Currents

Tanking Up

On April 11, 1985, while testifying in Florida before the Senate Commerce Committee, a vice president of a major oil company was asked why his company encouraged drunk driving. When he vehemently denied the claim, one of the senators asked, "Then why does your company sell beer and wine at its gas station convenience stores?" The obvious implication of the question: Selling beer and wine at the same location as gasoline leads to more drunk driving. Apparently based on this logic, Florida, along with Michigan, Indiana, Louisiana, Ohio and California, is considering prohibiting gas station convenience stores from obtaining licenses to sell packaged beer and wine. Seventy-two communities in California have already approved such prohibitions.

Is a ban on common-site sales of alcohol and gasoline an effective means of controlling drunk driving? Ongoing research by economists Patrick McCarthy and John Umbeck of Purdue University suggests that it may not be. Based on a comprehensive analysis of drunk driving in California over the past five years, they find that prohibitions of beer and wine sales at gas station convenience stores have led to no reduction in the incidence of drunk driving. In fact, there may have been a slight increase in drunk driving. Given the intense legislative interest in reducing drunk driving, the logic of their finding is worth considering in more detail.

Proposals to prohibit common-site sales are premised on the notion that if alcohol is less convenient to obtain, less of it will be consumed. This is undoubtedly true. If packaged beer and wine are made less convenient to obtain, they become relatively more costly; as with any other good, the increase in cost should reduce consumption. But this may or may not translate into less *drunk driving*. Conceivably, people could drink less in total, while drinking more on the road or while doing more driving while under the influence.

The problem is that increasing the time cost of packaged wine and beer is likely to lead consumers to buy less alcohol, but at less convenient, more distant locations. By prohibiting consumers from purchasing beer or wine at gas station convenience stores—which are typically located near residential areas, large apartment complexes, or university dormitories—consumers must drive elsewhere to get those beverages—presumably further away and perhaps to relatively higher traffic, nonresidential areas. At a minimum, consumers have to make an extra trip when shopping for gas and wine or beer. With packaged beer and wine made relatively less convenient than alcohol sold by the drink, there may also be a substitution of drinking in bars—usually requiring a drive home—for drinking at home. Either way there is likely to be more time on the road to drink and drive, and more time on the road intoxicated. The net effect on drunk driving depends on the extent to which these other factors offset the effect of raising the cost of drinking.

To test the effect of banning common-site sales, McCarthy and Umbeck analyzed each of the more than 400 cities in California, comparing drunk driving accident rates in cities that had banned common-site sales (72 as of October 1, 1986) with those that had not. They attempted to control for differences that could arise for reasons other than the presence or absence of the ban, such as traffic congestion, road conditions,

Note to Our Readers:

Regulation is pleased to announce that it is rejoining the American Enterprise Institute for Public Policy Research starting with the January/February 1987 issue. The move comes as our editor-in-chief and publisher, Christopher C. DeMuth, assumes the presidency of AEI. Please address all correspondence to *Regulation,* 1150 17th Street, N.W., Washington, D.C. 20036, or call 202/862-5800.

the number and type of alcohol establishments, and the likelihood of punishment (fine, jail sentence, or participation in a rehabilitation program) in the event of a drunk driving arrest. McCarthy and Umbeck had data on every traffic accident reported from January 1981 through December 1985.

Using standard regression analysis, McCarthy and Umbeck tested for the effects of common-site sales on the number of alcohol related accidents per capita. Their finding: Bans on the licensing of beer and wine sales at gas station convenience stores did not reduce the incidence of drunk driving accidents; to the contrary, they appear to have increased the incidence. In virtually every test, cities with bans were found to have experienced an increase in the incidence of alcohol related accidents after imposing the ban. Although this effect is very small, it is statistically significant.

This research, part of a larger study of drunk driving laws underway at Purdue University, is consistent with the view that the key to reducing drunk driving is to raise the cost of *drinking and driving*. This can be accomplished most directly by increasing the probability of arrest and conviction, or toughening the penalties.

Surely the final word is not yet in on the efficacy of prohibitions on common-site sales of alcohol and gas; researchers will inevitably quibble over the details of this empirical work. But the insight that merely raising the convenience costs of obtaining alcoholic beverages will prompt some increase in driving to obtain such beverages, with ambiguous effects on the incidence of drunk driving, is one with potential application to other areas of drinking-and-driving policy, such as increasing minimum legal drinking ages in the states.

Jittery Play Spoils Legal Super Bowl

On December 17, 1986, the United States Football League (USFL) came to an end—at least for the 1987 season, but probably forever—as U.S. District Court Judge Peter Leisure ruled against granting the league injunctive relief in its antitrust suit against the National Football League (NFL). The previous August the jury had found the NFL violated the Sherman Act by monopolizing the "market for professional football," but assessed damages of only one dollar. Without a big damage award or court injunction, the USFL is probably doomed.

The USFL had complained that the NFL engaged in "predatory" business tactics and erected "barriers to entry" against the new professional football league. The predatory acts were said to include co-opting some USFL owners, engaging in bargaining tactics aimed at raising USFL players' salaries, disparaging the USFL, and undermining the USFL's Oakland Invaders franchise by fanning the hopes of Oakland fans that the NFL's Raiders franchise would be recovered from Los Angeles.

The most important alleged entry barriers involved broadcasting and stadiums. According to the USFL, the NFL blocked new entry by signing broadcasting contracts with all three television networks and rotating among them the right to televise the Super Bowl. Each contract specified the number of NFL games a network would broadcast, and the number of commercial minutes that could be sold during each telecast. The USFL argued this effectively restricted the three networks' collective output of football programming and prevented the amount of professional football advertising from being competitively determined. Since any increase in the amount of professional football televised (and hence the amount of advertising sold) would lower revenues from NFL telecasts, thereby reducing the value of the networks' NFL contracts, the maximum a network would pay to televise a new league was its net additional revenues minus the reduced value of the NFL contract. This "dilution effect" was said to give the networks systematic incentives against telecasting a new league. The rotation of Super Bowl games among networks, the USFL argued, was used to reward the individual networks for cooperating with the NFL's regular-season broadcasting scheme, rather than awarding each year's Bowl to the highest bidder.

The other key entry barrier was said to arise from exclusive leases between NFL clubs and stadium owners—usually local governmental authorities. The argument here was that an exclusive lease is unnecessary to protect the playing field—its alleged rational—and hence that the leases were unreasonable restraints on access to "essential facilities" (the antitrust term for resources in very scarce supply).

The NFL denied these practices were anti-

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"First, we had to wear ugly uniforms because the NFL had a monopoly on all the good colors. Then they made us play in dinky little stadiums. And finally they prevented us from exercising our God-given right to obtain a lucrative TV contract."

competitive—noting, for example, that the "dilution effect" existed only during the term of a broadcasting contract, and could be taken account of when contracts were renegotiated—and went on to argue that the practices were largely exempt from antitrust attack even if anticompetitive. The league argued, for example, that because stadiums are owned by local governments, actions to obtain exclusive lease arrangements are constitutionally protected, arising from the right of club owners to petition government for favorable policies. The district court agreed with this argument and excluded the stadium charges from the case.

The NFL also claimed broad antitrust exemptions under the Sports Broadcasting Act of 1961, which authorizes professional sports teams to negotiate national television rights through their leagues. Both sides agreed the NFL could negotiate league-wide contracts, but disagreed whether it could contract with all networks, and whether the Act was a blanket exemption of all television-related activities. Here the court sided with the USFL.

Finally, the NFL argued that all of its league-wide business arrangements were shielded from antitrust liability by the AFL-NFL Merger Act of 1966, which permitted, free of customary antitrust review, the merger that created the NFL. The USFL claimed this exemption applied only to the merger, not to the league's subsequent activities. The court held, with some ambiguity, that "the consequences of these acts of Congress—the NFL's single league structure and *its joint operations*—are not antitrust violations" (emphasis added).

After winning a "monopolization" verdict but no real money from the jury, the USFL asked the court to provide it with injunctive relief to cure the monopolization. It first asked the court to require the NFL's two divisions, the American Conference and National Conference, to operate separately except for arranging the Super Bowl. This would have required each conference to negotiate independently for television contracts, players, and franchise locations; the NFL would have been limited to establishing common playing rules and codes of player behavior, and arranging and marketing the Super Bowl (by competitive bidding). Alternatively, the USFL proposed that the NFL be permitted to operate as a single league, but limited to being televised by

only two television networks and obliged to leave one free television slot on Sundays for competitive leagues. A third USFL alternative was that future NFL expansion be at prices established by the court in order to strip new franchises of their monopoly value.

Judge Leisure rejected these proposals for two reasons. First, nearly all NFL conduct was either exempt from antitrust liability or had been found lawful by the jury. (The jury had found the NFL monopolized the "market for professional football," but found no monopolization of a separate market for "national television of professional football.") Second, the USFL had failed to prove the NFL's monopoly of the "market for professional football" would persist. The USFL's case for its proposed injunctions relied on economic arguments about the merits of eliminating scarcities created by the NFL (scarcities of teams, of jobs for football players, of the amount of television advertising, of the number of televised games), supplemented by testimony from mayors, state attorney generals, and players' associations supporting the USFL's proposals. The court rejected these arguments on grounds that a private antitrust plaintiff is not entitled to relief on the basis of public benefits if its own interests conflict with the public benefits. In this instance, the interests of cities which could support a team but do not have one, of fans and advertisers who would like more professional football, and of football players who would like more professional football jobs, were all found to conflict with USFL interests—if a court-regulated NFL in fact served these interests, the USFL would have an even tougher time getting a foothold.

Whichever league one was rooting for, the conduct and calls in *USFL* v. *NFL* were a letdown. Although a rich body of analysis has grown up in recent years on the economics of "predatory" business practices and the economics of sports leagues, neither league presented much useful economic theory or evidence at the case's jury trial. Largely for this reason, the jury returned an incoherent verdict. There is no such thing as a "market for professional football." A market is a group of sellers and buyers of fairly substitutable goods or services, and the football business includes several such markets—teams (or leagues of teams) on one side, and players, stadiums, spectators, and broadcasters on the other. In the absence of a reasonably clear specification of the market involved, it is impossible to know what it was the jury thought the NFL had monopolized (except that it was not the sale of broadcasting rights to television networks, where the jury found no monopoly). Probably the jurors were just agreeing that the NFL was the sole professional football league when the USFL came along—a fact that is irrelevant insofar as antitrust policy is concerned.

The short shrift is given the economic substance of the USFL's charges was in turn due to the broad but uncertain antitrust exemptions Congress has lavished on the NFL over the years. When Congress awards such exemptions, there is a rather strong implication that the conduct involved would indeed run afoul of antitrust policy but for the exemptions. The precise scope of an exemption will therefore be strenuously litigated. So, one can appreciate the NFL's legal strategy of resting heavily on its exemptions rather than facing up to the economic merits of the USFL's charges. The result, however, was a decision of no use at all as a guide to permissible activities in other sports leagues (such as tennis, hockey, baseball, and basketball) and in other businesses. And the essential purpose of civil litigation is to provide such guidance for others; if the purpose was merely to settle the dispute at hand, private arbitration would be sufficient. Here as in other recent cases, special exemptions prompted by vague or perverse antitrust doctrines interfered with the progressive judicial reform of the doctrines themselves.

For all of these legal miscues, the *USFL* v. *NFL* trial (which is now on appeal) was a helpful development in one respect: it is further evidence of the increasing skepticism of judges and juries toward antitrust claims brought by business firms against their competitors. The jury's witty damage award may be taken as suggesting that if the NFL is a monopolist, this is no cause for complaint by a new entrant—which is exactly right as an economic matter. And Judge Leisure's injunction decision was lucid in rejecting judicial relief which, according to the USFL's liability theory, should have benefited the general public but hurt the USFL's own prospects. Antitrust scholars, the Department of Justice, and the Supreme Court have been growing increasingly hostile to the use of antitrust as a tool of business rivalry. *USFL* v. *NFL* suggests that lower courts and citizens are getting the point as well.

Regulating *Regulation*

Most folks subscribe to *Regulation* by filling out one of our little business reply cards and mailing it in with their check. To some, however, this wise but simple step is a federal case. When the Food and Drug Administration subscribed to *Regulation*, we received a four-page requisition form from DHHS/PHS/ASC/DIV. OF MATERIAL MGMT. It listed a plethora of rules and regulations we must comply with if we want the FDA's money. For example, *Regulation* is strictly prohibited from saying that it is endorsed by the federal government. Drat! There goes our new advertising campaign—just when it first occurred to us.

Do Campaign Finance Laws Protect Voters or Incumbents?

The record level of spending on the recent midterm elections has galvanized interest in the reform of federal campaign expenditure laws. Prominent leaders in both parties, grass-roots citizens' groups, and even some political action committees have expressed outrage with the current system. A recent poll of voters in South Dakota (following a particularly vitriolic Senate race) found that 88 percent favored campaign spending limits. Reformers wish to create a "level playing field" to make political competition "fair." But the most popular proposals—including a bill sponsored by Senator David Boren (D-Ok), and a ballot initiative recently approved by Arizona voters—would limit individual and PAC contributions in such a way as to shield incumbents from potential challengers.

In a recent paper in *Public Choice* and a forthcoming article in the *Journal of Public Economics*, John R. Lott, Jr. of the Hoover Institution and Montana State University finds that past political advertising by incumbent politicians creates "entry barriers" in political markets. Incumbents have advertised in previous elections and have had free media exposure and franking privileges while in office. These "investments," Lott argues, constitute barriers to entry in subsequent elections—they protect incumbents from potentially more efficient newcomers. Unless a challenger is free to spend substantially more money than the incumbent, he may have little chance of winning even if he is more competent than the incumbent.

Lott provides econometric evidence that an increase in an incumbent's campaign expenditures discourages future challengers. He finds that each dollar increase in an incumbent's spending in the current campaign reduces the opponent's spending in the next campaign by 15 cents. This finding is based on an econometric analysis of the relation between campaign spending by challengers for U.S. House seats in 1978 and by incumbents in the previous elections.

Viewing advertising as a barrier to entry may seem to contradict prevailing thought on how competitive markets operate. For example, it is rarely argued (anymore) that government should intervene in private industries to give new firms a "fair chance" simply because existing firms have already advertised and invested in customer relations. There was a time when advertising restrictions were justified on grounds of eliminating barriers to entry, but most economists today regard advertising as promoting rather than inhibiting new entry.

But, as Lott argues, there may be a fundamental difference between politicians and firms. When a firm is inefficient and there are entrepreneurs who can run it better, these entrepreneurs can offer to take over the firm—including the present good-will value of past investments in reputation. An offer which exceeds the value of the business as currently run is likely to be accepted, with ownership changing hands.

In contrast, if a popular politician becomes less effective—perhaps because of age or the progressive accommodation of interests hostile to those of his constituents—another politician cannot buy his name and reputation. Transfers of political brand name occur only infrequently and incompletely (as when a popular politician endorses a candidate, or when children of a popular politician run for office), and almost exclusively within parties. *Competing* politicians are incapable of "purchasing" each other's market reputation, so the political market lacks one important mechanism for replacing established agents whose ineffectiveness is better known to other producers than to consumers. Effective competition depends more heavily on independent entry by new challengers.

On the basis of this analysis, Lott concludes that uniform limits on campaign spending by incumbents and challengers could undermine rather than enhance political competition. In the short term, such limits lower and equalize current expenditures without doing anything to affect past investments by incumbents. In so doing, they bolster the incumbent's advantage. While the incumbent's advantage might be reduced in the long term, it is unlikely to be wholly eliminated. According to Lott, if campaign spending limits are to be used, higher limits should apply to challengers than incumbents.

This research does not address the broader issue of what, if any, campaign finance regulation might be beneficial. What it suggests is simply that proposals to tighten campaign spending laws in the name of "fairness" may reduce the fairness of political competition.