-taking behavior typically occurs in markets where firms produce identical, or nearly identical, products. When the products of all of the firms in a market are perfectly substitutable with one another—that is, when they are homogeneous—no firm can raise the price of its product above the price of other firms without losing most or all of its business.").

33. See MANSFIELD & YOHE, supra note 26, at 347-48 ("We have seen that a perfectly competitive economy maximizes the total net gain of consumers and producers. We then showed...how deadweight losses—reductions in economic efficiency—result if the government [obstructs the forces of supply and demand by imposing] a price ceiling[,]...a price floor[,]...a tariff, a quota, or an excise tax."); PINDYCK & RUBINFELD, supra note 1, at 55 n.2 ("The market mechanism is the tendency for supply and demand to equilibrate (i.e., for price to move to the market-clearing level), so that there is neither excess demand nor excess supply.").
consumption, production, and allocation. Further, it is through the creation of such efficiencies that a perfectly competitive market promises the greatest social opportunity for wealth creation. In antitrust parlance, it promises greater output at lower prices.

If the above conditions must be met for the perfectly competitive market to thrive, then, from a purely economic perspective, it follows that any market conduct or activity that impairs, threatens, suppresses, or jeopardizes any one or more of such underlying conditions must be discouraged as a matter of public policy. It is in this context that the underlying conditions provide a powerful analytical paradigm for identifying market conduct or activity that may likely constitute an unreasonable restraint of trade, an unfair method of competition, and a competitive injury.

B. Perfect Competition and Its Assumption of Rationality

Economic theory has long acknowledged that the given environment within which society functions is constrained by scarcity and that such scarcity is the fundamental source of social and political conflict. Given such scarcity, all societies are confronted with the problem of determining (1) what, and how much, to produce, (2) how to produce, and (3) for whom to produce. The field of microeconomics has demonstrated that the adoption of the perfectly competitive model provides a remarkable social mechanism with which to address the social problems generated by scarcity. The perfectly competitive model ultimately nurtures, if not ensures, efficiencies in the allocation, production, and distribution of scarce resources. Central to the perfectly competitive model is the assumption that all market participants are rational, with rational action being defined by the principle of utility-profit maximization.

34. See Pindyck & Rubinfeld, supra note 1, at 575-85, 590-91.
35. See id.
37. Id. at 5.
38. Id. at 9.
39. See supra note 33 and accompanying text.
40. See Colander, supra note 25, at 6-8, 239 (noting that "firms are profit-maximizing entrepreneurial firms"); id. at 181 ("The analysis of rational choice is the analysis of how individuals choose goods within their budget in order to maximize total utility, and how maximizing total utility can be accomplished by..."
that fails to maximize the utility or profit of an individual or firm is considered to be irrational economic behavior. Economic rationality necessarily requires that all costs and benefits be considered when exercising economic choices. Consequently, in order to act rationally, all market participants must be fully informed of all costs and benefits associated with their respective economic activities. Once informed of all activity costs and benefits, an economically rational actor will weigh his or her costs and benefits, and if the benefits exceed or equal the costs, he or she will engage in such activity. To the extent that all such costs and benefits are not considered (i.e., they are external to the rational decision-making process), non-utility/profit-maximizing choices will be made, resulting in unacceptable market inefficiencies.
C. Perfect Competition and Its Information Requirements

In short, rationality requires that market participants be fully informed of all relevant economic and technological data. In fact, as noted above, fully informed market participants are an essential operational condition of the perfectly competitive model. Without full information, distortions in output and price will result.

D. Product Disparagement and Its Nurturing and Injurious Effects

1. Effect on Access to Information

Product disparagement, if truthful and accurate, is welcome information in the competitive marketplace. To the extent that a disparagement practice might inform a consumer of the differences between two competing products, such a practice nurtures a vigorous competitive environment. As long as the disparagement practice contributes to the information available to market participants, it lubricates the operational efficiencies of the perfectly competitive model. The more information available to market participants, the more rational their choices; the more rational their choices, the more efficient the model is in determining a welfare-maximizing equilibrium.

Conversely, product disparagement that is false and inaccurate is an iniquity that strikes at the very heart of a competitive marketplace and cannot be tolerated. False information impairs rational action on both the demand side and the supply side of the market. For example, conduct falsely disparaging a rival or a rival's goods or services interferes with the consumer's ability to identify all benefits and/or costs associated with the purchase of the rival's goods or services. Most importantly, it distorts the environment within which market participants are expected to effectuate rational choice. In addition, the distorting effect of false and similar cases, the pursuit of private gain will not necessarily promote the social welfare.

44. See supra note 41 and accompanying text; PINDYCK & RUBINFELD, supra note 1, at 595 ("[W]e have assumed that consumers and producers have complete information about the economic variables that are relevant for the choices they face.").
inaccurate information often results in the underproduction of the disparaged product or service and/or the overproduction of the disparager's product or service. In short, the intentional false disparagement of rival goods and services creates disequilibrium with respect to output and price.

As one economist observed:

Real-world markets often involve deception, cheating, and inaccurate information. For example, car dealers know about defects in the cars they sell but do not always reveal those defects to consumers. Another example is when consumers who want health insurance do not reveal their health problems to the insurance company. In both cases, it is in the interest of the knowledgeable person not to reveal information that the other person or firm would need to know to make an informed decision about the transaction. Hence imperfect information can be a cause of market failure.  

Figure 1 illustrates the distortions that might result from deceptive and false disparagement practices. The demand function for Firm A's product is a statement of the relation between the quantity demanded, Q, and all factors that affect that quantity. These factors include the price of the good or service under analysis, the price of other goods, the number of buyers in the market, the relative income of consumers, consumer tastes and preferences, general marketplace expectations, and other possible influences.

To the extent the disparagement distorts the price of the product or negatively influences the taste and preferences of the consumer with respect to Firm A's product, the demand for

45. COLANDER, supra note 25, at 417; see also PINDYCK & RUBINFELD, supra note 1, at 596-97 ("Market failure can also occur when consumers lack information about the quality or nature of a product and so cannot make utility-maximizing purchasing decisions.").

46. See infra fig.1.

47. Other goods include, namely, compliments and substitutes.

48. MARK HIRSCHY, MANAGERIAL ECONOMICS 67-68 (10th ed. 2003) ("In functional form, a demand function may be expressed as Quantity of Product X Demanded = Qx = f (Price of X, Prices of Related Goods, Expectations of Price Changes, Consumer Incomes, Tastes and Preferences, Advertising Expenditures, and so on.").

49. Price distortions will necessarily result from the consumer's under-evaluation of the benefits provided by the product, or from the over-evaluation of the costs associated with the product.
the product or service may likely shift to the left, from $d$ to $d'$, curtailing output of Firm A's product or service from $Q^*$ to $Q'$.50

**Figure 1:**

![Economic Effects of False Disparagement](image)

Additionally, the disparagement practice may not only distort the market for the disparaged product, but it may also distort the market for product substitutes. For example, in Figure 2 below, Firm B, by and through its disparaging practices, may capture market share from Firm A, resulting in an increase in Firm B's output from $Q^*$ to $Q'$ as consumers substitute Firm B's products or services for Firm A's.

50. In this illustration and those that follow in this subsection, the disparagement conduct is exhibited in a highly competitive monopolistic market characterized and driven by product differentiation. See Pindyck & Rubinfeld, supra note 1, at 424 ("A monopolistically competitive market has two key characteristics: 1. Firms compete by selling differentiated products that are highly substitutable for one another but not perfect substitutes. ... 2. There is free entry and exit: it is relatively easy for new firms to enter the market with their own brands and for existing firms to leave if their products become unprofitable.").
Successful disparagement also results in a type of market failure commonly referred to in economics as adverse selection.\textsuperscript{51} Adverse selection occurs "when buyers and sellers have different amounts of information about the good for sale,"\textsuperscript{52} or "when products of different qualities are sold at a single price because buyers or sellers are not sufficiently informed to determine the true quality at the time of purchase."\textsuperscript{53} False disparagement practices restrain the rational action necessary for efficient exchange and, therefore, restrain trade. False disparagement vitiates the conditional environment within which competition thrives. Consequently, to the extent the false disparagement of a rival's products creates information asymmetries, it injures competition.

It merits noting that such practices have been held to constitute an unfair method of competition under Section 5 of the Federal Trade Commission Act.\textsuperscript{54} In Carter Products, Inc.

\textsuperscript{51} PINDYCK & RUBINFELD, supra note 1, at 598; see also COLANDER, supra note 25, at 417 ("Such a market failure is called an adverse selection problem—a problem that occurs when buyers and sellers have different amounts of information about the good for sale."); LANDSBURG, supra note 28, at 313-15 ("Adverse selection: The problem that arises when people know more about their own risk characteristics than others do.").

\textsuperscript{52} COLANDER, supra note 25, at 417.

\textsuperscript{53} PINDYCK & RUBINFELD, supra note 1, at 598.

\textsuperscript{54} Section 5(a)(1), the pertinent provision of the Federal Trade Commission Act, states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared..."
v. FTC, the Fifth Circuit Court of Appeals upheld the Commission's finding that the manufacturer of a popular aerosol shaving cream had engaged in unfair methods of competition when it disseminated information that was misleading, unfair, and damaging to a competing product. The court reasoned that

under Section 5(a) [of the Federal Trade Commission Act] the law is clear that an advertisement is illegal if it contains a false claim inducing the purchase of a product inferior to the product the consumer bargained for. The false claim may be a quality, an ingredient, or effectiveness the advertised product does not have. Or the advertisement may disparage competing products by attributing to them inferiorities they do not possess.

2. Effect on Other Conditions

A successful campaign of disparagement may also jeopardize and threaten other conditions necessary for competition to thrive. It can create entry barriers, lead to capricious market exit, create artificial market equilibrium, or even lead to oligopolies and monopolies. A firm injures competition if it falsely disparages its competitors and their respective products for the purpose of forcing them to exit the market, or to create a barrier to their entry or re-entry into the market. Such practices will certainly drive up prices by


55. Carter Prods., Inc. v. FTC, 323 F.2d 523 (5th Cir. 1963).
56. Id. at 530-31.
57. Id. at 528 (footnotes omitted) (emphasis added). Accord Perma-Maid Co. v. FTC, 121 F.2d 282, 284-85 (6th Cir. 1941) (wherein manufacturers of steel cookware were enjoined from making "representations that food prepared or kept in aluminum utensils was detrimental to health and caused formation of poisons and that the consumption of such food would cause ulcers, cancers, cancerous growths and other ailments, afflictions and diseases"). But see FED. TRADE COMM'N, STATEMENT OF POLICY REGARDING COMPARATIVE ADVERTISING (Aug. 13, 1979), available at http://www.ftc.gov/bcp/policystmt/ad-compare.html (last visited March 7, 2006) ("Comparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchase decisions. Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace. . . . [However, s]ome industry codes which prohibit practices such as 'disparagement,' 'disparagement of competitors,' 'improper disparagement,' 'unfairly attacking,' 'discrediting,' may operate as a restriction on comparative advertising. The Commission has previously held that disparaging advertising is permitted so long as it is truthful and not deceptive.").
curtailing output, as demonstrated in Figure 3 below.

**Figure 3:**

![Welfare Effects of Successful Disparagement Campaign](image)

The market supply function, $S$, for a given product is a statement of the relation between the quantity supplied and all factors affecting that quantity. Such factors include the price of the good in question, the price of a supplier's related goods, the number of sellers producing the good, input prices, the current state of technology, and general market expectations. As rival firms are driven from the market as a result of false disparagement, the market supply curve, $S$, shifts to $S'$, thereby resulting in a curtailment of output ($Q'$ decreases to $Q$) and an increase in price ($P'$ increases to $P$). As a result, there is a deadweight loss to society.

**IV. MICROECONOMICS vs. JURISPRUDENTIAL ECONOMICS**

**A. Antitrust Analysis and the Tension Between Microeconomics and Jurisprudential Economics**

The artful application of antitrust law generally depends on the jurist's ability to synthesize an historical morass of

58. HIRSCHET, supra note 48, at 74 ("In functional form, a supply function can be expressed as Quantity of Product $X$ Supplied = $Q = f$(Price of $X$, Prices of Related Goods, Current State of Technology, Input Prices, Weather, and so on))."

59. See COLANDER, supra note 25, at 272 (defining deadweight loss as "the net cost to society from the existence of monopoly").
evolving common-law doctrine, as well as his or her ability to access, understand, and relate fundamental microeconomic theory. The integration of economics is essential in the study and application of antitrust law. Such integration, however, is often problematic given the breadth and depth of both the legal and economics fields, as well as their respective institutional constraints. Although the statutory origins of U.S. antitrust law include a political component, antitrust scholars, academicians, and practitioners tend to orient their analysis exclusively upon economic theory. While economists find clarity in their theories and models, the legal profession's application of such models is often colored with the law's institutional biases, driven by the value it attaches to stare decisis. Consequently, the clarity of microeconomics is often compromised, contorted, and even ignored by jurisprudential economics in an attempt to reconcile economic theory with the factual precedent of past antitrust decisions.


    Congress and the American public viewed the great trusts in light of a traditional conception of the connection between individual liberty and economic organization. Liberty was the freedom to pursue one's self-defined goals to the greatest extent consistent with the liberty of others. Trusts threatened this liberty in two ways. First, they possessed the economic power to exclude people from opportunities to seek material success through competition in the market. Second, the trusts' immense wealth provided the ability to corrupt the legislative process so as to benefit their owners at the expense of the rest of society. Liberty therefore depended on the decentralization of economic power; the possibility that concentration may have been more efficient in some circumstances could not justify its evils.

    Id. at 1224.

61. Black's Law Dictionary defines stare decisis as “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

It merits observing that the Supreme Court's compulsion to conclude that the injury complained of in Cargill did not constitute a threat of an antitrust injury was driven by its precedent established in Brunswick. See supra note 19 and accompanying text. And yet, regardless of the factual and legal precedent of Brunswick, the economist would have reached the same conclusion in Cargill with the aid of microeconomic theory and its models.
For example, in the recently decided case *Sanderson v. Culligan International Co.*, Judge Frank Easterbrook affirmed the dismissal of the plaintiff’s antitrust claims, holding that neither § 1 nor § 2 of the Sherman Act reached the defendant’s alleged false and disparaging statements made during a trade show about plaintiff’s products. In the Chicago School tradition, Judge Easterbrook, citing precedent, stated:

Antitrust law condemns practices that drive up prices by curtailing output. False statements about a rival’s goods do not curtail output in either the short run or the long run. They just set the stage for competition in a different venue: the advertising market.

Indeed, microeconomic theory maintains that conduct that artificially drives up prices or curtails output obstructs the efficiencies emanating from a competitive market structure. Judge Easterbrook’s assertion that “false statements about a rival’s goods” do not create similar inefficiencies is simply incorrect and illustrates the enervated nature of jurisprudential economics. As demonstrated above, microeconomic theory abhors false, misleading, and incomplete information because it obstructs the operation of the perfectly competitive model and can result in inefficiencies characterized by reduced demand, curtailed output, higher prices, and economic waste. By making such an absolute statement, Judge Easterbrook compromises and contorts, if not ignores, requisite core economic principles in an attempt to reconcile their application with historical, factual precedent.

---

63. *Id.* at 622.
64. See Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213, 215 (1985) (“The Chicago School model of antitrust policy dictates that allocative efficiency as defined by the market should be the only goal of the antitrust laws.”).
65. *Id.* at 623 (citations omitted).
66. *Pindyck & Rubinfeld, supra* note 1, at 347 (“Because monopoly power results in higher prices and lower quantities produced, we would expect it to make consumers worse off and the firm better off.”).
67. In rendering his opinion, Judge Easterbrook referenced his previous opinion in *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d. 397 (7th Cir. 1989), involving a supposed commercial falsehood, wherein he explicitly asserted that “[i]f such statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but...
B. Sanderson v. Culligan International Co.—Judge Easterbrook’s Flawed Jurisprudential Economics

Charles Sanderson, an inventor and manufacturer of a number of magnetic devices used to improve certain water qualities, filed suit against Indiana Soft Water Services, Inc. and Culligan International for allegedly publishing and distributing false information that disparaged his products. Sanderson asserted claims under both the Lanham Act and the Sherman Antitrust Act. The trial court dismissed his antitrust claims and granted summary judgment with respect to his Lanham Act claims. At the core of his complaint, Sanderson “allege[d] a widespread conspiracy in the worldwide market beginning in the 1970s ‘to discredit and malign magnetic water treatments.’” The Water Quality Association, a trade association, was alleged to be at the center of this conspiracy. Sanderson specifically alleged that the Water Quality Association conspired with others to restrain trade by means including:

- Improper use of various studies and reports derogatory to magnetic water treatment and devices, including interstate and international publication and sale of the studies with knowledge that the information contained therein was not accurate, and acting with reckless disregard of the truth or accuracy of the conclusions reached in the studies.
- Distribution of negative position papers and policy statements regarding magnetic water treatment.
- Banning the display of magnetic treatment devices at the trade shows sponsored by Water Quality Association.
- The instigation of investigations by various public more speech—the marketplace of ideas.”

---

68. Sanderson v. Ind. Soft Water Servs., Inc., No. IP00-0459-CHK, 2004 WL 1784755, at *1 (S.D. Ind. July 23, 2004)). It merits noting that after the parties’ pre-trial conference, Sanderson stipulated to the dismissal of all claims against Indiana Soft Water Services, leaving Culligan International as the only defendant. Id. at 1 n.1.

69. Id.; see also Sanderson v. Culligan Int’l Co., 415 F.3d 620, 621-22 (7th Cir. 2005).


71. Id.
officials, including various state attorneys general, the Federal Trade Commission, and the Better Business Bureau, with such investigations being prompted by an improper motive, to-wit, the restraint of trade and harassment of a competitor.

Placement of letters and other articles of misinformation in the trade press.

Direct contact with customers and potential customers of Plaintiff to discredit Plaintiff’s products and processes.

Appearances at trade shows and other public forums to distribute information negative to magnetic water treatment.\(^7\)

Applying conventional microeconomic theory to the facts in Sanderson, if Culligan and others, namely the Water Quality Association, disseminated truthful and accurate information about Sanderson’s product, such conduct accommodates competition. Competitors who disseminate accurate and truthful information should be applauded for being exemplar economic citizens. On the other hand, if Culligan combined with others for the express purpose of disseminating false and inaccurate information, such conduct is antithetical to the perfectly competitive model. Such conduct would be anticompetitive and should be condemned as such.

Unfortunately, the parties will never know whether such conduct was nurturing or injurious to the fundamental tenets of the perfectly competitive model. The district court dismissed Sanderson’s case for failing to state a claim upon which relief could be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).\(^73\) According to the district court, Sanderson’s antitrust claim was built upon allegations that the defendants and others engaged in a deliberate campaign to falsely disparage Sanderson’s product.\(^74\) Constrained by precedent,\(^75\) the district court ruled that “Sanderson’s antitrust claim fails at the pleading stage for failure to

---

72. Id. (citing Sanderson’s First Amended Complaint at ¶ 40).
73. Id.
74. Id. at *2.
identify any conduct that could be actionable as a restraint of trade.\textsuperscript{76} In reaching its summary conclusion, the district court quoted Judge Easterbrook in \textit{Schachar v. American Academy of Ophthalmology, Inc.}: “Warfare among suppliers and their different products is competition. Antitrust law does not compel your competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust law.”\textsuperscript{77} According to the district court, \textit{Schachar} made it clear that the antitrust laws are not a source of relief for Sanderson’s claim that the defendants were making deliberately false or misleading statements about his products.\textsuperscript{78} The district court held that “joint criticism,” even if proven to be false, is not enough to establish an antitrust violation.\textsuperscript{79}

C. Judge Easterbrook’s Analysis

On appeal, Judge Easterbrook reiterated the ill-conceived precedential rule of law that the Sherman Act does not reach conduct consisting of the intentional false disparagement of a rival’s goods.\textsuperscript{80} According to Easterbrook, “[a]ntitrust law condemns practices that drive up prices by curtailing output. False statements about a rival’s goods do not curtail output in

\textsuperscript{76} \textit{Brugman}, 2001 WL 699876, at *2-3 (citing \textit{Schachar}, 870 F.2d at 397) ("[T]he Seventh Circuit explained the governing principles here. In \textit{Schachar}, several ophthalmologists sued a professional association and some of its members alleging a conspiracy to restrain trade by labeling a surgical technique (radial keratotomy) as 'experimental,' with the effect of depressing demand for plaintiffs' services in providing the surgery. The Seventh Circuit affirmed a jury verdict in favor of the defendants, but its opinion stated in no uncertain terms that the case should never have been allowed to go to trial because there was no evidence of any restraint of trade. . . . Similarly here, Sanderson has not alleged that defendants imposed any restraints of trade, such as boycotts or other coercive measures, that prevented customers or others from dealing with him or prevented him from selling his products to any willing buyer.").

\textsuperscript{77} \textit{Id.} at *3. Accord \textit{Schachar}, 870 F.2d at 399; \textit{Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.}, 784 F.2d 1325, 1338-39 (7th Cir. 1986) ("Competition is a ruthless process. A firm that reduces costs and expands sales injures rivals—sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm from rival's wounds. The antitrust laws are for the benefit of competition, not competitors.").

\textsuperscript{78} \textit{Brugman}, 2001 WL 699876, at *3.

\textsuperscript{79} \textit{Id.} (interpreting Judge Easterbrook's holding in \textit{Schachar}).

\textsuperscript{80} See Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623-24 (7th Cir. 2005).
either the short or the long run. They just set the stage for
competition in a different venue: the advertising market.”

Judge Easterbrook is right to suggest that competition is
“warfare,” and therefore “criticism,” or rather “product
disparagement,” alone may constitute a proper and welcomed
method of competitive engagement. Product disparagement,
if true, provides important information to market
participants necessary for competition to thrive. As stated
above, one of the critical assumptions of the perfectly
competitive model is that “[a]ll market participants, that is
all buyers and sellers, are fully informed of all relevant
economic and technological data.” Information is sacrosanct
to competition. Access to information on both the demand
and supply side of the equilibrium equation fosters and
nurtures vigorous competition. Without accurate
information, rationality is impaired and economic waste
results.

Judge Easterbrook is wrong, however, to suggest that the
intentional, false disparagement of a rival’s products cannot
rise to the level of a Sherman Act violation. While antitrust
law does not compel a competitor to praise a rival’s product or
sponsor its work, antitrust law does compel a competitor to
refrain from anticompetitive conduct that either restrains or
attempts to restrain trade, or in fact, may effectuate a
monopoly. The antitrust law is the statutory guardian angel
of the perfectly competitive model. To reiterate, “antitrust
injury” is synonymous with “injury to competition.” False
information impairs a fundamental operational condition of
the perfectly competitive model and, therefore, is injurious to
competition. Intentional dissemination of false information
about a rival’s product restrains trade in that it restrains
rational action in the marketplace.

Additionally, a conspiracy engaged in the false
disparagement of a rival’s product hinders product
substitution. It may not only cause firms to exit the

81. Id. at 623 (citations omitted).
82. MANSFIELD & YOHE, supra note 26, at 290-91; see also supra note 31 and
accompanying text.
83. See discussion supra Part III.B.
84. See Culligan, 415 F.3d at 623 (quoting Schachar v. Am. Acad. of
Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989)).
85. See supra notes 8-10 and accompanying text.
marketplace irrationally, but may also create barriers to entry and re-entry. To the extent that such intentional conduct forces suppliers to leave the marketplace, economic theory demonstrates that the supply function is apt to shift to the left, thereby curtailing output and increasing price.\textsuperscript{6} Moreover, the antitrust implications of such conduct are accentuated in an already concentrated market, or a dominant firm market. When such conduct forces marketplace exit, it nurtures an environment susceptible to single-firm market power with respect to output and price.

D. \textit{Intentional False Disparagement Is Per Se Unreasonable}

Information is an essential and necessary condition of the perfectly competitive market. Conduct that intentionally skews, taints, twists, distorts, biases, or contorts information should perhaps be relegated per se unlawful under the Sherman Act. After all, the Supreme Court has held price-fixing to be per se unlawful, regardless of whether the price ultimately fixed might be reasonable.\textsuperscript{87} As Justice Douglas observed in \textit{United States v. Socony-Vacuum Oil Co.}:\textsuperscript{88}

\textit{For over forty years [the Supreme Court] has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called...}

\textsuperscript{86} See supra fig.3.  
\textsuperscript{87} See United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927) ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable though the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.").  
\textsuperscript{88} United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. 89

As with price fixing, combinations, agreements, or conspiracies to engage in the intentional, false disparagement of a rival firm's products or services "may or may not be aimed at complete elimination of ... competition,"90 however, "[w]hatever economic justification [such] particular . . . agreements may be thought to have, the law [should] not permit an inquiry into [its] reasonableness."91 Given the fundamental importance of truthful and accurate information in the marketplace, such agreements should "all be banned because of their actual threat to the central nervous system of the economy."92

Judge Easterbrook's analysis in Sanderson v. Culligan International Co. exemplifies what this article refers to as jurisprudential economics. Constrained by precedent largely established himself, Judge Easterbrook's analysis contorts and twists fundamental microeconomic principles to find a result consistent with that precedent. Although he might be correct to state that "[t]here can be no restraint of trade without a restraint,"93 he is short-sighted to conclude that the intentional dissemination of false information about a rival's product does not constitute a restraint of trade. Such conduct restrains the autonomous forces of supply and demand, and is therefore injurious to competition. Similarly, it restrains rational action necessary for efficient trade and is therefore a restraint of trade.

V. CONCLUSION

Product disparagement, depending on its motivating origins, can either nurture or spoil a competitive environment. Disparagement motivated by a rivalry grounded in truthful, accurate information is welcome competitive conduct and should be encouraged as a matter of public policy. To the extent such disparagement reveals

89. Id. at 218.
91. Id. (citing Socony-Vacuum, 310 U.S. at 225-26 n.59).
92. Id. (citing Socony-Vacuum, 310 U.S. at 225-26 n.59).
93. Sanderson v. Culligan Int'l Co., 415 F.3d 620, 624 (7th Cir. 2005).
accurate distinctions with respect to product characteristics and qualities, it cultivates a vigorous, competitive environment. However, product disparagement fueled by a rivalry driven by deception and misinformation is unacceptable and should be discouraged as a matter of public policy. The dissemination of false, deceptive, and inaccurate information desecrates the hallowed efficiencies for which competition is so highly touted. Contrary to the flawed jurisprudential economics applied by Judge Easterbrook in Sanderson v. Culligan International Co., microeconomics instructs that fully informed market participants are a required condition of the perfectly competitive model. If the antitrust laws are intended to protect competition from conduct that is ultimately injurious to its operational foundation, then such laws are relevant and applicable in situations involving the intentional false disparagement of a rival's products. Intentional false disparagement of a rival's product is an unacceptable form of economic warfare, and Judge Easterbrook is amiss to suggest otherwise. Such conduct imperils the operational efficiencies of perfect competition and is proscribed as a matter of microeconomic theory. Accordingly, the Seventh Circuit's summary conclusion that §§ 1 and 2 of the Sherman Act fail to reach such conduct is economically ill-conceived. It defies conventionally accepted economic constructs and, most importantly, it essentially legislates a statutory exception with respect to conduct that threatens the very heart of the perfectly competitive model.