How blind faith in antitrust has led to confusing and arbitrary enforcement

THE Antitrust Religion

EDWIN S. ROCKEFELLER

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Introduction

We aspire to a government of laws, not of men. The rule of law implies ascertainable, coherent rules for guiding and judging behavior. It is the thesis of this book that antitrust law is not consistent with our aspiration for a rule of law. There is no such thing as antitrust law. Antitrust is a religion. Antitrust enforcement is arbitrary, political regulation of commercial activity, not enforcement of a coherent set of rules adopted by Congress.

Thurman Arnold, assistant attorney general for antitrust in the New Deal, described the origin of and need for the religion of antitrust in the following manner:

> Historians now point out that Theodore Roosevelt never accomplished anything with his trust busting. Of course he didn't. The crusade was not a practical one. It was part of a moral conflict and no preacher ever succeeded in abolishing any form of sin. Had there been no conflict—had society been able to operate in an era of growing specialization without these organizations—it would have been easy enough to kill them by practical means. A few well-directed provisions putting a discriminatory tax on large organizations would have done the trick, provided some other form of organization were growing at the same time to fill the practical need. Since the organizations were demanded, attempts to stop their growth necessarily became purely ceremonial. . . . The actual result of the antitrust laws was to promote the growth of great industrial organizations by deflecting the attack on them into purely moral and ceremonial channels.[1]

This book's thesis will be developed first by defining antitrust as a religious faith with an existence independent of the antitrust statutes. Chapter 2 describes the development of a cult of professional followers who serve as a priesthood to carry out the ceremonial function of antitrust. Chapter 3 contains a brief history of attempts at reform. Chapter 4 discusses the central element of antitrust faith—''market power''—an imaginary, hypothetical concept borrowed from economic theory and used by the antitrust community as though it describes something that actually exists when, in fact, the concept of market power is based on false assumptions about a future that cannot be known. Chapters 5 through 8 describe activities attacking supposed evils identified by the antitrust religion and point out the inconsistency of those activities with our aspirations for a society ruled by laws and not men. The final chapter draws the tentative conclusion that educating society about the unsoundness of the basic elements of the antitrust faith might lead to meaningful change.

1. What Is ''Antitrust''?

Quasi-religious Faith Distinct from the Antitrust Statutes

Section 4 of the Clayton Act of 1914 provides that any person ''injured in his business or property by reason of anything forbidden in the antitrust laws'' may sue for three times his damages plus costs and ''a reasonable attorney's fee.'' Section 1 of the Clayton Act defines the term ''antitrust laws'' as including the Sherman Act of 1890 and the Clayton Act. These are referred to in this book as ''the antitrust statutes.'' Definitions are important for making sense of the subject. The antitrust literature provides little help. Most of it perpetuates confusion. Consider the following example from a basic textbook used at the Harvard Law School:

> Antitrust law implicitly but clearly takes a particular stance toward the economic problems to which it applies. On one hand, its very enactment indicates that Congress rejected the belief that market forces are sufficiently strong, self-correcting, and well-directed to guarantee the results that perfect competition would bring. On the other hand, antitrust's domain is intrinsically limited.[1]

What are the authors talking about? Antitrust law? Antitrust? The antitrust statutes? Do they recognize any difference among those three terms? There are two antitrust statutes, the Sherman Act and the Clayton Act, adopted by Congress and found in the U.S. Code. You can look them up. The quoted passage does not refer to those statutes but begins with the undefined term ''antitrust law,'' which implies a coherent set of rules that ''takes a particular stance.'' The student is told that enactment of ''antitrust law'' shows that Congress rejected a belief that the market is self-correcting. But Congress did not enact ''antitrust law.'' It enacted two antitrust statutes, one in 1890 and another in 1914. What beliefs Congress entertained or rejected at either of those times is debatable.

Next the student is introduced to an additional undefined term—"antitrust." "Antitrust" has a "domain." Authors Phillip Areeda and Louis Kaplow began with an imagined concept of "antitrust law" and then shifted to a discussion of "antitrust," something different from "antitrust law" and even more distant from the antitrust statutes. Antitrust has an existence outside of the antitrust statutes. Antitrust not only exists but also does things. It is a formidable actor. The professors describe it thus:

> Antitrust supplements or, perhaps, defines the rules of the game by which competition takes place. It thus assumes that market forces—guided by the limitations imposed by antitrust law—will produce good results or at least better results than any of the alternatives that largely abandon reliance on market forces. Therefore, the perfect competition model can be viewed as a central target, the results of which antitrust seeks, but the conditions for which antitrust does not take for granted. Antitrust thus looks to perfect competition for guidance, but the analysis inevitably emphasizes the myriad and complex imperfections of actual markets.[2]

Antitrust "supplements" or "defines." The professors are not sure which. Antitrust "assumes" things. Antitrust "seeks results" but "does not take things for granted." Antitrust "looks to perfect competition for guidance" to supplement the guidance that it has received from antitrust law's limitations. Having extracted from the antitrust statutes an imagined concept of "antitrust law" and having pulled out of that hat a rabbit called "antitrust," the professors conclude by telling us what "the analysis" emphasizes. The student might wonder: where did "the analysis" come from? The antitrust statutes? Antitrust law? Antitrust? Whose analysis is it? Why is it "the" analysis?

Antitrust is not defined in any of the provisions of the antitrust statutes. It can't be translated into foreign languages. Antitrust was not enacted. It is not a coherent set of rules. You can't look it up. Experts are required to interpret it. Much of it is in the eye of the professor. In their casebook, Eleanor Fox and Lawrence Sullivan write of "the central concern of antitrust" and its "several goals" and that "antitrust regulates economic structure and economic conduct through law."[3] They also tell us when a court decision is "a defeat for antitrust."[4] Timothy J. Muris, while chairman of the Federal

Trade Commission, observed that there is much to do "to assure that antitrust avoids the mistakes of its past."[5]

Antitrust can't be amended, reformed, or repealed. It is an intuitive mix of law, economics, and politics; a mystical collection of aspirations, beliefs, suspicions, presumptions, and predictions. Antitrust is a quasi-religious faith independent of the provisions of the antitrust statutes.

Antitrust has many doctrines that are analyzed endlessly in lectures, seminars, articles, and court opinions. The antitrust faith is based on four elements that are seldom mentioned but will be discussed in subsequent chapters of this book. They are as follows: (1) a belief in the legend of Standard Oil, (2) fear of corporate consolidation, (3) a belief in the magic of "market power," and (4) faith that government can protect us from those evils.

Vague Statutes—Unaccountable Discretion

The antitrust statutes give to those in positions of power wide discretion to interfere with commercial activity and freedom of contract. Three provisions illustrate the point, two from the Sherman Act of 1890 and one from the Clayton Act of 1914.

Section 1 of the Sherman Act designated as a federal crime "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." That declaration of Congress would have outlawed any contract in interstate commerce, because every contract restrains some trade. (If I contract to sell you a wristwatch, I am restrained from selling the watch to someone else. You, in turn, are restrained from buying another product with the money that you paid to me.) To avoid that truism, the judiciary invented the so-called rule of reason, amending the prohibition by Congress of *every* contract in restraint of trade to prohibit only those contracts found by the courts to "unreasonably" restrain trade. As a result, unless the restraint is one that the Supreme Court has presumed to be unreasonable—such as the so-called per se offenses discussed later—it may be impossible to tell whether a contract is unlawful without a lengthy trial. Justice Louis Brandeis suggested that the trial should proceed along the following lines:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes

> competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the Court to interpret facts and to predict consequences.[6]

In other words, everything is relevant but nothing is determinative. An absolute prohibition by the legislature was turned into a delegation of discretion to jurors and judges to approve or disapprove contracts after a lengthy inquiry as to whether or not they restrain trade ''unreasonably.''

Section 2 of the Sherman Act made it a crime ''to monopolize'' or ''attempt to monopolize'' any part of the trade or commerce among the several states or with foreign nations. No one knows what those words mean. Over the past century, judges and commentators, such as Areeda and Kaplow, have developed a vocabulary for talking about the subject, but no meaningful rules have emerged. Court declarations perpetuate ambiguity. According to the Supreme Court:

> The offense of monopoly under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[7]

In 1918 Justice Brandeis attempted to distinguish between contracts that promote competition and those that suppress or destroy competition but was unable to do so. Similarly, in 1966 the Court sought to differentiate between willful acquisition of monopoly power and being an effective competitor but was unable to state any rule for doing so. The result has been to leave to judges, juries, and officials at the Justice Department and FTC power to make arbitrary decisions on a subjective basis.

Most government activity under the antitrust statutes finds its support in section 7 of the Clayton Act, which prohibits corporate acquisitions ''where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.'' Yet we have no workable definition of what constitutes ''competition'' and no way to measure it. Applying section 7, the Supreme Court under Chief Justice Earl Warren essentially declared all corporate mergers unlawful. Expressing concern with industrial ''concentration'' and desiring to protect ''small business'' from more efficient competitors, the Court during the 1960s decided every case in the government's favor. First came the *Brown Shoe* case,[8] which involved the acquisition by Brown (primarily a shoe manufacturer) of Kinney (primarily a shoe retailer). The Court held the merger illegal under section 7 in two ways: first, as a horizontal merger and, second, as a vertical merger. Both companies made shoes. Brown made roughly 4.0 percent and Kinney made roughly 0.5 percent of the nation's shoes. Merger of the two manufacturers, said to be ''horizontal'' because it involved two companies directly competing with each other, was found illegal. The Court also held the merger of Brown and Kinney illegal as a ''vertical'' merger—i.e., one involving two companies that had a supplier-customer relationship—because Brown, selling 4.0 percent of the nation's shoes, merged with Kinney, a retailer that accounted for 1.2 percent of U.S. retail shoe sales. The vertical merger of the supplier Brown with its customer Kinney was said to ''foreclose'' a share of the retail market otherwise open to manufacturer-competitors of Brown.

Four years later, in the *Von's Grocery* case,[9] the Court concluded that section 7 prohibited the merger of two grocery chains because the merger would result in ownership by a single firm of 1.4 percent of the grocery stores in the Los Angeles metropolitan area, accounting for 7.5 percent of the area's grocery sales.

Mergers neither horizontal nor vertical—where the merged firms were not competing and did not have a supplier-customer relationship—were given the sinister-sounding name of ''conglomerate'' mergers. The Court upheld government action to prevent conglomerate mergers on theories that they raise ''barriers to entry,'' eliminate ''potential competition,'' or create opportunities for ''reciprocal dealing.'' Mergers that created ''competitive advantages'' were condemned for doing so. Economic efficiency created through merger not only didn't serve as a defense but also became a basis for a conclusion of illegality.

By the late 1960s the operative question became not whether a merger was illegal but whether the government would oppose it. In 1968 the Justice Department published Merger Guidelines that were more permissive than Supreme Court rulings such as those in the *Brown Shoe* case.[10] The result has been to transfer to government attorneys the arbitrary power to decide whether or not a merger will be allowed or prohibited, guided only by an irrational fear of corporate consolidation. Moreover, since 1976 all corporate mergers above a certain size have had to be reported to the government in advance.[11] According to the Commentary on the Horizontal Merger Guidelines published by the FTC and the Justice Department, ''For more than 95% of the transactions reported . . . the Agencies promptly determine . . . that a substantial lessening of competition is unlikely.''[12] During fiscal 2005, notices of 1,695 proposed mergers were filed. The FTC challenged 14, and the Justice Department challenged 4, a total of 18 out of 1,695, or 1.06 percent.[13] There is no way to tell which mergers will be allowed and which will not. The process will be examined in more detail in Chapter 6.

No Clear Rules—Arbitrary Decisions

Lacking any coherent, ascertainable rules in the written antitrust statutes, judges and other government officials make arbitrary decisions using antitrust doctrines based on a faith not easily overcome by reason, logic, or empirical data. There is no need to explain decisions not made. A contract, a ''monopoly,'' or a merger permitted requires no explanation. Most corporate mergers reviewed by the government are cleared without question or explanation. Only attacks call for justification. If the decisionmaker wishes to disapprove, the language of antitrust is there to justify the disapproval. Metaphorical labels such as ''the market'' are used as though they are factual descriptions. Antitrust doctrine containing a prohibition is recited. The disapproval has been rationalized.

The success of Microsoft Corp. came at the expense of some of Microsoft's competitors—losers in the marketplace who sought government action against a winner. Interest was first aroused at the FTC, where two commissioners favored action, two favored doing nothing, and the fifth declined to participate. The assistant attorney general at the time was an activist new to the job. She took over the matter and persuaded Microsoft to make some changes in its method of doing business. That agreement was presented to a district court for adoption as a consent decree without any findings of fact. The district judge to whom the case was assigned had read some books about computers. On the basis of such reading he rejected the decree as inadequate.[14] A reviewing court of appeals said it was the job of the attorney general, not a district judge, to decide the adequacy of such decrees.[15] The appeals court sent the matter back to a different district judge.[16] That judge later denied a contempt petition, issued a preliminary injunction, and referred the case to a special master,[17] a decision reversed by the court of appeals.[18] Meanwhile, the Justice Department began an entirely new, somewhat broader, proceeding that resulted in a district court's issuance of 400 or so "findings of fact"[19] and then a memorandum and order, in which the judge confessed an inability to determine what to do because of divergent opinions about the future.[20] He concluded that "plaintiffs won the case, and for that reason alone have some entitlement to a remedy of their choice," including breaking up the defendant.[21] That remedy should be adopted, he said, because it was urged by government officials "in conjunction with multiple consultants," and such officials are expected to act in the public interest, whereas the defendant is not.[22] That order was vacated by the court of appeals.[23] The court recited prevailing doctrines of market definition and power, which contain assumptions about a future that no one can know but could be applied to the Microsoft case because of the phraseology of the district judge's findings of "fact."[24] Assisted by some notions about "short term" and "long term" and some fine distinctions between "procompetitive" and "anticompetitive" conduct, the Court labeled Microsoft, like the legendary Standard Oil, a monopolizer and as such prohibited by section 2 of the Sherman Act.[25] The Justice Department abandoned any further attempt to break up the company but did insist on several regulatory restrictions to protect complaining competitors.[26]

Futility of Reform

Attempts at reform or repeal of the antitrust statutes are futile as long as faith in Antitrust with a capital "A" is preserved. Provisions of the antitrust statutes contain words without definition, but, except when amended by Congress, at least the words are fixed. One can look them up and write them down. Antitrust, the mystique, is a different matter. One cannot look it up. Joel Klein, while serving as assistant attorney general in charge of the Justice Department's antitrust division, described the antitrust laws as "common law statutes." He said to a meeting of antitrust lawyers, "You know, so much of litigation in the Supreme Court, or whatever, will be on what exactly are the words of the statute. But in antitrust it really is much more dynamic."[27]

The antitrust lawyer must learn a special vocabulary not found in the U.S. Code. Observable phenomena are described by metaphors, which are not scientific labels of real-world data but artificial concepts, like "market" and "market power." Antitrust experts speak a sort of poetry. Journalists and politicians take it as a description of reality. The public is confused. Antitrust concepts give a sinister characterization to the ordinary phenomena to which they are applied. "Oligopoly" is a good example. People who are learned in antitrust vocabulary know that an oligopoly is simply any number of sellers more than one—a common situation, but it sounds to the average citizen like a nasty condition and cause for concern.

Fashions in antitrust concepts change even when the statutory words don't. Some terms achieve acceptance for a time but then lose their appeal and are abandoned. "Reciprocity" is a good example. At one time the FTC chairman saw reciprocity as an evil of great potential, warning that it "could result in closed-circuit markets from which medium or small factors are excluded" and, "thus oligopoly would be magnified in a sort of circular integration fashion . . . foreclosing the opportunities of firms without substantial market power to gain access to the inner circle of firms."[28] At about the same time, the head of the Justice Department's antitrust division stated that "there is a legitimate basis for attacking reciprocity, not only under section 1 of the Sherman Act . . . but also under section 2 . . . as an unlawful attempt to monopolize."[29] Some hand wringing occurred, but the attack never came. Eventually, it became clear to everyone that the nation is not in any danger if businesspeople tell each other: "I'll buy from you if you buy from me." Also, the word got around that it isn't a very effective way to do business anyway, so we just don't hear much about it anymore.

"Conglomerates" had a longer run as antitrust witches. Having succeeded in obtaining Supreme Court declarations that virtually all mergers of competitors as well as those of customers and suppliers are prohibited by section 7 of the Clayton Act, the government harassed "conglomerates." In addition to court proceedings to prevent corporate acquisitions by conglomerates, both the FTC and the Justice Department conducted highly visible investigations of those that merely existed. The campaign was eventually abandoned. Many of the most feared "conglomerates" later shed their acquisitions or went out of business altogether without any help from government.

A key concept that currently has a firm grip on the imagination of the antitrust community is the concept of "market power" (see chapter 4). "Market power" is an imaginary concept borrowed from theoretical economics. It incorporates assumptions and predictions but is used by the antitrust community as though it describes facts subject to proof.

Antitrust as faith endures not because it has a fixed basis in science or reason but because it does not. Faith in antitrust allows the pursuit of mutually exclusive goals. It serves the human desire for both justice and "fairness." The attempt to rationalize antitrust as consumer welfare economics has eliminated some of the glaring irrationality of interpretations of the antitrust statutes. Antitrust doctrines have been tidied up, but no amount of economic theory can resolve the basic conflict inherent in the human desire for both efficiency and fairness—goals that are often incompatible. The antitrust religion allows the pursuit of both goals simultaneously. It also avoids facing three real issues: (1) how to state a normative rule that distinguishes between contracts that unreasonably restrain trade and those that do not; (2) how to distinguish between willful acquisition of "monopoly power" and being an effective competitor; and (3) how to tell whether a merger may substantially lessen competition.

The generality and ambiguity of the antitrust statutes allow arbitrary decisions disguised as findings of fact. Market efficiency requires no government interference on its behalf. Fairness does. Antitrust allows the decisionmaker freedom to intervene on the side of fairness when he wishes to do so. The decision is not dictated by any objective measurement but by labeling as findings of fact theoretical concepts such as "the market" and "market power." Unstated assumptions and predictions are incorporated into conclusions stated as facts, and then doctrines dictate the result. To maintain an appearance of a rule of law, the decisionmaker portrays the process as a factual inquiry followed by findings of fact to which rules are then applied. Actually, the result is dictated by the assumptions and predictions. Where one comes out is determined by where one starts in. Assumptions and predictions cannot be proven. They are subjective judgments in which the decisionmaker's personal sense of fairness cannot be ruled out.

Change through Rejection of the Faith

Faith in antitrust—as a policy and as an enforcement mechanism—overcomes reason based on either theory or evidence. In 1978, using economic theory, then-professor Robert Bork made obvious the paradox of the pursuit in the name of antitrust of the mutually exclusive goals of protectionism and a free market.[30] Adjustments in antitrust doctrines have occurred, but the statutes remain unamended, and Supreme Court precedents remain available to state attorneys general, private plaintiffs, and federal authorities whenever they choose to be "vigorous" about enforcement.

In 1976 Richard Posner, while a University of Chicago Law School professor, recommended repeal of all antitrust statutes except section 1 of the Sherman Act.[31] In 1986 professor D. T. Armentano concluded that "antitrust law" has lost "its claim to legitimacy" and explained why.[32] Several years ago Robert Crandall and Clifford Winston of the Brookings Institution assessed the evidence on whether antitrust policy improves consumer welfare. They concluded that there is no evidence that it does.[33]

There is little reason to believe that evidence, or the lack of it, any more than economic theory, can counteract the nation's commitment to faith-based antitrust. As Armentano pointed out, the benefits of antitrust regulation are substantial—especially to the antitrust community. Yet that group's indifference or even opposition to change is not the primary obstacle to repeal of the antitrust statutes. The primary obstacle to repeal is the depth of the nation's faith in antitrust. That faith is held not only by those who profit from antitrust enforcement but also by those for whom it is a costly nuisance. The antitrust statutes will not be repealed or significantly amended as long as faith in antitrust retains its grip on the psyche of journalists, academics, and policymakers.

It is possible that the public could be educated to understand what is really going on and to understand that the basic elements of the antitrust faith are unsound. We do not need to fear corporate consolidation. The imagined magic of market power is just that—imagined. We do not need government protection against imaginary evils. Unfortunately, none of those in a position to discover and publicize the error of the beliefs supporting the antitrust faith has any incentive or inclination to do so. Their activities are described in the next chapter.

2. The Antitrust Community

The antitrust faith is preserved by a cult of professional followers who call themselves "the antitrust community." Basic elements of the antitrust faith have been part of the American psyche since the "trust-busting" era of Theodore Roosevelt, but it was not until the 1950s that a cadre of professionals devoted to promotion of antitrust took shape. President Eisenhower's attorney general, Herbert Brownell, appointed a National Committee to Study the Antitrust Laws. In 1955 that group published a report that became a handbook for aspiring antitrust lawyers. The group's members and consultants formed a nucleus of the antitrust community-to-be.

In 1953 the incoming Eisenhower administration replaced Herbert Bergson as assistant attorney general in charge of the antitrust division. Bergson then opened an office for the private practice of law in Washington, and promptly took on representation of corporate clients, including those seeking merger clearances from the antitrust division. Having just left that office, his qualifications for such representation were unmatched. But Brownell indicted Bergson under a law that prohibits representing someone with a claim against the government within two years of leaving government employment. A district judge dismissed the indictment, concluding that a claim means a demand for money or property, not the seeking of merger clearances.[1] The indictment may have gilded rather than tarnished Bergson's attractiveness to corporate clients with antitrust problems. Within five years he had built a premier practice and was elected chairman of the American Bar Association's antitrust law section, which he had helped organize in 1952.

Although the antitrust community is a welcoming group and its members enjoy a feeling of kinship, one cannot become a member of it overnight. It takes about six months to become familiar with the territory and comfortable with the language. The veteran has little advantage over the novice, since neither can predict results, but the practitioner has to speak the language. The subject is not complex, merely confusing to outsiders. As has been said about coaching football, one must be smart enough to be good at it and dumb enough to take it seriously. There are three steps in the process of joining the antitrust community. The required skills can be acquired in law school or by reading or listening to continuing legal education lectures. First, one must become familiar with a few statutory provisions and be able to recall them at any time. Second, one must learn to recognize a few terms not found in the statutes, such as "per se" and "rule of reason" and a few case names, like *Illinois Brick* and *Noerr-Pennington* so as not to be one-upped by other initiates, who like to use case names as shorthand for the doctrines they contain. Third, one must pick up a few terms from microeconomic theory.

The third step is a critical one—learning to speak a vocabulary of meaningless or ambiguous terms with authority. One must learn to use metaphors like "market" and "barrier to entry" as though they have meaning that one fully understands. That skill comes through practice with actual situations where decisions are being made—in government or private law practice—learning through experience at the expense of the taxpayer or of the private client. Simple use of the terms is not enough. Statements must be made with sufficient pomp that it is difficult for the listener to avoid taking them seriously. And to be taken seriously one has to take oneself seriously. That skill is acquired not by listening but by talking when others are forced to listen. In that respect, there is no substitute for government service since the government antitrust official must be listened to no matter what is being said. In the antitrust community, just the right amount of self-righteousness must be displayed. Here, also, government experience is the best teacher.

There is an additional dimension to the value of government experience, particularly if it is recent. Today there are obstacles to making immediate use of government experience for the benefit of a private client the way Bergson did in the early 1950s, but if lawyers are to attract and hold clients with antitrust problems, it helps if clients think the lawyer has some better source of information than the newspapers. Appearance of proximity to the decisionmaker adds value to the lawyer's opinions. Much antitrust law practice consists of assessing and influencing the thinking of middle-level government officials on matters over which they have broad discretion.

The antitrust lawyer is selling access to and insight into the minds of those making subjective decisions off the record. In merger matters, that is almost the entire game. Statutory and case law, if applied vigorously, would stop virtually all corporate mergers, leaving only this question: will the government attack this one? Pinning the right descriptive metaphor on a set of facts determines the outcome.

No amount of study of written material can provide as much chance to avoid expensive miscalculations as a well-timed lunch, tennis game, or casual resort hotel conversation with a well-chosen official. It is not a matter of corruption but of access to decisionmakers and assessment of their thinking. As professor Spencer Waller, director of the Institute for Consumer Antitrust Studies at Loyola Chicago School of Law, has written, "Knowledge of the decisionmakers, familiarity with current enforcement policy, even if unpublished, and access to the agencies play a critical role in selling oneself as an expert."[2]

Development of the Antitrust Community

The antitrust community includes practicing lawyers, law professors, economists, and government officials who hold conferences and publish materials propounding antitrust doctrines. The antitrust community comes together in the American Bar Association's antitrust law section. Membership in the ABA is a prerequisite to enrollment in the antitrust section. Within 25 years of its 1952 beginnings, the section had grown to 11,000 members. Membership peaked in 1980 with a mailing list of about 13,000 dues payers. In recent years membership has remained at around 11,000, but participation by members in section activities has greatly increased. Current section dues are $50 per year. A promotional brochure promises "networking" with "a diverse group of thousands of professionals, including attorneys in private practice and government practice, corporate in-house counsel, international associates, judges, economists, and law students."

The antitrust section has a roster of officers elected each year, usually without opposition, and a council of 15 members with staggered three-year terms. The chairman of the Federal Trade Commission, the assistant attorney general for antitrust, and a federal judge are also ex officio members of the council. The section has 28 general committees, 6 administrative committees, 3 program committees, and 7 publication committees. There are also 11 special task forces.

During 2006 the section of antitrust law scheduled meetings in New York and Washington, as well as at Chateau Montebello in Montebello, Canada; the Savoy in London; Halekulani, Honolulu, Hawaii; St. Regis Monarch Beach Resort, Dana Point, California; and the Sanctuary, Kiawah Island, South Carolina. The largest gathering of the membership occurs during the annual spring meeting in Washington, timed for the cherry blossoms. At the 2006 meeting in late March, 2,200 members had preregistered before the meeting began. The fee was $725. Participants came from 43 states and 38 countries. For dinner, 118 tables seating 10 persons each were sold out. ''Non-government'' people paid $135 for a seat; ''government, academic, and students'' paid $95. Cocktails were provided at massive receptions sponsored by law firms.

As of June 30, 2005, the section's finance officer reported reserves of $7,320,980. Operations during fiscal year 2003–2004 produced net revenues of more than $900,000. The budget for 2006–2007 projected net revenues of $275,000. In return for paying dues, ABA members receive the *Antitrust* and *Antitrust Law Journal* three times a year and the opportunity to participate in section activities. They also receive discounts on publications sold by the section. Members prepare reviews, manuals, handbooks, guides, and monographs. Those are then sold to the general public for hundreds of thousands of dollars a year. *Antitrust Law Developments* (5th ed.), described in the publications catalog as a ''must have'' for the antitrust practitioner, is hardbound in two volumes totaling 2,000 pages and priced at $365. An annual supplement is available at $115. The publications catalog itself consists of 36 pages. Included are three merger books priced at $149.95 each. Two are second editions and the third is a third edition. A 171-page paper titled *Market Power Handbook* is available at $134. The 2006–2007 budget planned for gross revenues of $737,063 from publications.

Waller's overview of the situation follows:

> The antitrust world, to a large extent, is driven by the American Bar Association Antitrust Law Section and the antitrust partners of the large law firms which dominate the Section and handle the vast majority of large antitrust matters. The ABA Antitrust Section provides the most direct

> opportunities to demonstrate that you are a member, and major player, in the antitrust club. . . . [ABA] socialization . . . provides . . . the language and acculturalization to work the halls of power and interact with practitioners of similar backgrounds who may be friends, foes, or the government decision-maker in any given matter, and who may surface in the same or different posture in the next matter.[3]

Members of the antitrust community aren't likely to offer any serious criticism of enforcement policy or to develop any constructive proposals for reform except as related to procedures or the elimination of statutory exemptions from the antitrust laws. Anyone dealing closely and continuously with antitrust is busy profiting from the status quo. The ABA antitrust section has become a cheerleader for whatever government activity is currently in fashion and its global extension. The section's long-range plan states that part of its ''mission'' is ''enhancing its role as the preeminent source for analysis, debate and continuing legal education in the antitrust, competition law, competition policy and consumer protection fields.'' Its charter states that within its mandate is ''the development of *active* antitrust enforcement'' (emphasis added). In April 2002 that meant ''support for full funding of the federal antitrust enforcement agencies.''[4] No systematic review or evaluation of such activism is ever undertaken. The basic questions—for example, did this proceeding make any sense or accomplish anything?—are seldom asked at meetings or in publications of the section. Instead, officials responsible for continuation of fiascoes such as the Justice Department's fruitless campaign against IBM and the FTC's pursuit of an imaginary ''shared monopoly'' of ready-to-eat cereal manufacturers are given ''achievement awards'' for their contributions to the community.[5]

In 1958 a Committee on Antitrust Policy of the Twentieth Century Fund published a report based on a review of antitrust history in 20 industries, concluding the following:

> By this time several hundred cases have ended in decrees of various sorts designed to bring about changes in market structures and business practices. Yet very little time and effort have been spent, either inside the government or out, in assessing the effects of these decrees on the behavior of firms or the status of competition in the affected industries.

> How differently do the firms encompassed act from the way they would if a case had never been brought? Is competition, in some meaningful sense of the word, noticeably improved? Almost no one has bothered to enquire.[6]

The Antitrust Modernization Commission Act of 2002 created a commission consisting of 12 distinguished members of the antitrust community and gave the commission $4 million over a period of three years to make recommendations about ''issues and problems relating to the modernization of the antitrust laws.''[7] The assistant attorney general for antitrust, having been asked to provide his views as to topics that the commission might study, suggested that the group ''should consider engaging respected experts (including those who do not earn their living providing antitrust services) to design a rigorous study of the effects of antitrust enforcement.'' The commission emphatically rejected the suggestion. At a forum during the 2005 spring meeting of the antitrust section one commission member said that a study of empirical data as to what, if any, benefits result from antitrust activity would be too difficult because the data are not readily available, and the commission had better uses for its resources.

Those actively engaged in antitrust practice must talk as though there are ascertainable rules that make sense and do their best at ''the relatively sterile function of weaving together old decisions in an attempt, usually futile, to design a legal fabric at once a little more appealing to their clients' needs and to the courts' tastes.''[8] Members of the antitrust community, when advocating change, usually restrict themselves to ''remedies'' and procedures. They are reluctant to evaluate results or to analyze judicial attempts to state normative rules. They find it difficult to stand apart from existing doctrines that they are continually obliged to advocate.[9]

Law School Indoctrination in Elements of Antitrust

Antitrust, as distinguished from the antitrust statutes that anyone can look up in the U.S. Code, is a mystical collection of persistent beliefs, not necessarily based in either fact or law or subject to control by Congress. Those beliefs are kept alive and transmitted to new generations by members of the antitrust community at bar association conferences and in law schools. At an Antitrust Masters Course in Sea Island, Georgia, one prominent member of the antitrust community told would-be masters paying a substantial attendance fee that "it is important to go beyond a list of 'do's' and 'don'ts' and try to explain, on a deeper level, what the antitrust laws are all about."[10]

Antitrust masters must get beyond mere interpretation of legal requirements enacted by legislatures and administered by government officials because there are few fixed rules. They must sense at a "deeper level" the meaning of it all. The principal vehicle for transmission of this learning once was study of court opinions and casebooks containing them, but much court doctrine is now acknowledged by the antitrust community as out of date. "The traditional law school casebook misses the point of modern antitrust law and practice," writes Waller.[11]

Compilers of casebooks have had to recognize the futility of trying to portray antitrust as a unified coherent system of law. Some have turned their courses into history courses presenting endless unanswerable questions.[12] Some have attempted to distinguish themselves by "a balanced, diversified approach in presenting a wide spectrum of ideas regarding the goals and economic underpinnings of antitrust law" permitting the students "a larger perspective for individual choice."[13] One trio of professors has produced a casebook titled *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*[14] in which they attempt to bring the student closer to reality. According to one book review, the authors "avoid formal categories" and "focus, instead, on economically based concepts." The book contains an introduction to the study of antitrust law with "three themes": (1) how antitrust is "evolving from the analysis of discrete categories of behavior toward reliance on a set of core concepts," (2) the "unfolding trend toward globalization of antitrust law," and (3) "skills demanded of the antitrust lawyer." The book is characterized as "a casebook for our time."[15]

A primary assumption behind years of antitrust teaching—that the antitrust laws provide a coherent, rational, and discoverable set of rules by which to evaluate behavior—can no longer be taken seriously. Yet that situation cannot be directly addressed. Antitrust law professors cannot admit that the antitrust community is administering a system of mere regulatory hunches by those who happen to be in decisionmaking positions, but that is the implicit thesis of the casebook for our time. To be an antitrust lawyer in our time, one must grasp ''concepts'' that are ''evolving'' to get to ''a deeper level'' of ''what the antitrust laws are all about.'' To develop that skill, one must study handbooks, manuals, guides, monographs, and reviews. The student must go beyond ''formal categories of behavior'' and ''focus'' on ''core concepts'' to understand how antitrust law is ''evolving.'' Meetings must be attended and lectures listened to. Indoctrination by elders of the community must be absorbed.

Students of antitrust are taught to answer questions in a language of metaphors. The notion is conveyed that the word game students are trying to learn and the concepts they are struggling to grasp are scientific descriptions of real-world phenomena, not just metaphorical descriptions of an imagined one. Numbing students' minds begins by introducing the untranslatable word ''antitrust,'' which has no fixed content. Where the word came from and its lack of definition are not discussed. Professors of antitrust law, such as those at Harvard quoted in chapter 1, are at ease with the regal personification of antitrust implied in terms like ''antitrust's domain,'' ''the task of antitrust,'' and ''the targets of antitrust.''[16] Such professors are able to work with the explicit personification of antitrust by the use of active verbs in phrases like ''antitrust seeks'' and ''antitrust does not take for granted''[17]—implying that the professor is on speaking terms with the seeker or doer, and that someday the student may be, too.

Law school casebooks still present the material under a table of contents that suggests the subject matter can be organized into a coherent system of discoverable rules constraining the decision-maker, rather than only gaseous concepts that permit unpredictable results based on hunch or whim. Because ''antitrust'' has no fixed meaning, neither can ''antitrust law.'' Repeated use of the terms ''antitrust'' and ''antitrust law'' gives students the feeling that the terms have a definite meaning when they do not. That is not explicitly acknowledged. Instead, students are told that antitrust ''is a unique blend of intellectual theory, social policy, political economy, micro-economics and law.''[18]

Sinister-Sounding Terms—Self-righteous Feelings

The antitrust community invents sinister-sounding terms for natural phenomena and enjoys a feeling of self-righteousness in protecting the public from those evils. The antitrust process is said to be a ''complex'' one ''by which the policymaker must select among competing policy values.''[19] That makes policymakers of all those making antitrust decisions. An important part of the process is affixing to freely-arrived-at contracts between consenting adults labels that imply the use of force when none is involved. That is done by the use of misleading metaphors, such as ''market power,'' ''market control,'' and ''market dominance.'' A firm that made 40 percent of the sales in some past period is said to ''control'' 40 percent of the market. A firm that sold more of something than any other seller is said to ''dominate'' the market. But control or dominance results from offering for sale something that people want to buy. People can't be forced to buy. There is no force involved. No one is controlled or dominated. In some cases the supposed antitrust victim is not the party supposedly controlled or dominated but might like to be—someone who may have been deprived of an opportunity to sell. For instance, as in ''reciprocity'' (I won't sell to you unless you buy from me) or ''exclusive dealing'' (I won't sell to you if you buy from anyone else). In other cases such as ''tying'' contracts (if you want to buy my machine, promise to buy my salt or ink or punch cards that go in it), the supposedly injured party may not have the machines to sell. In cases of ''predatory pricing'' (selling at prices lower than those at which competitors wish to sell) or ''predatory buying or predatory bidding'' (buying at prices higher than those at which competitors wish to buy), nothing predatory is occurring. People are simply making freely-arrived-at contracts of purchase and sale.

The multiple goals of antitrust provide psychic income to all participants by applying sinister-sounding labels to natural business activities. No matter whom antitrust community members are representing, they can feel that they are serving the public interest. On one side of the argument, lawyers are defending economic efficiency and consequent consumer welfare. On the other side of the argument, lawyers are defending the right of the little man to fundamental fairness, protecting him from being controlled, dominated, or excluded by forceful and predatory behavior. On either side, antitrust lawyers can feel that they are doing the right thing for others while doing well for themselves.

During the past 50 years antitrust lawyers, like most lawyers generally, have made a transition. Most formerly independent professionals chosen by clients for objective judgment, knowledge, and integrity have had to become self-promoting participants in institutional commercial operations sustained by expensive advertising and active business solicitation. In the early years, programs of the ABA section of antitrust law identified speakers only by their individual names; law firm names were never printed in the program. That has changed. Lawyers no longer practice law under their own names but under an established institutional trade name. No name is complete without an institutional affiliation. Some combine both law firm and academic connections, using one or the other as best suited for the occasion. For most, practicing law means serving as replaceable cogs in huge wheels grinding on at high hourly rates churning out memos, reports, briefs, and depositions for clients of "the firm." A few of the more independent-minded have become buccaneers who invent a class of supposed victims, elbow their way to the head of a parade of others doing the same, and then shake down defendants for huge settlements resulting in little, if any, benefit to the purported "clients" but handsome fees for the lawyers.

That transition may have been especially pronounced and visible in the antitrust community, but to make up for it, there are also special compensations beyond the money for antitrust lawyers. Litigating can be equally strenuous in any specialty, but it is less intellectually demanding to be an antitrust adviser than to be a tax lawyer. Tax lawyers can make mistakes. Since there is so little predictability in antitrust law, one can seldom appear to have been wrong. It is difficult to be an incompetent antitrust lawyer. Almost any minimally trained attorney can do the work; the challenge is to get business. Class-action lawyers create their own clients. Large law firms hang onto clients inherited or recruited across different lines of specialization under one tent. Risks of failure and personal responsibility are minimized.

One of the most satisfying compensations of being a member of the antitrust community is the feeling of camaraderie that comes with sharing a special language and being a member of a club not open to the general public. The community shares a desire to pass that camaraderie on to future generations. As one chairman of the antitrust section has stated, "While many organizations function principally for the benefit of their members, the Section has always recognized a broader mission."[20] The section's mission statement includes, among other things, "Making known to a diverse group of law students and young lawyers the opportunities for satisfying and rewarding careers in the practice of antitrust law, and encouraging them to consider pursuing such opportunities.'' One chairman of the section has referred to ''spreading the antitrust gospel.''[21] It is difficult to imagine an organization of tax lawyers talking that way.

Spreading the gospel is not confined to the continental United States. In somewhat the same pattern as the attorney general's National Committee to Study the Antitrust Laws during the Eisenhower administration, an International Competition Policy Advisory Committee created during the Clinton administration published a weighty report and served as a springboard for members of the U.S. antitrust community to advance their careers doing missionary work abroad.[22] An International Competition Network has been organized. Its fifth annual conference, held in Cape Town, South Africa, in May 2006, was reported to have attracted ''nearly 300 representatives from about 70 antitrust agencies.''[23] The fourth annual conference, held in Bonn, Germany, in June 2005, was attended by ''more than 400 representatives of 80 competition agencies and competition experts from international organizations and the legal, business, consumer, and academic communities.''[24]

In support of proposed appropriations for fiscal year 2007, the FTC chairperson asserted that her commission ''plays a leading role in key multilateral fora'' (sic) promoting ''cooperation and convergence toward best practices with competition and consumer protection agencies around the world.''[25] Participation in activities of this sort provides members of the antitrust community opportunities for foreign travel, for business development, and for reinforced feelings of self-righteous satisfaction with ''spreading the antitrust gospel.''[26]

3. From ''Trust-Busting'' to the Present

There is no consistent U.S. policy toward competition. The antitrust community is *pro*-competition, not just *anti*-trust. Antitrust believers see competition as the basis of the economy and regard themselves as its guardians. They think that political control of business is necessary. They view ''regulated industries'' as minor exceptions in a market economy that is supposedly fundamentally free and look at antitrust as the alternative to regulation. Antitrust, they believe, is needed to keep the free market free. Antitrust as umpire sees to it that the game is played fairly and by the rules. Enforcement of the antitrust laws is supposed to protect a competitive system from those who might try to monopolize something the way Standard Oil is believed to have monopolized oil a century ago. Business practices, such as price discrimination (sales at different prices to different purchasers), exclusive dealing (sales on condition that the purchaser not buy from a competitor of the seller) and mergers, must be prevented where they might lessen competition or tend to create a monopoly such as Standard Oil, according to the antitrust community.

The antitrust believer's view of the economy arrogantly overstates the role of antitrust. The antitrust believer's assumed free market and concepts from microeconomic theory of ''markets'' and ''market power'' do not take account of much that has happened in the past 100 years or of much that now occurs in the real world. The U.S. economy is not free. Government creates barriers and helps favorites. Labor unions fix the price of labor. Government grants monopolies (patents). Government takes large shares of profits that would otherwise be available for investment.

The antitrust community sees antitrust as the main event. Regulated industries are viewed as a sideshow even though the American Bar Association's *Antitrust Law Developments* (5th ed.) lists under ''regulated industries'' the following: agriculture, communications (including broadcasting, common carriers, and cable television), energy (including natural gas, electric power, and federal lands programs), financial institutions and markets, government contracts, health care, insurance, organized labor, sports, and transportation (including motor, rail and air, and ocean shipping). Despite those acknowledged exceptions, a policy in favor of competition is supposed to be fundamental. Harvard professors tell students, "Antitrust . . . looks to perfect competition for guidance, but the analysis inevitably emphasizes the myriad and complex imperfections of actual markets."[1]

The Sherman Act of 1890, the basic antitrust statute, does not contain the word "competition." The statute refers to "trade or commerce." The other antitrust statute, the Clayton Act, adopted in 1914, contains the phrases "substantially to lessen competition" and "injure, destroy, or prevent competition," but provides no definition of the word "competition." Congress favors competition but only if it is fair. In the Federal Trade Commission Act,[2] adopted in the same year as the Clayton Act, Congress declared unlawful "unfair methods of competition" and created a federal commission to prevent them. Congress left it to the commission to define which methods of competition are unfair. (The Federal Trade Commission Act is not among the acts defined as an "antitrust law" in the Clayton Act.)

In 1922 the Supreme Court ruled that staging baseball games is not interstate commerce and therefore does not involve competition subject to the federal antitrust statutes.[3] The antitrust community refers to this as "the baseball exemption."[4] Neither football[5] nor basketball[6] has a similar exemption. The Curt Flood Act of 1998[7] added a provision to the Clayton Act revoking baseball's antitrust exemption insofar as it relates to the employment of major league players. The statute leaves unchanged the exemption from the antitrust laws of the minor leagues (including the player draft) and of matters not involving player-management relations.

In 1933 the Supreme Court concluded that use of a common selling agency by 137 coal producers in four states to fix the price of coal should not be condemned simply because it eliminates "competition" between the sellers.[8] The court, with one dissent, did not see the elimination of this sort of competition as forbidden by the antitrust laws. Students at New York University Law School are told in a casebook, "In *Appalachian Coals*, the Court treated the arrangement as a legitimate joint sales agency (although it might well have seen the joint sales arrangement as a cover for a cartel)."[9] One pair of professors writes that the joint selling agency "was upheld on the rationale that it lacked market power."[10] Some today regard that decision as "an aberration of the 1930's."[11] Students at Georgetown Law School are told in a casebook that "a sophisticated characterization process is necessary" before something can automatically be labeled an illegal cartel.[12]

Academics acknowledge the existence of the *Appalachian Coals* decision, but the practicing antitrust community no longer finds it useful and seldom refers to it. Some decisions of the Warren Court are also disregarded. During the days of aggressive government merger prevention, that Court declared illegal every sort of merger, including those that might eliminate "potential" competition.[13] Today it can correctly be said, "Antitrust concern with conglomerate mergers seems to have disappeared without a trace."[14] The community is no longer interested in such mergers. Current merger guidelines relate only to "horizontal mergers" (those between parties said to be "competing firms"). On one hand, the guidelines are more permissive than the Court decisions. On the other hand, with regard to price-stabilization combinations, the antitrust community prefers the more restrictive of two court declarations. In the *Appalachian Coals* case the Court declined to condemn a combination to fix the price of coal. In the *Socony-Vacuum* case[15] the Court upheld a criminal conviction of a combination to fix the price of oil. The antitrust community has adopted the latter and ignores the former. Those are illustrations of the "dynamic" nature of antitrust free of "what exactly are the words of the statute."[16]

Two professors have described an episode illustrating the shallowness of the U.S. commitment to competition as follows:

> The New Deal's initial response to the Depression was to abandon enforcement of the antitrust laws. In the pursuit of a national remedy to revive the economy, the antitrust laws were expressly abrogated by the National Industrial Recovery Act of 1933. Contrary to the conventional economic wisdom of the day, which advocated balancing the budget and cutting wages and other costs, the NRA was an attempt to "reflate" the economy by forming cartels in the major sectors of the economy. The NRA administrator ordered former competitors to meet together, to include labor organizations and consumer groups, and jointly to prepare codes governing

> each industry that restricted or eliminated competition in that industry. The Codes specified every commercial aspect including prices, conditions of work, and the terms of trade for each product and service in the economy.[17]

During this period the United States had a clear policy as to business competition. The policy was to eliminate as much competition as possible, whether fair or unfair. The Supreme Court held the National Industrial Recovery Act unconstitutional as an improper delegation of power to the president and beyond congressional power to regulate interstate commerce.[18] No consistent policy has been developed since.

It is not clear whether corporate acquisitions should be seen as destructive of competition or as a method of competition. It is not clear what methods of competition should be seen as fair or unfair. It is not clear when contracts will be regarded as lawful because they promote competition or unlawful because they suppress competition. It is not clear when activities will be regarded as lawful efforts to compete or unlawful efforts to obtain or abuse a monopoly. Lacking a definition of competition, we, as the public, do not know how to measure it or how to tell whether or not it is being lessened. We have no consistent policy as to when we favor it or oppose it. When court decisions about competition seem to contradict each other, antitrust professors tell students, "Perhaps each case is a product of convictions dominant at the time it was decided."[19] "Convictions" could be translated as "hunches" or "whims," and one might ask, "Whose convictions about what?"

There is no consensus on what meaning to give to the word "competition." Most people in business say they favor competition, and yet they use government to protect themselves from it any way they can. At least five different meanings of the word "competition" have been suggested: (1) rivalry, (2) the absence of restraint over one person's economic activities by another, (3) that state of the market in which the individual buyer or seller does not influence the price by his purchases or sales, (4) the existence of fragmented industries and markets preserved through the protection of viable, small, locally owned businesses, and (5) "any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree."[20] In the real world, politics controls business rivalry through patents, licenses, selective exemptions, quotas, subsidies, price supports, fuel economy standards, environmental controls, minimum wages, and taxes and tax credits, and through random, selective enforcement of ambiguous antitrust statutes. The assertion that antitrust "looks to competition for guidance" is meaningless. It depends on who is doing the looking and where that person looks.

Pre-1980 Enforcement—Mutually Exclusive Goals

One pair of scholars describes the erratic enforcement history of the antitrust statutes as follows:

> From the origins of the Sherman Act and throughout its history, a list of terms of ambiguous content seem (sic) to have influenced both enforcement initiatives as well as the caselaw. In the beginning there were such terms as "trusts," "monopolies," and "cut-throat competition." During the Depression and beyond, "bigness," "concentration," "collusion," "conscious parallelism," "leverage," "coercion," "foreclosure," "market power," "monopoly power," and "merger movement" became the basis of enforcement action.[21]

The period from the late 1950s, following the creation of the section of antitrust law by the American Bar Association, to the late 1970s was one of directionless activism in antitrust. During the closing days of the Eisenhower administration a "revitalized"[22] FTC vigorously enforced section 2 of the Clayton Act, seeking to rid the garment industry of advertising and promotional payments by manufacturers not made available on proportionally equal terms to all competing customers—a widespread practice in clear violation of the statute. One enforcement action went all the way to the Supreme Court.[23] At that time the antitrust community was debating how to protect competition without protecting competitors. Some were saying that when competitors are eliminated competition is lost, so competitors (frequently labeled "small business") must be protected. Others were saying that, as long as competition remained healthy, the loss of individual competitors should not be of great concern. Adoption of the single goal of consumer welfare was later suggested as a solution to this puzzle.

Preserving competition, rather than protecting individual competitors, gained ascendancy as antitrust's purpose. Steady efforts to have all corporate mergers declared unlawful continued. Attacking big business became more appealing than protecting small business. The Justice Department began an investigation of IBM in 1967 and filed a complaint in 1969, alleging that IBM had monopolized general-purpose digital computers.[24] In the same year President Richard Nixon asked the ABA for a professional appraisal of the FTC. In due course the chairman of an ABA study committee was appointed chairman of the FTC. Another revitalization of the institution followed. This time, rather than attacking garment manufacturers, the FTC pursued bigger targets. In 1972 the commission alleged that four makers of ready-to-eat cereal shared a monopoly and that the industry should be restructured.[25] In 1976 the commission alleged that General Motors had unlawfully monopolized a portion of its own auto parts inventory. The commission sought to force GM to change its parts distribution system.[26]

Frederick Rowe's book on price discrimination,[27] published in 1962, intellectually destroyed section 2 of the Clayton Act. That section of one of the two basic antitrust statutes lost favor among the antitrust community. Section 2 of the Clayton Act is in such low repute that the antitrust community prefers not to think of it as an antitrust law and refers to it as "the Robinson-Patman Act." A task force consisting of senior members of the section of antitrust law of the ABA prepared a report titled "The State of Federal Antitrust Enforcement—2004" in which it recommended "repeal of Sections 2 (c) and 3" of the Robinson-Patman Act. There is no section 2 (c) of the Robinson-Patman Act. The task force meant to refer to section 2 (c) of the *Clayton* Act, as amended by section 1 of the Robinson-Patman Act, and to section 3 of the Robinson-Patman Act.

That careless error is indicative of the casual attitude of the antitrust community toward statutes. The error is not immaterial. Section 2 of the Clayton Act prohibited price discrimination but was interpreted in such a way as to provide insufficient protection to small grocery retailers competing with chain stores. Section 1 of the Robinson-Patman Act of 1936 amended section 2 of the Clayton Act to remedy the perceived problem. Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, remains one of the antitrust laws defined by Congress as the basis for possible treble damage actions.

In addition to section 1, which extended by amendment the Clayton Act's civil prohibition of price discrimination, the Robinson-Patman Act contains other provisions that are not "antitrust laws." For example, section 3 of that act makes it a criminal offense to sell "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."[28]

Following the 1950 amendment of section 7 of the Clayton Act extending that statute's coverage, most notably to asset as well as to stock acquisitions, both the FTC and the Justice Department pursued active merger prevention programs. Robert Bork, while a Yale professor of antitrust law, described the atmosphere as follows:

> The imminent concentration of all ownership in a few giant corporations, with the concomitant demise of small business, is the standard, Mark I, all-weather antitrust hobgoblin. This congealing of the economy has been prophesied freely at least since the debates on the Sherman Act of 1890, always on the basis of overwhelming current trends, and it never comes to pass. It also never ceases to frighten people. The evil of this predicted economy-wide concentration appears to be so enormous and self-evident that critical faculties are overwhelmed.[29]

Studies were published about market structure. An oligopoly model was developed. It linked market structure with higher profits and anticompetitive behavior. The idea gained acceptance that, if increased concentration is a good reason for stopping mergers, "deconcentration" may be called for. After all, merger prevention only preserves the dominant position of the already-dominant. Why not break 'em up and do some real good? A 1968 White House Task Force on Antitrust Policy recommended enactment of a Concentrated Industries Act to reduce concentration in any industry in which "any four or fewer firms had an aggregate share of 70% or more during at least seven of the ten and four of the most recent five base years." Sen. Phillip Hart proposed an Industrial Reorganization Act directed at the largest companies in seven industries.

The "concentration" fever did not last. In 1971 John McGee published *In Defense of Industrial Concentration*.[30] He produced graphs and algebraic equations in defense of concentration to refute those that had been used to condemn it. Other economists such as Harold Demsetz[31] and Yale Brozen[32] undermined both the theoretical and the empirical bases for concerns about concentration. Legislative proposals to break up industry were abandoned. In 1982 the FTC gave up on its cereal case. That same year, after five years of litigation with General Motors over auto parts distribution, the commission concluded that ''the parties have pretty much battled to a stand off.'' Realizing there was nothing it could do about the situation anyway (because it could not force GM to sell to specific buyers), the FTC abandoned the case. Also in 1982 the Justice Department quit its fruitless 15-year pursuit of IBM's alleged monopoly of computers. By 1984 it could be said that the oligopoly model ''embodies the stale vision of a bygone age.''[33] This does not mean that it has been eliminated from the antitrust psyche. In fact it has a prominent role in the current merger guidelines. Fear of corporate consolidation remains a central element of antitrust.

Attempt at a Rational Basis in Economic Theory

By 1980 protecting small business through vigorous enforcement of section 2 of the Clayton Act and preventing concentration through blanket enforcement of section 7 of the Clayton Act had lost their appeal. The Justice Department's use of section 2 of the Sherman Act to attack IBM's alleged monopolization of computers and the FTC's attack on the shared monopoly of cereal makers both turned out to be fiascoes. Antitrust needed a new rationale. What has been called ''the Chicago school'' supplied one.

As Daniel Gifford and Leo Raskind noted, ''By the late 1970's, it had become clear that allocative efficiency had emerged as the dominant criterion in the judicial interpretation of the antitrust laws.''[34] The thinking went as follows: Monopolies are bad because they allow the monopolist to raise price above marginal cost and obtain monopoly profits at lower volume. As a result, resources are misallocated and consumer welfare is lessened. Antitrust should be directed toward the single goal of preventing monopolistic practices that harm consumer welfare. Everything else is useless or mischievous. Economics is the key.

In 1976 Richard Posner, a University of Chicago Law School professor, suggested repeal of all antitrust laws other than section 1 of the Sherman Act because ''redundant antitrust statutes . . . have stimulated an uncritical and unwise expansion of the prohibitory scope of antitrust.''[35] Two years later, Bork, a University of Chicago

Law School alumnus, urged antitrust reform "to strike at three classes of behavior": (1) horizontal agreements to fix prices and divide markets; (2) horizontal mergers "creating very large market shares" leaving "fewer than three significant rivals in any market"; and (3) "deliberate predation," with "care . . . taken not to confuse hard competition with predation." Some condemned conduct should be permitted—"agreements on prices, territories, refusals to deal, and other suppressions of rivalry that are ancillary . . . to an integration of productive activity . . ., small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirements contracts, 'predatory' price cutting, [and] price 'discrimination.' "[36]

Bork concluded that "the only legitimate goal of American antitrust law is the maximization of consumer welfare" and that "the legislative histories of the antitrust statutes . . . do not support any claim that Congress intended the courts to sacrifice consumer welfare to any other goal."[37]

Posner and Bork believed in antitrust and sought reform, not abolition. They changed antitrust rhetoric. Without any amendment of the statutes, the prohibitory scope of antitrust had been narrowed. As to price discrimination prohibited by section 2 of the Clayton Act, a task force of the ABA section of antitrust law noted in a 2001 report "the essential elimination of federal enforcement activity over the last quarter century" and "nearly complete bipartisan neglect of the statute."[38] Amendment of section 7 in 1976, requiring notice to the government of proposed mergers, has made section 7 impossible to ignore in the way section 2 has been ignored, but indiscriminate merger prevention has ceased. Bork's recommendation that vertical and conglomerate mergers should be permitted has been followed. More than 95 percent of reported mergers are left unmolested.

Consumer Welfare Economics Takes Over as Rhetoric—Protectionist or Fairness Strain Lives On

Some members of the antitrust community saw Chicago-school thinking as a threat to their existence, and for a time it was. Ronald Reagan's election as president resulted in the appointment of James C. Miller, an economist rather than a lawyer, to chair the FTC, and a Stanford law professor, William Baxter, to head the antitrust division at the Justice Department. Baxter had been a member of the 1968 White House task force that recommended breaking up concentrated industries, but by 1981 he had changed his mind about concentration. Antitrust activity, along with other regulatory activities, slowed down. It was rumored that one prominent Washington law firm had to borrow money to meet the monthly payroll. The firm that former Justice Department antitrust chief Herbert Bergson had started in the early 1950s began downsizing and eventually disappeared. Ralph Nader and Fred Furth, an experienced antitrust plaintiff's lawyer, held a revival meeting at their personal expense at Airlie Center in northern Virginia not far from Washington. Most of the leaders of the antitrust community were invited and attended. Academic traditionalists made efforts to prevent ''the pendulum'' from swinging ''too far.''[39] In 1987 the Georgetown University Law Center dean said ''failures to act and loose rhetoric have contributed to a foolish and wasteful surge of giant consolidations'' and urged that ''a more vigorous, pragmatic antitrust enforcement policy should be restored.''[40] Another prominent member of the antitrust community lamented that the antitrust ''religion'' was ''dying'' and that this was ''the loss of a precious cultural resource.''[41]

The antitrust religion was not dying. It remains alive and well. Attendance at the 2006 spring meeting of the ABA's section of antitrust law was at an all-time high. Antitrust has simply changed clothes from protection of small business and prevention of concentration to advancing consumer welfare. One creator of the new rhetoric for antitrust has looked upon his work with favor in the following words:

> Beginning around 1970, increased consensus and sophistication in the economic analysis of antitrust encouraged a more sophisticated approach to antitrust law and, beginning in the 1980's, coincided with a more positive public attitude toward capitalism. The ''big business'' chimera was largely forgotten. Efficiency became the only generally accepted goal of antitrust. More judges and lawyers learned the rudiments of antitrust economics, and antitrust economists became more effective as consultants and expert witnesses. It is fair to say that at the beginning of its second century antitrust law has become a branch of applied economics, has achieved a high degree of rationality and predictability, and is a success story of which all branches of the law and allied disciplines can be proud.[42]

Note this antitrust believer's use of the term "antitrust" and the absence of any reference to the antitrust statutes. It is the "analysis of antitrust" and the "goal of antitrust" that is in question. What is being discussed is religious doctrine, not the meaning of statutory language. The argument is over how to clothe antitrust. Belief in the Standard Oil legend and fear of corporate consolidation are still basic elements of the faith. But what remains is for the antitrust community to adjust to the new rhetoric and adapt it to the goals of the faith. This is possible because economic theory cannot supply normative rules of behavior. Economics, even if accepted as science, can tell us what was, what is, and sometimes what will be. It cannot tell us what ought to be. Antitrust can.

Even the Chicago school's rhetorical victory has been overstated. Acceptance of efficiency as the only goal of antitrust is less than complete. As antitrust scholar Herbert Hovenkamp told students:

> The Chicago School's approach to antitrust is defective for two important reasons. First of all, the notion that public policymaking should be guided exclusively by a notion of efficiency based on the neoclassical market efficiency model is naïve. That notion both overstates the ability of the policymaker to apply such a model to real world affairs and understates the complexity of the process by which the policymaker must select among competing policy values. Second, the neoclassical market efficiency model is itself too simple to account for or to predict business firm behavior in the real world.[43]

Hovenkamp is yet another antitrust community member who accepts the existence of "antitrust" as something independent of legal rules. There is no pretense of the enforcement of statutes by judges. Antitrust must be approached in a more sophisticated way. Antitrust decisions are policy decisions. Through a complex process, the decider selects among competing policy values.

The Chicago school tried to give antitrust enforcement a single goal to provide rationality and predictability in place of what was seen as the Warren Court's tendency to select among competing policy values and enforce "its own social preferences."[44] There is now broad acceptance that allocative efficiency has become *one* of the goals of antitrust, but substantial sentiment remains among the antitrust community that antitrust has more than one goal from which those making antitrust decisions can choose, leaving the decisionmakers free to enforce their own policy preferences. One pair of experts sees the choice of goals as follows:

> These goals generally fall into four categories: (1) consumer welfare goals, including the efficient allocation of existing resources and avoiding wealth transfers to participants with market power; (2) fostering innovation and technological progress; (3) protecting individual firms through fairness and equity goals; and (4) maintaining decentralized power.[45]

The claim that antitrust law has achieved rationality and predictability can be supported by citations to Supreme Court decisions that moved in that direction. The Court has recognized the implausibility of predatory price cutting[46] and declined to hold that blanket licenses of copyrighted music are automatically illegal.[47] Nor, said the Court, are agreements between buyer and seller necessarily illegal simply because they restrict the buyer's freedom to resell.[48] Still, it is difficult to maintain that applied economics has given any precision to the problem of identifying illegal monopolization or that today's merger regulation has any predictability at all. Ambiguous phrases in the antitrust statutes empower government officials to interfere in business activity but do not supply much guidance as to when or where or why to do so. A century of court decisions has provided little clarification. There is little reason to believe that microeconomic theory will bring much change. Even if allocative efficiency were to be accepted as the sole rationale for decisions enforcing the antitrust statutes, fairness and equity goals, still widely and firmly cherished, could be pursued through imaginative application of the imaginary concept of market power. Indeed, market power has replaced concentration as the all-purpose antitrust hobgoblin and the primary evil at which the ceremonial process of antitrust is now directed.

4. The Magic of "Market Power"

The antitrust community uses market power, an imaginary concept from economic theory, as though the term describes something that actually exists. Antitrust is *pro* competition. To what is antitrust anti? The antitrust statutes don't contain an answer to that question. The antitrust community has supplied one. Antitrust is *anti* market power. The basic evil at which antitrust activities are said to be directed is market power. The thinking goes something like this: The bad thing about monopolization is that the monopolist acquires market power. The bad thing about some mergers is that they may result in market power. One of the central elements of antitrust is a belief that firms can and do exercise market power and that it is up to government to prevent their doing so. Official doctrine declares, "At its core, antitrust policy is aimed at preventing firms from obtaining, retaining, or abusing market power."[1]

Two elements of antitrust—belief in the legend of Standard Oil and fear of corporate consolidation—are shared by many literate Americans. The third element—belief in the existence of market power, as well as the responsibility of government to do something about it—belongs to professional antitrust experts. Most Americans have never heard of it. What is market power?

> Economists define 'market power' as the ability of a firm or group of firms within a market to profitably charge prices above the competitive level for a sustained period of time. Although any firm can raise its price, not every firm can profitably do so. As a result, a distinguishing characteristic of a firm or group of firms with market power is that their prices can be raised without the firm or group of firms losing so many sales that the price increase is unprofitable. If there are close substitutes or others could easily begin producing close substitutes, a firm will not profit from a price increase and thus, by definition, does not have market power.[2]

In other words, you have market power if you have market power. This market power is not real. It is an analytical concept of economic theory. It comes from textbook models of perfect competition and monopoly. The concept carries no assumption that market power has ever been possessed by any firm or group of firms or that it ever could be. It is an imagined power, like witchcraft. It is the power that a firm or group of firms would have in an imagined situation—a situation in which the firm or group of firms has no competitors for a sustained period of time and that no close substitutes or potential close substitutes exist. This imagined capacity of an imagined firm or group of firms in an imagined situation has been imported into the interpretation and enforcement of rules of law that contain the words "restraint of trade," "monopolize," and "lessen competition" as though market power is real—as though it describes a situation that actually exists—as though possession of such hypothetical power can be a matter of factual proof.

The Sherman Act forbids contracts "in restraint of trade or commerce among the several States or with foreign nations" and monopolizing or attempting to monopolize "any part of the trade or commerce among the several States, or with foreign nations." The Clayton Act forbids mergers "where in any line of commerce . . . in any section of the country, the effect . . . may be substantially to lessen competition, or to tend to create a monopoly." The judicial inquiry as to whether conduct violates those vague and ambiguous normative standards in the antitrust statutes turns into what the antitrust community calls "market analysis." Decisions are given a gloss of rationality by discussion of "the relevant market." The process is described as follows:

> Market analysis begins with the definition of the relevant market. Without defining the relevant market, there is no meaningful context within which to assess the restraint's competitive effects. A relevant market has both product and geographic dimensions. After defining the relevant market, the Court considers whether the defendant has "market power"—typically defined as "the ability to raise prices above those that would be charged in a competitive market." Courts generally have held that proof of defendant's market power is an absolute prerequisite for a plaintiff seeking to use market analysis to satisfy its burden of proving likely anticompetitive effect.[3]

The antitrust community takes this process seriously because court opinions written in these terms are used as rules by which to judge conduct. Market power in this formulation is not just a theoretical concept. It is an ability that the defendant can achieve and exercise. Possession of market power can be a matter of ''proof''—something that judges and juries can find as a fact. In that sense Justice John Paul Stevens has called market power a ''special ability . . . to force a purchaser to do something.''[4] In the same sense, the Commentary on the Horizontal Merger Guidelines (2006) published by the Federal Trade Commission and the Justice Department states on page 1 that ''the core concern of the antitrust laws, including as they pertain to mergers between rivals, is the creation or enhancement of market power'' and that ''mergers should not be permitted to create or enhance market power or to facilitate its exercise.''

The authors of the Commentary write as though the antitrust laws are people. People have concerns. Statutes do not. Someone has concerns about the creation, enhancement, and exercise of market power. Government must respond to such concerns.

Antitrust experts point out: ''Market power often is not easily assessed; 'the' analysis certainly requires a fact-specific and detailed inquiry into the underlying competitive conditions, which may be complex.''[5] Market power ''is possessed to some degree by every firm that is not constrained by perfect competition.''[6] In other words, every kid with a lemonade stand has *some* market power. ''In markets with differentiated products, the absence of localized competition may enable a firm to exercise market power.''[7] How do we know when the defendant possesses sufficient market power intentionally achieved to be a criminal in violation of the Sherman Act? How do we know when a merger may result in the creation of such an unacceptable amount of market power that it should be prevented? ''Economic theory alone . . . does not provide a bright line that indicates when such power raises concerns that violate the antitrust laws.''[8] ''The quantum of power required for judicial intervention varies with the nature of the antitrust challenge.''[9] According to ''the'' analysis, ''the courts must make a judgment of degree. . . . Performance tests obviously cannot detect power that has not yet been attained and thus cannot aid antitrust efforts to control conduct leading to market power. . . . Market power and its determinants are all matters of degree. . . . But decisions must be made even when available data are inconclusive.''[10]

Why must such decisions be made? Why should we condemn conduct when all we have are inconclusive data? In his book *The*

Antitrust Paradox, Robert Bork described how some members of the antitrust community answer this question:

> Several hundred lawyers at a meeting of the Antitrust Section of the American Bar Association listened to a nationally prominent attorney, who subsequently became an Associate Justice of the Supreme Court, contend it was fruitless to worry about antitrust's intellectual problems. Antitrust, the attorney said, is in the good old American tradition of the sheriff of a frontier town: he did not sift evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people.[11]

Antitrust believers feel a need to do something even if they can't be sure that it will accomplish anything. As Thurman Arnold said, ''The crusade is not a practical one.''[12] Even if attempts to deal with market power accomplish no more than did Theodore Roosevelt's trust-busting, the attempt has moral and ceremonial value.

How would someone prove the existence of market power? No one can prove it, but the antitrust community infers its existence from market share. ''While market shares and concentration statistics are not perfect proxies for market power, they have become a proxy in the courts and before the agencies for the assessment of market power and the likely performance of a market.''[13] The Chicago school's efforts to make antitrust law a branch of applied economics have resulted in the retention of concentration as a central element of antitrust.

''Market'' Is Metaphor; It Can Only Be Assumed and Cannot Be Proven

To prove the existence of market power, a market must first be defined. The antitrust bible published by the ABA tells us:

> The definition of a relevant market is important in most antitrust cases and is often the central battleground issue. Although the courts have identified basic methodologies and factors to be considered in defining a market, applying these principles in particular cases often proves difficult and complex.[14]

The government's Horizontal Merger Guidelines define a market ''as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant."[15] The Guidelines also contain the statement: "In attempting to determine objectively the effect of a 'small but significant and nontransitory' increase in price, the Agency, in most contexts, will use a price increase of five percent lasting for the foreseeable future."[16]

Determinations of the market and market power are made through a self-hypnotic process of circular reasoning. The market is only a metaphor, not a description of reality. There is no actual market. This was explained by Frederick Rowe:

> Fundamentally, the market is metaphor, not actuality, a mental "picture in our heads." While many definitions, all circular, state attributes of what the market *is*, a market is a market is a market—there is no *there,* there. Like the law's concept of contract, economics' concept of market yields no answers for any but the blackletter textbook case. But unlike contract, which has been objectified by precedent, historical gloss, and case-by-case interpretation, the market has no objective content outside itself. Without empirical referents, identification of *the* market is perforce arbitrary, a façade for decisions elsewhere derived. Inevitably, *the* market entails a mix of intuition, judgment, and choice, relative for each case and every question at hand. (Derivative norms of "market power" then wax delusive or piffling, for such power exists everywhere or nowhere, and becomes meaningful only as a variable of time and degree for any given case.). . . The market itself cannot be the predictive premise, the analytic constant for inferring positive or negative prospects of particular enterprise events in any actual case. . . . The rub is not with economic models as models, but their misuse as legal norms.[17]

The Guidelines' market definition requires the assumption that, while the hypothetical price increase on which the market definition is to be based continues (a 5 percent increase for the foreseeable future), "the terms of sale of all other products are held constant." The attempt is to make a static analysis of a dynamic world by making an assumption about an unknown future, and the assumption is most probably wrong. The one thing we know about the future is that things do not stand still. Definition of the market is based on an assumption that could be true only in a dream world, not the real world.

To deal with this problem, the antitrust community has employed the concept of "barriers to entry," another metaphor needed to give a surface plausibility to the market metaphor. Supposedly, because of barriers to entry, hypothesized higher prices do not attract additional sellers:

> The existence or absence of barriers to entry is a critical market characteristic that is inevitably considered in one form or another in every market and market power analysis. Both the courts and the economic literature recognize that a monopolist or collusive group will not be able to increase prices above the competitive level for sustained periods of time where entry into a relevant market is easily accomplished.[18]

This neatens up the doctrine but merely leads to further difficulty in imposing the concepts onto facts in the real world. According to the *Market Power Handbook*, "there remains significant disagreement over both the definition of entry barriers, and the best method of evaluating the ease or difficulty with which a new competitor will be able to enter a market."[19]

If it is possible to exercise market power because there are barriers to entry, when were the barriers erected and by whom? Were they in place before the market power was obtained? One pair of economists concludes: "There is no general consensus about what precisely constitutes a barrier to entry."[20] It may be that the only effective barriers to entry are those maintained by government through special legislation or patents.[21]

Market Power—Imagined and Unverifiable

Market "power" is the imagined power that a seller might have if an assumed future, in which all other things remain unchanged and which cannot be verified, were to occur. Government forces citizens to pay taxes. That is real power. Business firms cannot force citizens to pay for anything. Power cannot be achieved by high sales volume. There is no right to sell. No one can be forced to buy.

Antitrust believers derive—out of circular assumptions—a miraculous power of some sellers to force sales on buyers. Market definition depends on an assumed power and that power, in turn, depends on definition of the market. Both depend on assumptions about a future that no one can know. Application of the term ''market power'' to a consensual relationship of buyer and seller confuses thought on the subject. The only real power a seller has is derived from satisfying buyers. Absent government coercion, it is only the buyer, not the seller, who has any power.

The antitrust community must use available terms to get results, given existing antitrust doctrines. Every seller has a monopoly at a particular time and place, but everything competes with everything else for the buyer's dollar. The antitrust community attempts to reconcile these two truisms with the necessity of giving some meaning to the terms ''monopolization'' and ''competition.'' At the present time, ''market analysis'' is the only tool available. The antitrust community is stuck with that tool, given existing antitrust doctrines. Lawyers merely apply those doctrines and cannot be expected to provide assistance at developing intelligent public policy.

Belief in market power is critical for the antitrust community. If there is no such thing as market power, there is no point to antitrust. Where would the Apostle's Creed be without the virgin birth? Belief in the effect of a placebo, like belief in the power of prayer, may do some good and does no harm to nonbelievers. By comparison, belief in market power carries a potential for mischief and provides no rational basis for normative rules.

When a judge or jury finds that a defendant possesses market power, it can lead to a conclusion of illegal monopolization, with possible treble damages and breakup of the defendant to follow. When a government official concludes that a merger might lead to creation of substantial market power, the merger must be prevented. In the dream world of antitrust, as sales volume rises to the point that a particular market share is reached, like magic the sellers have obtained market power. Now they can raise prices above the ''competitive'' level, cut production, and make monopoly profits. But success is risky. If market share is a proxy for market power, the rule for the boldly creative and productive entrepreneur becomes at some point: hold down sales volume and avoid improvements in price, quality, and service or face antitrust prosecution. The enforcement of the antitrust laws is based on that theory. It takes an expert to believe in it.

"Market Power" Label—A Disguise for Subjective Decisions

The "market power" label is used to provide a façade for subjective decisions as to what the decisionmaker feels is fair. Whether a given defendant has an unacceptable amount of market power—whether that defendant has violated the law—is a matter of judgment. On what basis is the judgment made? Economic theory provides no "bright line" to guide the decision. Nor do the facts. Identification of the market is arbitrary, "a façade for decisions elsewhere derived."[22] As Rowe has written, market definition "entails a mix of intuition, judgment, and choice, relative for each case and every question at hand."[23] The judgment or choice is made to find that the defendant has, or did have or might have, substantial market power. Did the judge or jury find that the defendant had substantial market power because the defendant actually did have such power, or did the power exist only because the judge or jury found that it did?

Antitrust doctrines of market analysis bestow on antitrust decisionmakers the power to make arbitrary decisions based on hunch or whim disguised as reason. Those who understand what they are doing can further their own personal or political objectives, including the desire for fairness and social justice. Those who do not understand what they are doing are simply acting at random, or in whatever direction they can be led by effective advocates. As one chairman of the ABA section of antitrust law has written:

> Every antitrust case now involves a battle of economic experts, and it is very difficult for judges and juries untutored in antitrust economics to evaluate the presentation of economic experts effectively and, thus, the experts often simply cancel each other out of the case.[24]

Some decisionmakers may understand what they are doing. Some may not. In either case, they are not doing what they are supposed to do in our system—apply announced written rules to proven facts to decide whether a law has been violated.

5. Monopolization

The primary goal of antitrust is protection of the public from monopolization by the ''trust.'' The antitrust community has been unable to develop a specific description of the primary villain of antitrust—the trust. The Sherman Act, the original *anti*-trust law, declared it a federal crime, punishable by fine and imprisonment, to ''restrain trade'' and to ''monopolize'' any part of the trade or commerce among the several states or with foreign nations. Those activities were what the Standard Oil trust and other trusts were supposed to have done. Trusts were believed to have monopolized parts of trade. Clayton Act prohibitions—such as those against price discrimination, tying, and mergers—are not criminal. They were adopted later to prevent practices that purportedly might lead to monopolization.

As several authors have observed, the antitrust community favors competition but lacks a consensus on how to define it. Law professors Daniel Gifford and Leo Raskind wrote as follows:

> The Sherman Act was enacted as a response to the dominant political phrases of the day—''trusts,'' and ''monopolies.'' As the legislative history of the Sherman Act attests, the congressional debates that led to its enactment did not provide a clear direction for interpreting the statute as enacted.[1]

According to law professors Eleanor Fox and Lawrence Sullivan, when the Sherman Act was passed the public saw trusts as an ''intolerable evil.''[2] Congress acted to combat that evil ''despite doubts about precisely what the statute meant or would accomplish.''[3] The action was similar to the way today's politicians respond to public dissatisfaction with gasoline prices by proposals to do something about ''price gouging'' without being able to define it. In 1890 public dissatisfaction with trusts seemed to require doing something about monopolization although the term wasn't defined—and even though oil industry prices were declining at the time. Doubts about what the statute meant or would accomplish were no obstacle to congressional action.

The antitrust community has struggled ever since to give meaning to the statutory prohibition of monopolization. It is impossible to construct a factual foundation for the term. Like market power (and unlike, say, robbery) there remains only a prohibited concept of evil without factual reference. No one has developed a formulation that can distinguish legitimate from illegitimate competitive efforts by a single firm acting alone. Is the firm successfully competing, which is thought to be desirable, or is it monopolizing, which the statute condemns? There is no way to tell the difference on the basis of ascertainable facts.

In 2006 the Justice Department and the Federal Trade Commission held a series of joint public hearings to examine "whether and when specific types of single-firm conduct" may violate the Sherman Act "by harming competition and consumer welfare, and when they are procompetitive or benign."[4] At the initial hearing the FTC chairman indicated that the problem of how to define illegal monopolization "still vexes" and announced a new goal of antitrust—"undistorted competition."[5] The concept of "distorting" competition may help capture the elusive concept of monopolization.

Belief in antitrust begins with the Standard Oil legend. Antitrust believers are opposed to what the Standard Oil trust is believed to have done. Antitrust is *anti* the Standard Oil trust. Why? In the late 19th century, American businessmen attempted to consolidate corporations under a legal device known as the "trust." They transferred securities to trustees who then possessed authority to run the new entity as one unified corporation. Standard Oil formed the first trust in 1882 and, within a decade, other industries did the same.[6] In 1911 the Supreme Court held that Standard Oil Company of New Jersey was an illegal monopoly prohibited by the Sherman Act because Standard had unified "power and control over petroleum and its products."[7] The Court dissolved the evil trust into dozens of geographically dispersed companies. The legend of Standard Oil was established.

Professors of antitrust law preserve the legend. Phillip Areeda and Louis Kaplow accept as "clear facts" that Standard "had achieved undoubted dominance of domestic oil production and distribution through numerous mergers, some of which were *coerced*, and oppressive tactics against competitors, including the *coercion* of competitors' suppliers and customers.''[8] Fox and Sullivan tell their students how this ''dominance'' was exercised:

> The enormous buying power of that trust was used to *force* the railroads to give the trust low rates while charging its competitors high rates. As a seller, the Oil Trust charged high prices to customers in monopoly areas, while engaging in local price cutting designed to *force* recalcitrant competitors to sell out to the trust or be destroyed.[9]

Fox and Sullivan suggest that ''the railroads, needing Standard Oil's business, were afraid to offend it.''[10]

The Standard Oil legend is a starting point for belief in antitrust in somewhat the same way that belief in the virgin birth supports the Apostle's Creed. Without an acceptance of the Standard Oil legend, the collection of fears, assumptions, and predictions that constitute the antitrust religion would have nothing to build on. If the legend were shown to be without factual foundation, the Sherman Act may have been aimed at something that never existed. Legal action to enforce the statute might be chasing a ghost. That could be the reason it is so difficult to define monopolization—it never happened. Antitrust might be, as professor D. T. Armentano has asserted, a ''hoax.''[11]

Not everyone agrees with Areeda and Kaplow that the ''clear facts'' show Standard Oil achieved ''dominance'' of domestic oil production through ''coerced'' mergers and ''oppressive tactics'' against competitors. It may be that many firms were eager to be bought out by Standard.[12] Furthermore, at the peak of Standard's supposed dominance of the industry, ''the costs and prices for refined oil reached their lowest levels in the history of the petroleum industry.''[13] According to professor Thomas DiLorenzo, ''there never was any evidence that the trusts and 'combinations' of the late nineteenth century actually harmed consumers in the way that monopolies are supposed to harm consumers—by colluding to restrict production to drive up prices.''[14] Robert Crandall and Clifford Winston of the Brookings Institution concluded that the decree dissolving Standard Oil had ''little effect'' and note that real crude oil prices were falling before Standard Oil was brought to trial and rose after the breakup. They point out that Standard Oil's market share of refinery capacity in the United States had fallen before the decree from 82 percent in 1899 to 64 percent in 1911.[15] Professor

Simon Whitney concluded, "decline in the share of refining done by Standard Oil even before 1911, and a continued decline of successor companies as a group, indicate that the decree merely supported current trends."[16]

Armentano wrote that Standard Oil was more efficient:

> [The legend] has almost nothing in common with the actual facts. . . . Standard Oil's efficiency made the company extremely successful: it kept its costs low and was able to sell more and more of its refined product, usually at a lower and lower price, in the open marketplace. . . . In 1911 at least 147 refining companies were competing with Standard, including such large firms as Gulf, Texaco, Union, Pure, Associated Oil and Gas, and Shell. . . . Standard Oil . . . secured its market position in petroleum primarily through internal efficiency and merger, not systematic predatory practices.[17]

Professor John McGee examined the thousands of pages of the trial record in the Standard Oil case and concluded that the record shows "Standard Oil did not use predatory price discrimination to drive out competing refiners, nor did its pricing practice have that effect."[18]

Whatever the truth in the historical record, one might ask how the trust could "coerce" buyers to buy and sellers to sell without the assistance of government. What was the basis of Standard's so-called "dominance" of domestic oil production and distribution? What was the source of Standard's "power and control" over petroleum? How does a shipper of goods make railroads "afraid to offend it?" Was Standard's "power" to "force" others to enter into commercial transactions of buying and selling wielded at gunpoint or with baseball bats? If so, the trust could have been prosecuted for robbery. There would have been no need for adoption of an antitrust law.

The antitrust community acknowledges that it is difficult to put into words the concept of monopolization and that it is difficult to state a normative rule of just what is prohibited by declaring monopolization a crime. Antitrust believers see the difficulty as one of identification and description of the wicked monopolist, a matter of distinguishing between a good trust and an evil trust. Hearings are held to discuss the problem, but the community cannot accept the conclusion that the difficulty of defining monopolization may derive from the possibility that, without support from government, no one can monopolize any part of trade or commerce for long enough that we need a law against it. Without a belief in monopolization there would be no need for a law to prevent it and no need for a law to prevent business practices that might lead to it.

To gain a better understanding, let us compare the crime of monopolization with the crime of robbery. The crime of robbery has a clear definition based on provable facts. It is defined as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation."[19] Each of the elements of the crime of robbery has an anchor in the real world. Such concepts as "taking" and "by violence" have real meaning.

The offense of monopolization cannot be defined the way robbery can. The supposed elements of monopolization have no anchor in the real world. They can only be imagined. The American Bar Association's antitrust law section refers for a definition of monopolization to the *Grinnell* case[20] in which the Supreme Court identified what it referred to as "the elements of the offense" as follows:

> The offense of monopoly under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[21]

Unlike a statement of the elements of the offense of robbery, that statement by the Supreme Court is useless as an operative, normative rule by which to guide and judge conduct. The statement is simply a doctrinal verbalization. Taking by force can be observed by witnesses who can be questioned under oath. Possession of monopoly power cannot be observed by anyone. One either believes in it or one doesn't. Proof of the existence of monopoly power depends on assumptions and predictions that cannot be verified. There are no witnesses who can be questioned, only expert theorists who can offer opinions that "often simply cancel each other out."[22]

Even doctrinally the Supreme Court's statement relied upon by the antitrust community for a definition of monopolization leaves unresolved the tension between competing values. As Fox has written:

> The meaning of ''monopolize'' has been one of the puzzles of U.S. antitrust law for the entire century of its existence. The challenge is to formulate a liability rule or standard that takes wise account of the tension between providing incentives to be the best and preventing unjustified creation and abuses of monopoly power. The balance has shifted over time.[23]

Without the assumptions inherent in the concepts of ''the market'' and ''market power,'' there is no tension that needs balancing. Without the assumptions of static analysis applied to a dynamic world, there is no defining of ''the'' market and no ''market power.'' The problem of defining monopolization is in the concept, that is, in the impossibility of encouraging winners and protecting losers at the same time. Belief in antitrust allows belief in a kind of competition in which some win but none lose. Antitrust believers like Fox are attempting to reconcile competition with social justice. They have a dream.

The Supreme Court's definition of monopolization uses the term ''monopoly power.'' Is there any difference between market power and monopoly power? The ABA *Market Power Handbook* answers as follows:

> Some scholars have distinguished between the two terms. Those scholars point out that firms may have trivial amounts of market power, perhaps because the firm has transitory advantages that will be competed away as other firms innovate. That market power should not raise antitrust concerns. In contrast, firms with a substantial amount of market power may be said to have monopoly power or ''antitrust monopoly power,'' which does raise antitrust concerns. . . . Many economists would distinguish antitrust monopoly power as a circumstance where a firm (or group of firms) has substantial market power. The presence of substantial market power is reflected in the firm's (or group of firms') ability to raise a price significantly above competitive levels for a sustained period of time; the firm (or group of firms) is insulated from competition over the long run by significant barriers to entry as opposed to minor differences in product attributes.[24]

In other words, without barriers to entry market power does not equal monopoly power. Firms may have ''trivial'' amounts of market power that will be competed away, but such market power does not raise ''antitrust concerns.'' Only substantial market power made possible by significant barriers to entry raises such concerns. What are significant barriers to entry? Once again, the student of antitrust confronts an economic concept, like market and market power, defined by result and based on assumption, not ascertainable facts.

The ABA *Market Power Handbook* concludes its chapter on barriers to entry with the following:

> The likelihood of entry is a fact-specific inquiry that, like market power and relevant market analysis, requires a comprehensive assessment of the structural and behavioral characteristics of the market and firms at issue. No single test exists for whether entry will be likely, timely or successful. Rather, the analysis must consider a wide range of evidence.[25]

Once antitrust concerns have been raised, it does not necessarily follow that illegal conduct has occurred; only that a fact-intensive process of antitrust analysis should begin. Comprehensive assessment is called for. No single test is available. Everything is relevant and nothing is determinative. ''The analysis'' includes not only facts but also assumptions and predictions that cannot be verified. If the decisionmaker is so inclined, the label ''anticompetitive'' is applied, and the conduct pronounced illegal. There is no normative rule by which to guide or judge conduct. Results depend not so much on what the facts are but on how they are characterized by skillful advocates and theorists. A decision is reached as to whether something has happened that should be disapproved of—whether the defendant is a doer of evil, and whether a victim has been treated unfairly. If so, the defendant is accused of acting not competitively but *anti*-competitively. Then the conclusory label is applied and the conduct ruled illegal. There is no rule that can be stated in advance to guide and evaluate conduct. The conduct is evaluated first, and then a ruling is made. The conduct is not disapproved because it violates a rule. The rule can't be stated until the conduct has been exhaustively examined and disapproved on the basis of assumptions and predictions.

The antitrust process of deciding who is illegally monopolizing rather than just competing has been discussed as a matter of choosing standards. Steven Salop, professor of law and economics at Georgetown University, acknowledging that there is ''great intellectual ferment over the proper antitrust liability standard governing allegedly exclusionary conduct,'' finds ''two main competing liability standards.''[26] He prefers one over the other and says that making it ''the'' standard would ''unify antitrust law and make the doctrine more coherent.''[27] Prominent antitrust lawyer Mark Popofsky, apparently unconcerned about unity or coherence, identifies five different proposed definitions of exclusionary conduct. He says that the search for a unitary test should be abandoned, that courts must apply ''different'' legal tests and ''select between rules'' depending on the case.[28] Law professor Andrew Gavil says the following of the antitrust community's attempts to define monopolization:

> As an antitrust community we have long been of two minds about monopoly. On the one hand, the evils of monopoly are widely recognized: restricted output, higher prices, perhaps diminished incentives to pursue cost-cutting measures and innovation, and increased incentives to pursue rent-seeking strategies, as with predation. . . . Yet we also are aware of the potential dangers of too readily condemning the actions of monopolists for fear that legal standards will erode the very incentive that drove them to compete hard and succeed in the first place. . . . Identifying operative legal rules that resolve the obvious tension between these two competing values has proven to be an elusive goal.[29]

Gavil concludes that the goal of stating an operative legal rule should be abandoned because ''a unitary and inflexible standard will necessarily under- or over-deter.''[30] Rather than adopt Popofsky's recommendation that it be left to judges to select a rule to fit the case, Gavil suggests ''dominant firms'' should be asked to ''adhere to a higher code of responsibility.''[31] He does not say where this code can be found. Perhaps in the Golden Rule. It can't be found in the written provisions of the Sherman Act.

Counseling to avoid prosecution for monopolization is impossible. There is no way to know or predict what rule or standard, if any, will be selected to decide the case. How does the successful competitor avoid raising antitrust concerns? Cutting sales, so that inefficient competitors may more easily survive, may help to avoid government scrutiny. But the evil may already have been done. An unsuccessful competitor may sue for treble damages. For a fee, an imaginative and articulate economist may label some past competitive action of the defendant with a sinister term such as ''exclusionary'' or "predatory." Facts may be presented with sufficient skill such that the label sounds plausible to a jury sympathetic to the plaintiff. An enterprising lawyer may invent a class of injured parties and demand payment for damages so high that the successful competitor must either settle or face bankruptcy. That's not the rule of law but of roulette.

Unsuccessful Attempts to Give Meaning to the Statutory Prohibition of Monopolization

The history of government action against monopolization provides no cause for optimism that an operative definition of monopolization will ever be found. Antitrust believers struggling to make sense of the ambiguity in antitrust statutes reach for an analogy with common law development as though federal courts can develop a law of monopolization the way that old English courts developed tort and contract law. Professors E. Thomas Sullivan and Herbert Hovenkamp write that the Sherman Act "was designed to set forth only general principles so that the courts would be able to determine the legality of challenged practices on a case-by-case basis within the context of common law principles."[32] Areeda and Kaplow assert that the Sherman Act "may be little more than a legislative command that the judiciary develop a common law of antitrust."[33]

The common law analogy is misleading and confuses thought. The Sherman Act is a statute enacted by a legislature of limited powers delegated in a written constitution. Federal courts are not courts of general jurisdiction like those that developed English common law inherited by our state courts. Under our constitution, all federal law is statutory. There is no federal common law. Neither Congress nor the federal courts can create one. If the Sherman Act were, as Areeda and Kaplow suggest, only a command to develop a common law of antitrust, the act would be an unconstitutional delegation of legislative powers to the judiciary, without any intelligible principle to guide the judiciary in fleshing out the provisions of the statute.

A law subjecting the citizen to possible fine or imprisonment should be explicit as to what one may or may not safely do and should not leave too much to the discretion of prosecutors, judges, and juries. The Supreme Court, however, has rejected the argument that the Sherman Act is deficient in this respect.[34] The court said that ''the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree,'' and gave the example of ''murder, manslaughter, or misadventure'' resulting from an automobile accident.[35] But that analogy does not fit well with determinations of market power and barriers to entry. Perhaps that's why prosecutors have been reluctant to invoke the criminal sanctions of the Sherman Act. The ABA explains as follows:

> Sections 1 and 2 of the Sherman Act give the government the authority to proceed against violations by criminal indictment or by civil contempt. Although the language of the statutes offers no criteria for determining whether a particular violation should most appropriately be addressed criminally or civilly, the Antitrust Division has a long-standing policy of seeking criminal indictment only where it believes it can prove a clear, purposeful violation of the law.[36]

From Standard Oil to IBM to Microsoft—the Successful Competitor Turned upon When He Wins

Government attacks on alleged monopolization are rare, but there is always a danger to successful competitors, especially innovators, that competitive losers will pressure activist government officials to do something. Assisted by creative lawyers and economists, losers can place on the winner heavy financial burdens to defend business success against private treble damage actions with unpredictable results.

Prosecution of Standard Oil ended in victory for the government. The defendant was dissolved, a symbolic but useless victory for the Justice Department. In 1915 former president Theodore Roosevelt said of the prosecution of Standard Oil that ''not one particle of good resulted to anybody and a number of worthy citizens of small means were appreciably injured.''[37]

Similarly, the prosecution of IBM was a complete fiasco. The government began an investigation in 1967 and filed a complaint in January 1969.[38] Trial began in May 1975. The United States sought dismissal in January 1982.[39] Law professor John Lopatka describes the case as follows:

> The numbers astound: 700 trial days over the course of nearly seven years, preceded by six years of discovery; 87 live witnesses; 860 deposition witnesses (whose testimony was read

> aloud to an empty bench, a process that consumed 70 trial days); 104,400 trial transcript pages; 17,000 exhibits. . . . The government estimated that it spent $16.8 million, not including expert witness fees, litigating the case; the defendant estimated that the total annual cost—*annual*—to all parties was between $50 million and $100 million, an estimate that presumably does not include the incalculable indirect costs of the litigation. And after fifteen years after its investigation began, the United States simply dropped its case against IBM, Assistant Attorney General William Baxter concluding that the government would lose and fearing that it might win.[40]

The government alleged that IBM had monopolized a market of general-purpose digital computers, having reached sales of about 74 percent of that market. The government did not charge that IBM had acquired its market share unlawfully but that it had maintained its position through anticompetitive acts. According to author and former federal appellate judge Robert Bork, ''There was no sensible explanation for IBM's dominance in the computer industry at the time other than superior efficiency, and, as the firm's relative superiority declined, the market began to erode IBM's position.''[41]

A private party, Telex, also attacked IBM for its business success.[42] In the *Telex* case, Telex first alleged that IBM had monopolized and attempted to monopolize data-processing equipment and then, in an amended complaint, charged IBM with monopolization of plug-compatible peripheral products attached to IBM central-processing units. Rather than just defend, IBM fought back. In a counterclaim, IBM charged Telex with unfair competition, theft of trade secrets, and copyright infringement. After an exhaustive trial, a U.S. district judge concluded that IBM should pay Telex $259.5 million, plus $1.2 million in costs and attorneys' fees. A court of appeals reversed that decision. The court concluded that the evidence established that IBM's actions constituted ''valid competitive practice''[43] and ordered Telex to pay IBM on the counterclaim $17.5 million in compensatory damages and $1 million in punitive damages. Telex filed a petition for review in the Supreme Court but later withdrew the petition after a settlement in which each party released its claims against the other.[44] The case nicely illustrates the difficulty of distinguishing illegal monopolization from valid competitive practice. The parties, probably advised by the most expensive experts available, were unwilling to risk a decision in the Supreme Court as to which is which. The *Telex* case makes it difficult to maintain that there is any rule of law with regard to monopolization.

Chapter 1 describes the meandering procedural history of the *Microsoft* case.[45] Though the proceedings clarified nothing, they showed the subjective nature of decisions about monopolization and the absence of any discoverable rule by which to guide or judge conduct. Competitive losers complained to the Federal Trade Commission about Microsoft's conduct. Two commissioners would have done nothing about it. Two would have. Because the fifth commissioner declined to participate in the decision, the commission did nothing. The Justice Department pursued the case. After several years in the courts, involving two district judges and three circuit judges and an unsuccessful attempt by another circuit judge to mediate the case, a district judge found that Microsoft had illegally monopolized Intel-compatible PC operating systems and illegally attempted to monopolize Internet browsers. He concluded that the company should be broken up. A panel consisting of seven circuit judges, one of whom had been in charge of the antitrust division at the Justice Department before being appointed to the court of appeals, reversed most of the district judge's decision and turned the matter into a "tying" case that was settled out of court with the parties agreeing to regulatory provisions supposedly designed to protect complaining competitors. Chapter 7 will discuss tying.

On June 1, 1938, trial began on a complaint by the Justice Department that Aluminum Company of America had illegally monopolized aluminum. The government urged that the company be dissolved. The trial lasted two years and generated 40,000 pages of testimony. After another two years, a district judge dismissed the complaint. Two years after that, the Supreme Court announced that it couldn't assemble a quorum of six justices to review the case but referred the matter to the U.S. Court of Appeals for the Second Circuit. That court's opinion,[46] written by Chief Judge Learned Hand, has been called a "classic" that "did much to shape the modern law of monopolization."[47] The opinion is certainly a classic but might more accurately be described as having done more to perpetuate confusion than to shape law. The opinion contains statements that have lasted, such as: "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry"[48] and "The successful competitor, having been urged to compete, must not be turned upon when he wins."[49] But the court then proceeded to do just that. The court concluded that Alcoa was an illegal monopoly and had illegally monopolized the ingot market. Alcoa argued that it had conducted its business with skill, energy, and initiative, and that it should be commended, not dismembered. The court replied:

> It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but *we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared to a great organization, having the advantage of experience, trade connections and the elite of personnel.* Only in case we interpret "exclusion" as limited to manoevres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.[50]

The court condemned Alcoa for efficiency. The court had to do so. Otherwise, the Sherman Act would have been emasculated. The existence of Alcoa, like that of Standard Oil, was the very thing that antitrust is supposed to prevent. Thus was the modern law of monopolization shaped.

Antitrust proceedings pervert traditional legal procedure. Our system of law enforcement requires an ascertainable rule by which conduct can be measured. The system assumes that facts can be found establishing noncompliance with the rule. Findings of fact differ from statements of law. The judge states the law to the jury. The jury finds the facts and applies the law to the facts, and the result follows. In cases tried without a jury, the judge finds the facts.

Reaching a conclusion that the defendant has monopoly power, has used it anti-competitively, and is therefore an illegal monopoly cannot be done by traditional legal procedure without debasing the system. Whether the defendant has been shown to have taken something of value from another by force is a factual question. Whether the defendant has antitrust monopoly power is not. The gaseous theoretical concepts of antitrust mix questions of law and economics with questions of fact. When a judge hears a monopolization case without a jury, the judge can issue the decision and support it with an essay in which conglomerations of facts, assumptions, suppositions, predictions, guesses, theories, and conclusions are labeled as "findings of fact." In a jury trial, the judge can finesse much of the decision to the jury through supposed instructions as to the law, leaving it to the jury to make assumptions disguised as findings of fact and to resolve the case on any basis it chooses, including a personal sense of fairness. Such a decision is difficult for a court of appeals to review. Because there is no operative normative rule defining monopolization, instructing the jury in such cases is a challenging task.

The antitrust community maintains the pretense that monopolization law exists on which a jury can be instructed. At the same time, some community members urge that the search to define monopolization law should be abandoned. The community, attempting to assist the judge in the task of stating to a jury that which cannot be stated, has published model jury instructions supported by footnotes referring to court precedents.[51] They have been published in book form by the ABA Section of Antitrust Law. That volume's preface states that "the Section believes that the instructions accurately and fairly state the law" and that they "present a single, clear view of the law based on Supreme Court and Court of Appeals decisions."[52]

Many of the ABA's suggested instructions are open-ended and filled with abstractions. The successful competitor cannot be confident that success will be the only criterion for a conclusion of unlawful monopolization. A suggested instruction on proof of monopoly power includes the following:

> A market share above 50 percent may be sufficient to support an inference that defendant has monopoly power, but in considering whether defendant has monopoly power it is also important to consider other aspects of the relevant market, such as market share trends, the existence of barriers to entry, the entry and exit by other companies, and the number and size of competitors. Along with defendants' market share, these factors should inform you as to whether defendant has monopoly power. The likelihood that a company has monopoly power is stronger the higher that company's share is above 50 percent.[53]

With regard to "barriers to entry," the ABA suggests that juries be instructed as follows:

> Barriers to entry make it difficult for new competitors to enter the relevant market in a meaningful and timely way. Barriers to entry might include intellectual property rights (such as patents or trade secrets), specialized marketing practices, and the reputation of the companies already participating in the market (or the brand name recognition of their products).
>
> Evidence of low or no entry barriers may be evidence that defendant does not have monopoly power, regardless of defendant's market share, because new competitors could enter easily if defendant attempted to raise prices for a substantial period of time. By contrast, evidence of high barriers to entry along with high market share may support an inference that defendant has monopoly power.[54]

Concerning "anticompetitive conduct," the ABA suggests that juries be instructed as follows:

> The difference between anticompetitive conduct and conduct that has a legitimate business purpose can be difficult to determine. . . . In determining whether defendant's conduct was anticompetitive or whether it was legitimate business conduct, you should determine whether the conduct is consistent with competition on the merits, whether the conduct provides benefits to consumers, and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors.[55]

Whether the successful business will be penalized for success may depend on the jury's hunch as to whether some executive's decision made "business sense" or not. The Golden Rule might have greater precision.

Economists have shown ingenuity at developing sinister-sounding concepts, such as "buyer-side market power,"[56] to characterize competitive activity as not making business sense and to put successful competitors to the expense of defending their success in court. The 2005 *Weyerhaeuser* case[57] illustrates the process. The case is a replay of the Standard Oil legend. An integrated producer profitably supplies finished product at continually declining prices. Less-efficient operators at a single level of the competitive chain go out of business. Standard Oil was broken up. Weyerhaeuser was allowed to continue in its existing form but was ordered to pay some of its assets to the less efficient because it supposedly engaged in ''predatory'' buying.

The Court of Appeals for the Ninth Circuit upheld a damage award of $26 million (trebled to $78 million). A unanimous panel of three judges used the concept of inelastic demand and speculation about what price level might or might not benefit consumers in the long run to distinguish the *Weyerhaeuser* case from a Supreme Court decision[58] that had rejected a claim of ''predatory'' selling. The Court of Appeals accepted the label of the case by the plaintiffs' economist as one of ''predatory overbidding (i.e., paying a higher price for sawlogs than was necessary).'' Testimony by a Weyerhaeuser former employee that the company could ''influence prices in the alder sawlog market,'' evidence that prices had risen in that market, and the former employee's opinion that the company had paid more than necessary for sawlogs were seen as sufficient support for concluding that it ''had engaged in anticompetitive conduct through predatory overbidding.'' The court sustained a claim of an unlawful attempt to monopolize sawlogs, as well as the jury's estimate of damages based on ''the fundamental assumption that Weyerhaeuser maintained artificially high costs in the sawlog market during the damages period.'' Imaginative, articulate economic theorists were decisive. Lawyers argued over esoteric, doctrinal questions concerning standards for identifying ''predatory'' buying and selling.

The court of appeals did not state a rule by which to advise how to avoid this trap of business success into which Weyerhaeuser fell. There is no clue in the court's opinion as to what the defendant should have done that it did not do or what it should not have done that it did do. The case illustrates vividly the impossibility of distinguishing legitimate competition from unlawful attempts to monopolize and the symbolic political nature of the law of monopolization.

6. Mergers

"Vigorous" enforcement of section 7 of the Clayton Act has produced Supreme Court declarations that give government a legal basis to prevent any substantial corporate merger. Fundamental to antitrust is a concern that mergers unsupervised by government may lead to development of an evil trust. Antitrust believers fear corporate consolidation because they see it as a means to monopolize a good or service in the way they believe Standard Oil monopolized oil. The fear was expressed vividly by Supreme Court Justice William O. Douglas in a concurring opinion in a beer merger case in 1966.[1] The Court declared a merger unlawful in each of three ways: (1) the merged firm would have 23.95 percent of beer sales in Wisconsin, (2) the merged firm would have 11.32 percent of beer sales in the three-state area of Wisconsin, Illinois, and Michigan, and (3) the merged firm would have 4.49 percent of beer sales nationwide. Justice Douglas concurred with each of the Court's conclusions and asserted that any other decision would lead "to a form of concentration . . . described" in an appendix to his opinion. He attached a newspaper column of humorist Art Buchwald in which Buchwald observed that mergers were occurring and that "if the trend continues, the whole country will soon be merged into one large company." Buchwald went on to suggest that by 1978 all companies west of the Mississippi would have merged into one corporation and all companies east of the Mississippi into another corporation, those two companies would merge into one, and that company would then negotiate "with the President to buy the United States."

Justice Douglas believed in antitrust. He feared corporate consolidation. The clear implication of his opinion and its supporting appendix was that, if the government could not prevent a merger that would result in the merged company selling 4.49 percent of beer in the United States, all firms might be able to merge into one and might do so. The notion is so absurd that it is never explicitly articulated, but it is a persistent unstated assumption of antitrust. Irrational fear of corporate consolidation remains one of the enduring elements of the antitrust religion. Much antitrust activity is directed at responding to that fear.

Supreme Court doctrine on monopolization contains no clear statement of what the law allows or prohibits. By comparison, Court doctrine as to mergers is clear. Section 7 of the Clayton Act prohibits mergers that may ''lessen competition'' or ''tend to create a monopoly.'' The Supreme Court has interpreted the statute to cover all mergers. Under the Court's statutory interpretation there are no mergers that cannot be said to lessen competition or tend to create a monopoly. In effect, mergers are per se unlawful.

The campaign against mergers during the 1960s, described in chapter 1, was a complete success. The government prevented mergers of every type and won every case except one. In that case, the *General Dynamics* case,[2] decided in 1974, Warren Burger had replaced Earl Warren as chief justice. The Court rejected an attempt to prevent the merger of two coal companies. The Court saw no possibility of future competition between the companies, absent the merger, because one of the companies had limited reserves of coal. The Court concluded that the merger would have no competitive effect proscribed by the statute. *General Dynamics* was the last case in which the Supreme Court said anything substantive about mergers.

In 1962, in the *Brown Shoe* opinion, Chief Justice Warren had extolled ''small business'' as the ''way of life'' to be preserved by section 7 of the Clayton Act.[3] The following year, in the *Philadelphia National Bank* case, the Court condemned any ''merger which produces a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market.''[4] Backed up by the Supreme Court, the Justice Department hit mergers threatening to raise concentration in markets for ''frozen dessert pies,'' for ''artificial Christmas trees,'' for ''vandal-resistant plumbing fixtures'' used in prisons, for local towel rental services, for ''custom-compounded reinforced thermoplastics,'' for drapery hardware, or for commercial trash hauling in Dallas. The Federal Trade Commission moved against mergers threatening to raise concentration in markets for frozen pizza, for carburetor kits, for urological catheters, and for ''knockdown casket parts.''[5]

Some lower court decisions since 1975 have ''not adhered closely to the letter or spirit of the Supreme Court's merger jurisprudence.''[6]

Supreme Court antitrust decisions in nonmerger matters have been said to "provide grounds for inferring that the Court approves the evolution of lower court merger jurisprudence," but "the Court has never directly repudiated the teaching of its antitrust decisions."[7] Andrew Gavil, William Kovacic, and Jonathan Baker have suggested that "the foundations of U.S. merger policy rest upon the assumption, without the benefit of the Court's own direct guidance, that the Court no longer means what it once said."[8] Nevertheless, the merger doctrines of the Warren Court remain substantially intact. They are used to prevent mergers involving such products as ice cream, sardines, and mashed fruits and vegetables, although it is impossible to imagine the creation of a monopoly of any of those items or how a merger could tend to create one. Antitrust "market analysis" supplies a rationale for preventing such mergers. Markets are assumed in "superpremium" ice cream,[9] sardine "snacks,"[10] and "baby food."[11] In such markets the merger is said to lessen competition and is, therefore, illegal.

The campaign against mergers resulted in Supreme Court interpretations of section 7 of the Clayton Act that had the effect of declaring unlawful all mergers. The authorities had to face the fact that they did not intend to prevent all mergers. They were forced to be selective. They had to be more permissive than the law. Reluctant to contradict declarations of the Supreme Court or to renounce unlimited discretion to stop any merger should it become politically important to do so, the authorities have been unwilling to state unambiguously which mergers might be allowed.

All Mergers Are Illegal—Some May Be Allowed

Once it became apparent that the government could prevent any merger it chose to prevent, enforcement officials issued "guidelines" originally intended to give some guidance on which mergers might be allowed. From time to time, the Justice Department and the FTC have issued written documents misleadingly titled Merger Guidelines. These so-called guidelines were first published by the Justice Department in 1968.[12] It issued a complete revision in 1982,[13] and the FTC issued its own enforcement policy statement concerning horizontal mergers that same year.[14] The Justice Department's 1982 revision contained the following footnote:

> There is some economic evidence that, where one or two firms dominate a market, the creation of a strong third firm enhances competition. The Department has considered this evidence but is not presently prepared to balance this possible gain against the certainty of substantially increased concentration in the market.

Thus, in enforcing a statute prohibiting mergers that may ''lessen competition,'' the Justice Department was stating a readiness to prevent mergers that increase concentration even though they *enhance competition*. Two years later, it revised its statement and omitted that footnote.[15] In 1992, the FTC joined with the Justice Department in a new statement.[16] In 1997, they added a section on ''Efficiencies,'' resulting in a 36-page statement with 39 footnotes.[17] In March 2006, they published Commentary on the Horizontal Merger Guidelines.[18] It consists of 68 pages without footnotes.

In recent years, the treatment of ''horizontal'' mergers (between firms said to be competing with each other in some assumed market) has differed from the treatment of other types of mergers. Although Supreme Court doctrines are available to prevent vertical mergers (between suppliers and their customers) and conglomerate mergers (between firms that are not actual or potential competitors and do not have an actual or potential customer-supplier relationship), preventing such mergers has fallen out of fashion since the Reagan Revolution and the antitrust community's adoption of Chicago-school rhetoric. Some community members have deplored the failure to continue more complete merger prevention. They have urged that a ''more vigorous'' antitrust enforcement policy be ''restored.''[19] But restoration has not occurred. There has been no ''counter-revolution.''[20] Merger policy has remained ''consistent across administrations.''[21]

The reason may be that horizontal mergers offer enough professional activity to keep the antitrust community busy, and they are easy to attack. Horizontal mergers are by definition prohibited by the statute. Horizontal mergers are mergers of competitors. Because it can be assumed that the combined company will not compete with itself, any merger of competitors will eliminate the competition that existed between the parties before the merger and, thus, lessen competition to that extent.

Guidelines That Do Not Guide

The Guidelines give a doctrinal framework within which to rationalize decisions already made but don't give a basis for predicting which way a decision will be made. Originally intended as indications of which mergers might be allowed, the Guidelines have become restatements of concepts and doctrines used to rationalize merger prevention.

The latest Guidelines version discusses ''market definition and concentration,'' ''potential adverse competitive effects of mergers,'' ''entry analysis,'' ''efficiencies,'' and ''failure and exiting assets.'' Although there is no demonstrable correlation between concentration and competition, under ''Concentration and Market Shares'' the document introduces a pseudo-scientific measurement of concentration:

> Market concentration is a function of the number of firms in a market and their respective market shares. As an aid to the interpretation of market data, the Agency will use the Herfindahl-Hirschman Index (''HHI'') of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the participants. Unlike the four firm concentration ratio, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms. It also gives proportionately greater weight to the market share of the larger firms, in accord with their relative importance in competitive interactions.
>
> The Agency divides the spectrum of market concentration as measured by the HHI into three regions that can be broadly characterized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800), and highly concentrated (HHI above 1800).[22]

As if rules by which to evaluate conduct are being declared, the document's authors characterize discussions of concepts like market definition and market concentration as ''standards.'' The first page of the document reads:

> It is not possible to remove the exercise of judgment from the evaluation of mergers under the antitrust laws. Because the specific *standards* set forth in the Guidelines must be applied to a broad range of possible factual circumstances,

> mechanical application of those standards may provide misleading answers to the economic questions raised under the antitrust laws. Moreover, information is often incomplete and the picture of competitive conditions that develops from historical evidence may provide an incomplete answer to the forward-looking inquiry of the Guidelines. Therefore, the Agency will apply the standards of the Guidelines reasonably and flexibly to the particular facts and circumstances of each proposed merger.[23]

The 2006 Commentary on the Horizontal Merger Guidelines states: ''Merger analysis depends heavily on the specific facts of each case.''[24] Thomas Leary, while a member of the FTC, told a Joint U.S./E.U. Conference on Merger Remedies in Paris in January 2002:

> Merger cases are highly fact-intensive. People with the same basic philosophy can and do come to different conclusions on individual transactions.[25]

In other words, as to any particular proposed merger, one person may read the Guidelines to prohibit the transaction and another person may read the Guidelines to permit it. The Guidelines do not guide parties considering whether to merge, nor do they guide government officials considering whether to prevent or permit a merger.

Examples of Unpredictability

When presented with PepsiCo's proposed acquisition of Quaker Oats Co., FTC members split 2-2 on whether to oppose it, and then voted 4-0 to close the investigation. Two commissioners stated that allowing ''PepsiCo to further consolidate its soft drink position by acquiring Quaker Oats and its popular Gatorade products raises obvious and significant concerns that competition will be lost in the highly concentrated soft drink industry.'' The other two commissioners raised the question ''whether Quaker Oats, with its Gatorade product, has the potential to be a significant third competitive force in the marketplace.'' They added that ''predictions of future effects are difficult and that reasonable people can differ even when they apply the same tools of analysis.''[26]

When General Mills Inc. proposed to acquire Pillsbury Co. in 2001, the FTC considered two proposals: (1) a settlement integrating terms offered by the parties and (2) a preliminary injunction to stop the merger. Only two votes could be obtained for either proposal.[27]

In that same year the FTC closed its investigation of the merger of Phillips Petroleum Corp. and Tosco Corp. with a statement that the merger is not ''likely to harm competition and consumers'' because the firms operated in different parts of the country, their combined shares were low where their marketing overlapped, and no consolidation of Alaska North Slope reserves or production would result.[28]

In 2001, retiring after six years as FTC chairman during which an estimated 26,000 mergers were approved, Robert Pitofsky pointed with pride to having obtained a court of appeals reversal of a district court decision that would have permitted the Heinz and Beechnut baby food merger.[29] The district judge had found the following:

> The Commission made its prima facie case by showing increased market concentration. The defendants rebutted that case with proof that the proposed merger will in fact increase competition. The Commission responded to the rebuttal case essentially with only structural theory.[30]

Chairman Pitofsky told the *Wall Street Journal* that the decision overruling the district judge ''holds the line'' on antitrust enforcement. In an interview with *Legal Times* he said, ''Our role is mostly to play defense and preserve the status quo.''[31] On succeeding Pitofsky as FTC chairman, Timothy J. Muris said that he would have allowed the merger.[32]

Unpredictability is inherent in the merger regulation process. As the Guidelines point out, standards cannot be mechanically applied. Historical evidence may provide an incomplete answer. The inquiry is forward-looking. Regulators feel they must make assumptions about a future that cannot be known.

The 2006 Commentary on the Horizontal Merger Guidelines contains what are described as ''short summaries of matters that the Agencies have investigated . . . [in order] to further understanding of the principles under discussion.'' Indications are given as to how the investigations ended, but the reader is told that ''none of the summaries exhaustively addresses all the pertinent facts or issues that arose in the investigation.'' None of these examples provides any guide as to how another ''fact-intensive'' future investigation will end because (1) examples of past decisions do not contain all the ''pertinent facts,'' and (2) no future case will present exactly the same facts.

The ''standards'' in these documents can be cited in support of a decision to stop any horizontal merger, but they are no obstacle to allowing a merger—even a merger that not just eliminates competition but actually creates a monopoly. When Boeing Co. bought McDonnell Douglas Corp. and thereby obtained a complete monopoly of U.S. commercial aircraft manufacture, the FTC allowed the merger to proceed without any conditions.[33] ''The merger's industrial policy, foreign trade, and national defense implications generated political tension. . . . Some Executive Branch officials and members of Congress applauded moves to reinforce Boeing's lead in commercial aircraft production. . . . Department of Defense also welcomed the Boeing-MDC consolidation as a way to preserve the firms' defense capabilities and eliminate excess production capacity.''[34] Under those circumstances, the FTC published a statement rationalizing its way to the conclusion that this merger of what it called ''two direct competitors'' would not substantially lessen competition or tend to create a monopoly.

Neither 36 pages of Guidelines nor 68 pages of Commentary provide any guide to predict which merger will be allowed or which merger will be prevented. The documents inform the antitrust community of language that should be used to discuss a proposed merger no matter what the real considerations are. They illustrate how antitrust doctrines will be used to describe a decision to prevent a merger once a prevention decision has been made. The Guidelines do not prohibit the presentation of facts and argument that may be truly pertinent to a decision to allow a merger, but they provide no guidance as to what those facts and argument may be.

The 2006 Commentary states on the first page: ''The core concern of the antitrust laws, including as they pertain to mergers between rivals, is the creation or enhancement of market power'' and ''the Agencies challenge mergers that are likely to create or enhance the merged firm's ability . . . to exercise market power.'' Such statements provide no rule or guidance. To define a market (and the derivative market power) requires application of a static analysis to a dynamic world. Conclusions cannot be reached without assumptions. To define a market requires an assumption that, except for the merger, the world will stand still. In the course of that exercise those who share the same basic philosophy can and do come to different conclusions on individual transactions. Those individual judgments are impossible to predict.

Government harassment of mergers is arbitrary and unpredictable and is done in secret and randomly driven by complaints of competitors. At the time of the Warren Court pronouncements on corporate mergers and the Justice Department retreat from them in the original Guidelines, it was possible to merge first and then await a government attempt to obtain the facts and undo the merger. Congress changed that in 1976 by the addition to the Clayton Act of section 7A,[35] which requires premerger notification of all mergers above a minimum size and a waiting period before the merger can be completed.

There were premerger notification filings of 1,695 proposed mergers in fiscal year 2005. Federal regulators challenged 18 of them.[36] More than 98 percent were allowed to proceed without government interference. There is no way to tell why a proposed merger fell into the 98-plus percent that were ignored.

High-profile proposed mergers sometimes arouse public interest, which may prompt an announcement in antitrust language, such as ''this merger is not likely to give the merged entity market power,''[37] if the government decides not to object to the merger. There is no systematic disclosure of decisions to allow mergers. The public record of challenged mergers provides few clues as to which mergers will be allowed. In 2004 a federal district court refused to stop a merger to duopoly (two sellers) in ''high function software,''[38] and the Justice Department accepted the result without appeal. At the same time it opposed a merger to near monopoly in sardine snack products.[39] The FTC allowed a merger to monopoly in commercial aircraft manufacture[40] but an increase in concentration of jarred baby food was vigorously opposed,[41] and a merger in the retail market for ''superpremium'' ice cream was prevented.[42]

Since the early 1980s objections to some mergers have been disposed of by partial divestitures. Mergers are permitted on condition that some assets are sold off. These have included agreements to get rid of

> two bakeries, one brewery, four grocery stores, one cement plant, one casket plant, a suntan oil line, and eight nursing

> homes. Shrewd merger planners came to like a little overlap as antitrust insurance, for it bought peace by providing a token offering for a cosmetic decree.[43]

The antitrust community refers to merger review as ''merger enforcement.'' Annual Reports to Congress by the Justice Department and the FTC contain sections headed ''Merger Enforcement Activity.'' At the 2005 spring meeting of the Section of Antitrust Law of the American Bar Association, the assistant attorney general in charge of the Justice Department's antitrust division spoke of ''calling balls and strikes in merger enforcement'' and stated his belief that ''merger enforcement is a necessary part of antitrust.''[44]

Most mergers are allowed. A few mergers are prevented. Some mergers are modified. *No* mergers are enforced. The antitrust community uses the term ''merger enforcement'' even though no mergers are being enforced because it likes to think of what it is doing as law enforcement. Merger regulation is not law enforcement. No ascertainable rule is being enforced. It is an element of the antitrust belief that antitrust is a desirable alternative to regulation. Antitrust believers do not wish to acknowledge that the existing process of merger review is not law enforcement but whimsical government regulation of mergers. Merger review, merger prevention, merger control, and merger regulation are called ''merger enforcement'' by the antitrust community to preserve the fiction that government interference with mergers is law enforcement. The antitrust believer likes to think of unpredictable selective prevention of mergers as ''calling balls and strikes,'' acting as an umpire to keep the economy fair and free of regulation.

No Rule of Law as to Corporate Mergers

The statute and its interpretation by the Supreme Court state a law against mergers, but there is no rule by which to predict when the law will be enforced. Like highway speed limits, section 7 of the Clayton Act gives the merger police arbitrary power to select those against whom the law will be enforced. A merger may be substantial enough that a filing fee and waiting period are imposed, and thereby presumptively prohibited by law, but the merger may be allowed by a secret decision of unidentified, unelected, unaccountable government officials. Will the merger be put with the 95-plus percent to be ignored or the few percent to be looked at more closely? Does the merger arouse "antitrust concerns"? In whom? Will the merger be reviewed by the Justice Department or the FTC? Mergers are destabilizing. They threaten the status quo. Is the merger likely to cause any unhappiness? Might the merger cause unhappiness to anyone of political significance? Someone may lose a job, a sales account, or a satisfactory relationship of some kind. Those threatened may complain to a politician or directly to the antitrust authorities.

The ceremonial ritual of merger review consumes much of the antitrust budget. (An FTC press release in October 2000 said that "merger enforcement accounted for more than 70 percent of the FTC [antitrust] resources."[45]) Formal proceedings that might weaken Warren Court doctrines are seldom necessary. The ritual begins when two prominent companies propose to merge. They file notification forms. "Antitrust concerns" are expressed. Government officials demand further information. Being forced to wait, the parties may call off the merger. Executive branch officials, legislators, state government officials, consumer groups, customers, suppliers, and competitors are heard from privately, some in support and some opposed. The Guidelines provide a language in which to state objections. Phrases like "market power," "lessen competition," and "increase concentration" are intoned. Sometimes government attorneys broker a political solution. Sacrificial offerings may be made, such as promises to sell off a bakery, a brewery, or a casket plant. Whether the merger goes through or is called off, antitrust concerns are taken care of. The statutes and Warren Court interpretations remain in place. Fear of corporate consolidation is allayed. Antitrust is celebrated. Belief in antitrust is preserved.

7. ''Tying'' and ''Exclusive'' Dealing

Combination offers are labeled ''tying,'' and selection of customers is called ''exclusive dealing''—both of which sound sinister and suggest possession and exercise of power by the seller. Monopolization law is tidy but meaningless. The doctrine has no factual reference to the real world. There is no way to distinguish illegal monopolization from legitimate competition. The antitrust statute on mergers has been interpreted in such a way as to prohibit all mergers, but, like highway speed limits, there is no predictability as to when the law will be enforced. A former FTC chairman has said that merger regulation is based on ''quicksand.'' It ''lacks a firm foundation'' because of ''the uncertain empirical basis of existing theories for attacking mergers.''[1]

The law on what the antitrust community calls ''tying'' is no better. Professors Daniel Gifford and Leo Raskind call tying ''a troublesome antitrust issue.''[2] Tying doctrine is acknowledged to be ''in a somewhat uncertain state.''[3] There is no consensus as to what tying is, when tying is illegal, or why it should be. Professors Eleanor Fox and Lawrence Sullivan have suggested that ''The Supreme Court's evolving treatment of tying provides a microcosm of today's evolving and conflicting antitrust attitudes.''[4]

It is said that ''a tying arrangement exists when a producer of a desired product sells it only to those who also buy a second product.''[5] If buyers agree to take all their requirements of one product from the seller without regard to any other product, this is called an ''exclusive dealing'' contract.[6]

Prejudice against tying and exclusive dealing is best understood as rejection of perceived evil. Professors Phillip Areeda and Louis Kaplow imagine an element of coercion in tying. The seller coerces buyers, forcing them to buy. As Areeda and Kaplow see it:

> Although a tying agreement is a particular kind of exclusive dealing, the latter term usually refers only to nontying exclusive dealing arrangements. In all events, both invoke Clayton Act sec. 3 and its concern with *coercing* buyers and *foreclosing* a rival's opportunities.[7]

Note the personification of the inanimate. Written words are said to have a ''concern.'' The Clayton Act is just words on paper. How can words have concerns? Do the professors have this concern? Should we? Why? The Clayton Act doesn't say anything about ''coercing'' or ''foreclosing.''

Antitrust believers have many concerns and one of them is with tying. Antitrust believers are concerned about coercion of buyers and foreclosure of sellers. They believe that, as Justice John Paul Stevens has written, a seller with ''control'' over one product can ''force'' a buyer to buy a second product and prevent another seller from selling it.[8]

The case law on tying has been summarized as follows:

> Judicial analysis of tying arrangements has undergone important adjustments in the past twenty years. . . . Although the Supreme Court continues to classify some tying arrangements as per se violations, the test courts now use to determine whether the per se rule should be applied to a particular arrangement increasingly resembles a rule of reason inquiry because in deciding which test to apply the courts have shown a willingness to consider business justifications for tie-ins and sometimes have analyzed the economic effect of the arrangement. . . . Tying cases display inconsistent approaches to defining and applying the elements of a per se violation, but it is possible to identify several commonly accepted elements of the offense.[9]

''Per se'' in antitrust language means ''in and of itself''—without a ''rule of reason'' inquiry in which everything is relevant and nothing is determinative.

The elements of tying are said to be: (1) two separate products, (2) sale of one product conditioned on purchase of another, (3) ''the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product,'' and (4) ''a not insubstantial amount of interstate commerce in the tied product is affected.''[10] According to professors E. Thomas Sullivan and Herbert Hovenkamp, ''No general definition of a 'product' for purposes of the law of tying arrangements has yet been produced.''[11] Bork explained tying as follows:

> Every person who sells anything imposes a tying arrangement. This is true because every product or service could be broken down into smaller components capable of being sold

> separately, and every seller either refuses at some point to break the product down any further or, what comes to the same thing, charges a proportionally higher price for the smaller unit. The automobile dealer who refuses to sell only the chassis or the grocer who declines to subdivide a can of pears are engaged in tying. . . . There is no way to state the ''inherent'' scope of a product. The judge who attempts it either decides according to product dimensions that seem to him natural because he is accustomed to them, or explicitly decides on grounds of efficiency. . . . Economies of scale determine the definition of the product.[12]

''Tying'' and ''Exclusive Dealing''—Terms Used to Regulate Contracts to Prevent Evil

Neither of the terms ''tying'' or ''exclusive dealing'' can be found in the antitrust statutes. Antitrust believers have invented those supposed evils.

Tying has been condemned as a violation of section 1 of the Sherman Act (as a contract between buyer and seller that unreasonably restrains trade), as well as of section 3 of the Clayton Act. Andrew Gavil, William Kovacic, and Jonathan Baker state, ''Section 3 . . . includes a *specific* prohibition of tying.''[13] That assertion is frequently made but not quite correct. Section 3 prohibits sales ''on the condition . . . that the . . . purchaser . . . not use or deal in the goods . . . of a competitor . . . of the . . . seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly.'' Clayton Act prohibitions are more specific than those of the Sherman Act, but there is no specific prohibition of tying in the Clayton Act. The word does not appear in either statute.

Fox and Sullivan describe the origin of section 3 of the Clayton Act as follows:

> In the early 1900s, large and powerful sellers often required their customers to deal exclusively with them, blocking opportunities of sales by their rivals and limiting the freedom of their customers to choose alternative sources of supply. Such requirements were widely perceived as oppressive.[14]

According to that biblical account of the early days of antitrust, some sellers were not only large but also ''powerful.'' They had the power of ''coercion'' with which Areeda and Kaplow say the Clayton

Act is ''concerned.'' Powerful sellers didn't just choose their customers in those days. They coerced and oppressed them. Sellers forced customers to buy only from them and not from others. It is not obvious how large sellers stayed large by behaving this way, in that buyers cannot be forced to buy but are free to refrain from buying or to buy from whomever they choose, including sellers who might not attempt to impose any such requirements. Nevertheless, oppression by powerful sellers is said by Fox and Sullivan to have occurred ''often'' in the early 1900s.

Antitrust believers thought the practice was doubly evil. It deprived customers of freedom to buy from someone else, and it prevented rivals of the seller from making sales. Political action was thought to be called for. Rep. Henry D. Clayton proposed a bill to declare illegal *all* sales that prohibited the buyers from using the goods of a competitor of the seller. That proposal was not adopted. The law enacted applies not to all sales that are on that condition but only to those where the ''effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.''

The antitrust community has had difficulty stating how tying can lessen competition or tend to create a monopoly. Early cases involved patents. In 1917, the Supreme Court held illegal a license of a patented motion picture machine. The license limited use of the machine to the licensor's films. When films other than those of the licensor were used in the machines, the licensor sued for patent infringement. The defendant argued that the restrictive condition in the patent license was void, and the Court agreed. The Court said, ''A restriction which would give to the plaintiff such a potential *power for evil* . . . would be gravely injurious to that public interest, which we have seen is more of a favorite of the law than is the promotion of private fortunes.''[15]

In 1947, the Court held illegal a lease of patented machines that injected salt into canned products on condition that the lessees buy salt for use in the machines from the lessor. The Court said, ''The tendency of the arrangement to accomplishment of monopoly seems obvious.''[16]

Those cases inspired explanations such as the following by Earl Kintner, a former FTC chairman.

> All manufacturers naturally desire to maximize the sales of their goods, and any aid to this end is willingly embraced.

> Early in the twentieth century several devices were developed to achieve this purpose. One of these devices, the tie-in sale, utilized the market power of one product to increase the market power of another product. For example, a manufacturer of salt might develop a machine for the processing of salt which is more desirable than any comparable machine. If the machine is sold or leased only on the condition that the user purchase all his salt from the manufacturer, a tie-in sale has taken place. The market strength of the manufacturer's salt, the tied product, is thereby raised to the market strength of the processing machine, the tying product. . . . The manufacturer's competitors would be denied customers not on the basis of the competitive merit of their product but simply because of their inability to offer their customer the particular inducement available from the offending manufacturer. In the situation involving the salt-processing machine this inability might lead to a virtual monopoly by the tying manufacturer.[17]

Bork has questioned that rationale for prohibiting tying in the following manner:

> The tie-in tended to the accomplishment of *what* monopoly? In the machines? Requiring a purchaser to take salt does not build a monopoly in the machines; it would tend to have the opposite effect. In salt? It is inconceivable that anybody could hope to get a monopoly, or anything remotely resembling a monopoly, in a product like salt by foreclosing the utterly insignificant fraction of the market represented by the salt passing though these leased machines.[18]

The classic doctrinal statement of the evil nature of tying was restated in 1958 by the Supreme Court in the *Northern Pacific* case. In that case the Court found illegal land contracts with the condition that the buyer ship all goods produced on the land on the seller's railroad, with the following comments:

> Indeed, tying arrangements serve hardly any purpose beyond the suppression of competition. . . . They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected.[19]

This statement may be translated as follows: ''It is sufficient if the tying product has sufficient power to command the arrangement, which is to say that a tie-in is illegal if it exists.''[20]

Tie-ins have sometimes been explicitly allowed. A tie-in of cable access television equipment and service was permitted during the development period of a new industry.[21] A tie-in of a patented silo and a patented unloading device was upheld where there had been substantial customer dissatisfaction with unloaders purchased alone.[22] These cases might have been more easily resolved doctrinally by concluding that only a single product was being sold and that no tying of separate products occurred.

Bork argued that ''the entire theory of tying arrangements as menaces to competition is completely irrational''[23] and that ''there is no validity to the law's explanation of tying arrangements.''[24] More recently, Robert Levy made it clear that, ''Tying arrangements are neither predatory nor exclusionary . . . they are bargains between sellers and buyers, not collusion between competitors.''[25] Levy has explained how selling two products together may be a method of competition, not a means of preventing it:

> First, if the tying and tied products are functionally related, there may be cost savings through economies of joint production or distribution. Second, if the tied product is integral to the operational efficiency of the tying product, or if the tying product is sensitive to the quality of the tied product, there are obvious performance advantages in avoiding inferior substitutes—especially when it is difficult for the consumer to determine whether operating problems are due to low-quality inputs.[26]

Levy has also pointed out additional legitimate uses of tying, including protection against unauthorized copying of software, and providing a means by which to engage in lawful price discrimination through metering, risk sharing, and optimal product bundling.[27]

Courts remain unpersuaded by such thinking. In 1984, in the *Jefferson Parish* case, a divided Supreme Court reversed a lower court decision that had held illegal a contract between a hospital and a group of anesthesiologists. Although the Court ruled in favor of the defendant, included in the Court's opinion was the statement: ''It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se'."[28] Justice Sandra Day O'Connor concurred in the judgment but muddled the doctrine further with a complex treatise of her own as to when a tie-in should be found illegal.

Neither empirical facts, logical economic theory, nor common sense can overcome the intuition of antitrust believers that there is something evil about tying, that, as the Supreme Court has said, there is a "power for evil" in tying. Antitrust adherents believe that, as Justice Felix Frankfurter declared in the *Standard Stations* case, without any empirical or theoretical support, "tying arrangements serve hardly any purpose beyond the suppression of competition."[29] (In that case, the Court held illegal exclusive dealing contracts of oil companies with retail gasoline stations. Justice William O. Douglas deplored the decision as one that "promises to wipe out large segments of independent filling-station operators.")

Concerned that market power can exist and be misused, antitrust believers cannot rid themselves of a belief in leverage. Like Justices Frankfurter and Stevens, they retain a belief that a monopolist can extract monopoly profits in one market, extend his market power to another market, and extract additional monopoly profits in the second market as well. They believe that a seller with a monopoly, or market power, over one product can force buyers to buy that product in combination with another product and, by doing so, exclude competitors from the market for the second product.

"The best known and most influential exclusionary conduct case . . . was an opinion by a gifted district court judge, Charles Wyzanski," Fox and Sullivan wrote.[30] In that case, the *United Shoe Machinery* case, Judge Wyzanski expounded a theory of exclusion. He found that United Shoe had illegally monopolized shoe machinery by a method of leasing machines to shoe manufacturers.[31] The theory of automatic exclusion had also been used by Justice Douglas in the *Griffith* case. In that case the Court found illegal monopolization in a motion picture chain's practice of negotiating with each distributor a master agreement for all its theaters.[32] The theory of exclusion in these cases has two defects: "reliance on a nonexistent motivation for economic behavior and reliance upon the fallacy of double counting."[33]

Antitrust believers cling to theories that exclusion can result from linking two markets by lease, contract, or merger or by combined sales of separate products. The community resists the theory of ''one monopoly profit,'' a theory of microeconomics that a monopolist has the power to extract monopoly profits only once and cannot extend this power to other products or locations or by placing restrictions on customers.

According to generally accepted microeconomic theory, the presence of more than one seller means that price is determined by supply and demand. Sellers compete on price down to marginal cost of production. Resources are allocated efficiently, and the consumer benefits. Where there is only one seller, or monopolist, however, it can control output and price. He cannot be forced to sell. The monopolist can produce less, set price above marginal cost, and extract monopoly profits. He benefits but the consumer does not, and resources are allocated less efficiently.

Without support from government, monopolies can exist only temporarily, but during their existence they can extract monopoly profits. If the monopolist sells the product, the price obtains the monopoly profit. The monopolist can do this only once. He cannot sell a second time something that has already been sold. If he leases out the product, he can extract the monopoly profit in rent or in some other lease provision, but he cannot set the rent at a level that extracts the monopoly profit and then obtain some additional profit by means of an exclusionary lease term. It makes no difference if the monopolist sells at retail or to a retailer. There is still only one monopoly profit to be had. Likewise, if the monopolist sells the product over which he has a monopoly in combination with another product as to which there is a price set by the market, the monopolist can still take the monopoly profit in the tying product only once. The monopoly profit has to be captured in the price of the combination. The seller cannot obtain monopoly profits on the tying product and a second time on the tied product.

Consider this illustration in Levy's book:[34] Mr. *P* has a monopoly product that he prices at $1,000. In an attempt to extend his market power, *P* requires his customer, Mr. *C*, to purchase a worthless tied product for an additional $100. Assume further that the tied product is pure profit to *P* (i.e., his costs are zero), and pure loss to *C* (i.e., the product has zero value for use or resale). At first blush, it would seem that *P* has transformed a single monopoly into two. Note, however, that the package price for the two products would be the same whether *P* priced the tying product at the full $1,100 or priced the two products separately. In either case, *C* has two choices. He can accept the offer, which indicates that he values the tying product at $1,100 or more; or he can reject the offer, which indicates that he values the tying product at less than $1,100. Those two options are identical—with or without the tie-in. *P*'s monopoly is in the tying product only.

The theory of one monopoly profit has gained some acceptance since the publication of Bork's book, but not yet by the Supreme Court or the broader antitrust community. Acceptance of the theory would threaten much of antitrust, not only tying and exclusive dealing but also attempts to monopolize and so-called vertical restraints (restrictions placed on buyers by their suppliers such as where, to whom, and at what price to resell). Belief in the evil of tying is an important element of the antitrust religion.

Persistence of belief in exclusionary theory finds some support in the creative assertion of professors Thomas Krattenmaker and Steven Salop that "in carefully defined circumstances, certain firms can attain monopoly power by making arrangements with their suppliers that place their competitors at a cost disadvantage."[35] Tying supposedly can harm competition because "in carefully defined circumstances" the exclusion that results from tying can raise rivals' costs, making it difficult for them to compete, or something like that. Explained with the help of charts and not easily summarized or understood, the theory of "raising rivals' costs" is by its own terms of only limited application. Like the theory of market power, it is a theory of academic economics, a hypothetical condition that might exist somewhere sometime given an assumed set of circumstances, not necessarily a description of anything in the real world. Nevertheless, the theory is said to have been "highly influential at the federal antitrust enforcement agencies, particularly during the Clinton administration."[36]

Does Prohibition of Tying Make All Sales on Credit Illegal?

Enforcement of an asserted statutory prohibition against tying has resulted in a Supreme Court declaration in the *Fortner* case that sales on credit may be illegal. Attacking evil through the "ceremonial channels" of enforcement referred to by former assistant attorney general Arnold can have curious results.

In the *Schwinn* case, the Supreme Court declared unlawful a distribution practice widely used for years by most franchisors. Contracts between buyers and sellers contained provisions that the buyers would resell only within a specified territory or only to designated customers.[37] Prompted by the Justice Department, the Court declared that *any* agreement between seller and buyer that restricts the buyer's freedom where and to whom resales may be made is a per se violation of the Sherman Act. This novel interpretation in 1967 of a statute enacted in 1890 made widely employed contracts of long-standing use subject to criminal prosecution as a felony.

No criminal prosecutions were brought, but 10 years later the Supreme Court reversed the ruling, the only explicit reversal of a prior doctrine in antitrust history.[38] After the reversal, one prominent member of the antitrust community, concerned for the vigor of antitrust enforcement, urged careful distinction between price and non-price vertical restrictions so that the reversal not be allowed to permit "the pendulum" to swing "much too far."[39] Swinging of a pendulum is an unfortunate analogy for what are supposed to be rules of law but an apt one for antitrust.

A case that hasn't been reversed illustrates the mischief that can be done by attempts to combat the supposed evil of tying. In the *Fortner* case, the tying pendulum swung in a bizarre direction when the Supreme Court came close to declaring sales on credit illegal. Fortner, a real estate developer, financed the purchase of land and the construction of prefabricated homes by borrowing money from U.S. Steel Credit Corp., a subsidiary of U.S. Steel Corp. As a condition of the loan, Fortner agreed to erect homes manufactured by U.S. Steel on the land purchased with the proceeds of the loan. U.S. Steel Credit Corp. provided 100 percent financing, which was unavailable elsewhere. After acceptance of the loan agreement, a dispute arose over price and quality of the manufactured homes. Fortner sued U.S. Steel and the credit corporation, alleging violations of sections 1 and 2 of the Sherman Act, seeking treble damages for lost profits and a decree enjoining the enforcement of the supposed tie-in provision. A district court decided summarily for defendants, holding that Fortner had failed to establish that the defendants had sufficient economic power over the tying product, credit, and foreclosure of a substantial amount of commerce with respect to the tied product—prefabricated houses.[40] A court of appeals affirmed.[41]

The Supreme Court reversed.[42] The Court found the "sale" of credit by U.S. Steel Credit Corp. separable from the sale of houses by U.S. Steel. One dissenting justice saw the case as simply "a sale of a single product with the incidental provision of financing." Another wrote, "The logic of the majority opinion . . . casts great doubt on credit financing by sellers."

The Court sent the case back to the district court. Ten years of further litigation followed. The district court found the tie-in illegal because the credit offered was unique in that it covered all of the buyer's costs and at a low interest rate. A court of appeals agreed. When the case reached the Supreme Court a second time, the Court found insufficient the evidence of the uniqueness of the credit offered by U.S. Steel Credit Corp. and, therefore, that there was no illegal tie.[43] A lengthy, expensive, fruitless search for a villain had been made possible by antitrust tying doctrines. The defendants were finally let go, but the doctrines remain in place.

Unsuccessful Government Effort to Break Up Microsoft—Further Obfuscation of Tying Law

The government broke up Standard Oil. Theodore Roosevelt concluded "not one particle of good resulted."[44] Arnold agreed, stating that Roosevelt's trust-busting "never accomplished anything."[45] But a legend of evil was created. The latest high-profile attempt to break up a successful competitor, Microsoft, also failed, ending with consent to a regulatory regime of licensing requirements and product policing to protect competitors from practices of Microsoft thought to be unfair.

Tying "is sometimes cast in the form of a charge of monopolization."[46] In the course of the attempt to break up Microsoft, the Court of Appeals for the District of Columbia Circuit rejected a government effort to have Microsoft's inclusion of its Internet browser with its operating system declared a per se illegal tie-in but sent the case back to the district court for further proof. The appeals court included in a *per curiam* opinion—an opinion endorsed by all the circuit judges but not authored by any individual judge—a 22-page essay on tying.[47] The government thereafter abandoned its complaint as to tying.[48]

The antitrust community is embarrassed about the impossibility of distinguishing competitive business behavior from unlawful attempts to monopolize. The Antitrust Modernization Commission has the problem under consideration. The antitrust community sees no need, however, for modernizing existing doctrines as to tying. Like the suggestion to study whether any empirical foundation exists for the belief that antitrust activity produces a net benefit to consumers, tying is not on the Antitrust Modernization Commission's agenda.

Why do antitrust tying doctrines persist when they are so demonstrably without validity? Courts, law professors, and practicing lawyers must assume that statutes enacted by Congress have some meaningful content that can be discovered, even if they do not. Decisions and declarations of the Supreme Court must be taken as given and treated seriously by lower court judges and practicing lawyers. And, of course, tying doctrine is no threat to the welfare of the antitrust community. The prohibition against tying can be a useful tool for government and private plaintiffs to protect losers against unacceptably successful competitors thought to be making too much money and acting unfairly. Tying and exclusive-dealing doctrines fit in nicely with the other elements of belief in antitrust.

8. Price Fixing

Courts have interpreted laws prohibiting contracts in restraint of trade as allowing criminal conviction for price fixing without proof that any price was fixed or that anyone was adversely affected. Antitrust is not what it once was. Enforcement of section 2 of the Clayton Act, which prohibits some forms of price discrimination, has been abandoned. Most mergers substantially lessen competition and therefore violate section 7 of the Clayton Act, but only a few are challenged. The IBM antitrust case was a fiasco and gave the anti-monopolization provision in section 2 of the Sherman Act a black eye that the Microsoft case has not erased. Pressed to defend irrelevance, incoherence, and irrationality, the antitrust believer responds, "What about price fixing?" Defenders of the faith cling to the concept of the price fixer as a villain who should be vigorously prosecuted.

The antitrust community calls agreements affecting price "price-fixing conspiracies." Grand juries frequently investigate such agreements in preparation for criminal proceedings aimed at fines and imprisonment. "Criminal cartel enforcement" is the "top priority" of federal prosecutors.[1] Yet price-fixing agreements can be seen as partial, temporary mergers. Independence of the parties and some competition between them is preserved. In his book *Regulating Big Business: Antitrust in Great Britain and America 1880–1990*, Tony Freyer concluded that "in the United States the use of antitrust to outlaw cartels channeled investment decisions toward mergers engendering greater managerial centralization."[2] In other words, resolute prosecution of price fixing has tended to increase concentration.

The per se ban on price fixing is the product of "evolution."[3] The crime, like that of tying, has been defined by ideology, not by an act of Congress. Section 1 of the Sherman Act declared every contract in restraint of trade a felony. Since every contract restrains some trade, taking that prohibition seriously could have brought commerce to a standstill. Professors Eleanor Fox and Lawrence Sullivan have pointed out that Congress passed the Sherman Act ''[d]espite doubts about precisely what the statute meant or would accomplish.''[4] In an attempt to make some sense of it, the Supreme Court rewrote the statute to read, in effect, ''every contract in *unreasonable* restraint of trade,'' reserving to the courts the determination of which contracts are unreasonable.[5] The Court later declared that any contract that affects price is inherently unreasonable no matter what price is agreed on[6] and even if the agreement is to keep prices down.[7]

Agreement is the crime. Agreement need not be proven by direct evidence. It may be inferred from circumstances that suggest agreement even when there is no agreement. One of the few undisputed rules of antitrust law is this simple admonition: Do not discuss prices with competitors. Any communication between competitors about prices is perilous. If survival without price cooperation is in doubt, it may be better to consider a merger.

The full law of price fixing is not so simply stated. Originally enacted to protect the public from evil trusts, the Sherman Act has become a club to use on local sign painters[8] and cement producers.[9] In 1927 the Supreme Court upheld a criminal conviction of plumbing fixture manufacturers for combining ''to fix prices.''[10] But during the ensuing depression, the Court refused to enjoin a common selling agency even though the underlying agreement gave ''the selling agency power substantially to affect and control the price of bituminous coal.''[11]

In 1940 the Court upheld a criminal conviction of oil companies and declared as follows:

> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.[12]

But in 1979 the Court allowed an agreement among copyright holders fixing a fee for a blanket license.[13] ''Notwithstanding the literal agreement on price, the Court concluded that per se analysis was inappropriate because such an agreement was necessary for a new product—the blanket license—to be available at all.''[14]

Antitrust Law Developments (5th ed.) states that ''naked price-fixing'' is treated as ''illegal per se with virtually no factual inquiry.''[15] The editors of that publication say that the Supreme Court ''explained'' that "the aim and result of every price-fixing agreement, if effective, is the elimination of competition."[16] They finesse the question of effectiveness with further "explanation" that such agreements

> 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 . . . the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.[17]

That a merger might result in efficiency used to be regarded as a reason to condemn the merger. In the Procter & Gamble case, Justice William O. Douglas declared that "possible economies cannot be used as a defense to illegality" in merger cases.[18] The antitrust community has overruled Justice Douglas and now recognizes an efficiency defense. A revision of the Horizontal Merger Guidelines published in 1997 added a section on efficiencies. Section 4 states that "efficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[19] In announcing acceptance of the consolidation of Bell South into AT&T in 2006, the assistant attorney general for antitrust stated that one of the reasons for allowing the merger was that it "would likely result in cost savings and other efficiencies."[20]

Antitrust is flexible, allowing reversal of doctrine without any amendment of the statute and without even acknowledgment of a reversal. One prominent member of the antitrust community described the period during which efficiency went from a minus to a plus as one of "essential stability of merger policy" and its "core principles."[21]

If efficiency can justify a merger that supposedly eliminates competition, why can't it justify price cooperation that is only a partial merger? "Tensions" are "emerging" in the law of price fixing.[22] An efficiency defense could evolve out of this tension. To do so, it would have to overcome the antitrust community's strong emotional attachment to seeing price fixing as theft. According to the assistant attorney general for antitrust, "This type of conduct deprives consumers of their right to competitive pricing."[23] Like belief in the Standard Oil legend and fear of corporate consolidation, antipathy to agreements affecting price is deep and wide.

Justice Hugo Black once gave an entertaining explanation for disapproval of price fixing. He declared that agreements to fix prices "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."[24] Of course, any trader who voluntarily signed such an agreement would have been exercising his freedom and his ability to sell in accordance with his own judgment. That paradox must not have occurred to Justice Black.

The Supreme Court under Chief Justice Earl Warren had a protective attitude toward small business—an attitude that often gave rise to bizarre statements. For example, in the *Schwinn* case, Justice Abe Fortas, out of concern for what he called "smaller enterprises," condemned agreements between buyers and sellers that define territories for resale. He said that to allow such agreements "would violate the ancient rule against restraints on alienation."[25] Apparently, Justice Fortas believed he could enforce the rule against restraints on alienation by imposing his own restraint on alienation.

Some Agreements as to Price May Produce Efficiencies—Some May Not

Price fixing is a crime even if no price is fixed. Courts can infer agreement and impose a fine or imprisonment without any consideration of two questions: (1) Was the agreement effective? and (2) Was any harm done?

Scholars have found little evidence that price-fixing prosecutions affect consumer welfare. In 1988 Howard Marvel, Jeffrey Netter, and Anthony Robinson found an "absence of effective collusion in many of the criminal cases."[26] In 1993 Michael Sproul saw "little doubt that in the great majority of cases antitrust prosecution does not lead to lower prices. In general, an indictment for price fixing results in slightly higher prices."[27] In 2003 Robert Crandall and Clifford Winston concluded, "To be sure, there are well known examples where firms have clearly colluded to raise prices, including recent cases involving lysine, citric acid and vitamins. However, researchers have not shown that government prosecution of alleged collusion has systematically led to significant nontransitory declines in consumer prices."[28]

A contract to fix prices cannot be enforced and is not likely to endure. According to Robert Levy, "Experience teaches that cartels do not hold: once prices exceed market levels, the temptation to break the agreement becomes all but irresistible.''[29]

Professor Richard Epstein wrote, ''In comparison with the risks of government action, the dangers from private cartels look small, if only because of the inherent tendency to yield to individual members' cheating against the cartel for their short-term advantage.''[30] If a price is fixed below the market price, the market clears and the public benefits. If a price is fixed at the market price, the agreement has no effect. If a price is fixed above the market price, each seller has an incentive to undercut the fixed price, surreptitiously, in an attempt to achieve higher profits. Ultimately, the cartel is likely to collapse.

No evidence has been found that agreements as to price are necessarily sufficiently damaging to consumer welfare to outweigh the cost of government action against them. Perhaps some are and some are not. There is no way to tell in advance which are which. Antitrust believers assume that unobjectionable instances of price fixing are ''rare.''[31] The only available empirical data[32] suggest otherwise.

The effect of an action cannot be known without looking at results. As professor D. T. Armentano has explained:

> Support for a per se illegality approach to price-fixing schemes presumes that it is possible to know beforehand which business combinations will generate net social efficiency and which will not. This presumes that the very information provided by the working out of the market process can be known before that market process is allowed to operate.[33]

Without knowledge of the effects of an agreement there is no way to tell whether or not the agreement results in efficiency. Guesses can be made, but they are only guesses. And who should do the guessing? Guesses are a poor basis on which to impose fines and prison sentences. Prosecutors have no incentive to explore the question of whether or not an agreement is socially beneficial. As long as the per se rule persists, convictions can be obtained either way.

''Deterrence'' is offered as justification for the per se rule against price fixing.[34] But what conduct is being deterred? How much of that conduct was truly anti-competitive? The maxim ''Better to free a guilty person than to punish an innocent one'' is reversed. The per se rule on price fixing says, ''Better to punish the innocent than to let the guilty go free.''

The antitrust community is at its most united and self-righteous when pursuing price fixing. With government approval, unions negotiate agreements that fix the price of labor on a broad scale. Yet a few producers in Indianapolis discuss local cement prices and are prosecuted as criminals.[35] Antitrust believers learn to live with that pervasive contradiction. The value of enforcement of the per se rule against agreements affecting price has not been demonstrated by empirical data, but the rule clearly has benefits for the antitrust community. The rule obviates any need to discuss markets or market power, making convictions easier to obtain. By criminalizing price fixing, the rule strengthens the antitrust community's sense of self-righteousness and satisfaction that its activities are in the public interest.

Antitrust rhetoric is consistently anti-price fixing. Enforcement has been erratic. Price fixing by plumbing fixture manufacturers and producers of petroleum products was stopped.[36] Price fixing by coal mine operators and copyright owners was not.[37] Price-fixing cartels are tolerated or even sponsored when they have political support. Just as antitrust found a way to approve a politically desirable merger-to-monopoly in commercial aircraft manufacture,[38] antitrust authorities have found ways to allow politically desirable cartels.

In his 2002 book *Globalization and Its Discontents*, Joseph Stiglitz provided an eyewitness account of the impotence and irrelevance of antitrust when substantial political interests are at stake. In 1994 the international price of aluminum had dropped. There was a general global slowdown, and, because of new designs for soft drink containers, demand declined. With a cutback in production of military planes, Russia had more aluminum to sell. Stiglitz was then chairman of the Council of Economic Advisers. Paul O'Neill, later Secretary of the Treasury, was the chief executive officer of Alcoa, the same Alcoa that had been prosecuted for illegal monopolization and condemned in 1945 for excluding competitors by ''embracing new opportunities'' and having ''a great organization'' with ''the advantage of experience, trade connections and the elite of personnel.''[39]

According to Stiglitz, O'Neill ''engineered the global aluminum cartel.''[40] In a subcabinet meeting, a decision was made to support

O'Neill's proposal. The State Department supported it, as did Robert Rubin, who was head of the National Economic Council and played a decisive role. Stiglitz wrote, ''The US government was at the center of creating a global cartel in aluminum.''[41]

In January 1994 representatives of 17 nations (including three lawyers from the antitrust division of the Justice Department) met in Brussels.[42] Agreement to cut aluminum production was reached. In the third quarter of 1995 prices for ingot rose 20 percent from a year earlier.[43] Stiglitz said ''people'' at the Justice Department were ''livid'' at the subcabinet decision to support the creation of the cartel.[44] They were not so livid as to do anything about it, except to shield its existence.

In February 1996 a seller of painted aluminum signs for gasoline stations was fined and placed under six months' house arrest and 42 months' probation. The FBI had searched his office and that of a competitor and found evidence of an agreement on prices. As a buyer of aluminum, the defendant was probably a direct victim of the government-created cartel. On filing the criminal action against him in April 1996, the assistant attorney general for antitrust stated: ''Those who conspire to drive up the price of products should expect to face criminal charges.''[45]

In May 1997 the general counsel of the Aluminum Association received a letter from the Justice Department, stating that an investigation of the activities of major aluminum producers had been closed and that no violations of the antitrust laws had been found.[46] The assistant attorney general for antitrust had previously been quoted as saying that production cuts under the global agreement were ''individual decisions by producers.''[47]

The report of the International Competition Policy Advisory Committee in February 2000 contained a section on the ''Surge in US International Cartel Prosecutions.'' The report stated that the antitrust division ''since 1995 has given top priority to aggressive enforcement against international cartels.''[48] The report contains no mention of the aluminum cartel. Disguising sponsorship of that conspiracy allowed continuation of a high moral tone in announcements of criminal prosecutions. The antitrust faith was kept.

The Ivy League Cartel was handled differently. In 1958 the eight Ivy League colleges and MIT organized a system to prevent price competition by extracting and sharing financial information from applicants for admission to match tuition discounts called ''financial aid.'' Fearing that Stanford was luring students by larger tuition discounts and merit scholarships, which were prohibited by written agreement of the Ivy League members, the group attempted to recruit Stanford to join the conspiracy. Stanford refused on advice of counsel that the cartel was violating the Sherman Act.

In 1991 the Justice Department brought a civil suit but abstained from criminal action. The eight Ivy colleges consented to a prohibitory decree. MIT chose to litigate. After a nonjury trial, a district court issued detailed findings, most of which could not be disputed, and ordered an end to the joint determination of the price to be paid by a prospective student ''whether identified as tuition, family contribution, financial aid awards, or some other component of the cost of providing the student's education.''[49]

MIT appealed. During the course of further litigation, the White House changed hands. The new administration dropped the case after accepting a promissory letter from MIT in December 1993.[50] Having absolved colleges of a blatant cartel violation that had gone on for decades, the authorities then winked at creation of a cartel of aluminum producers. Stability of policy was maintained by prosecution of aluminum buyers and pursuit of other international cartels. Politics trumped law, but the antitrust community's belief in the villainy of price fixing was preserved.

That Standard Oil monopolized the oil industry and its breakup was publicly beneficial is a primary element of the antitrust faith. A second element is the belief that, without government interference, many more corporations would merge and become Standard Oil look-alikes, controlling everything. Antitrust believers are convinced that, when a seller reaches some high market percentage, he can then control prices and force people to buy. With such beliefs, it is easy to be frightened by the prospect that some group of competitors might cooperate on a price at which they will sell.

Fringe issues over the meaning of the per se rule are discussed within the antitrust community. Is it a rule of law, a rule of evidence, a rule as to who has the burden of proof, or only a rule that a defense will not be allowed?[51] Answers cannot be found in the laws. As the assistant attorney general for antitrust has said, it is not so much ''what exactly are the words of the statute. . . . In antitrust it really is much more dynamic.''[52] Although it acknowledges that some agreements as to price may be beneficial, the antitrust community is satisfied with the assumption that most price cooperation is pernicious. There is no debate within the community about that.

Erosion of the per se rule could revive the question of constitutionality of criminal prosecution for violation of section 1 of the Sherman Act. Our legal system does not allow fines or imprisonment for violation of rules that are vague. Does a law prohibiting "every contract that unreasonably restrains trade" provide sufficient notice of what conduct is criminal or does it leave too much discretion to prosecutors, judges, and juries?

In 1913 the Supreme Court considered a challenge to a criminal conviction under the Sherman Act. The Court rejected an argument that "the crime . . . contains . . . an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men." The Court said that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." The Court gave examples of "murder, manslaughter, or misadventure" resulting from an automobile accident.[53] Prosecutorial restraint and the per se rule have foreclosed opportunity to question that reasoning.

The policy of the Justice Department's antitrust division on antitrust criminal prosecution has been stated as follows:

> The Supreme Court has held that the Sherman Act is not unconstitutionally vague. But an indictment in a particular case might unfairly attack conduct not known to the defendants to be unlawful. The solution of the Antitrust Division to this problem of potential unfairness has been to lay down the firm rule that criminal prosecution will be recommended to the Attorney General only against willful violations of the law, and that one of two conditions must appear to be shown to establish willfulness. First, if the rules of law alleged to have been violated are clear and established—describing per se offenses—willfulness will be presumed. . . . The Supreme Court held more than 30 years ago that price fixing was a per se violation of the law—one for which no justification or defense could be offered. . . . Second, if the acts of the defendant show intentional violations . . . willfulness will be presumed.[54]

If the rule of law as to price fixing becomes less clear and established, if some price-fixing agreements become defensible on grounds of efficiency, some cases now being prosecuted criminally might be challenged because the indicted conduct was not known by the defendants to be unlawful.

Any weakening of confidence in the rightness of criminal enforcement would tend to undermine the self-righteous tone of prosecution. The antitrust community derives much psychic and other income from this process. Grand jury investigations provide an ongoing source of employment for government and private personnel. Fear of such investigations justifies meticulous antitrust audits and compliance programs that require many billable hours. The per se rule provides a foundation for this activity. Weakening the rule could weaken that foundation. The antitrust community may sense that placing overriding value on efficiency could bring down the whole antitrust house of cards.

Treble Damage Actions—No Obvious Benefit to the Public

Criminal prosecution is not the only weapon against the evil of price fixing. There is another method to punish the trust: the threat of treble damages. Even if the Justice Department shows discretion in prosecution of Sherman Act violations, state attorneys general and enterprising private lawyers can make allegations of price fixing that cannot easily be brushed off.

To punish trusts thought to be evil, antitrust law provides increased rewards for private suits against them. The Clayton Act says that any person "injured in his business or property by reason of anything forbidden in the antitrust laws" may sue for *three times* his damages plus "the cost of suit, *including a reasonable attorney's fee*."[55] Assisted by the per se rule, enterprising lawyers combine that provision and the modern class action procedure to produce dramatic results.

In a competitive economy, matching of prices is common. A price-fixing agreement can be imagined. A class of victims can be supposed. A client can be recruited. The client has nothing to lose. A complaint, skillfully drafted, is filed. A court certifies that the victim class can sue. Big costs can be incurred. Large damages are possible. Evidence gathering begins. Defendants' files and e-mails are scoured. Ambiguous words of mid-level executives may be uncovered. Evidence gathering continues. A trial date is scheduled. The threat of bankruptcy looms. Settlement becomes realistic and is reached. Money changes hands.

In December 2003 allegations of tying and an attempt to monopolize were settled in a class action in a U.S. District Court in New York. The complaint accused Visa and MasterCard of illegally tying their debit products to their credit cards. No adjudication of the merits of the claims occurred. Defendants agreed to create a settlement fund of $3.05 billion to be shared by five million merchants, giving them $610 each. Lawyers for the class sought reimbursement for costs of $18 million and a fee of $609 million. The Court ordered defendants to pay the costs and $220 million in attorneys' fees.[56] Some would say the attorneys earned it. They punished an evil trust.

9. In Conclusion

The antitrust laws provide a vehicle for the antitrust community to carry on a useless, mischievous activity portrayed as law enforcement. Antitrust has been called "a subcategory of ideology,"[1] "a religion without a cause,"[2] and "a hoax."[3] Whatever antitrust may be, it is not law enforcement. Justice Abe Fortas wrote: "Antitrust in the United States is not . . . a set of laws by which men may guide their conduct. It is rather a general sometimes *conflicting* statement of articles of faith and economic philosophy."[4]

Antitrust resulted from Congress's desire to do something even though nothing could be done. The antitrust statutes are pious declarations against evil. Antitrust was founded on the desire to solve a basic problem of capitalism: What to do about the losers? The statutes reflect a hope of preserving a nation of farmers, craftsmen, and traders in small towns before industrialization and corporate organizations transformed America into factories, offices, and cities. Antitrust is celebrated by a ritual of legal proceedings supposed to keep trade both free and fair.

Supreme Court antitrust decisions attempt to give meaning to what Justice Fortas called "conflicting" statements of "articles of faith." Decisions do not follow from principles on a case-by-case basis as they do in the development of English common law. Decisions do not clarify marginal ambiguities in statutory prohibitions or make rules precise. Instead, Supreme Court decisions are compromises over differing personal predilections of individual members of the Court as to what is evil. Lawyers and law professors search in the opinions for rules. Most court opinions simply muddy the water.

Reformers

Although "the will of Congress contains internal contradictions,"[5] judges, professors, and advocates assume that the legislature had something definite in mind when it adopted the antitrust statutes. Reformers don't accept Thurman Arnold's suggestion that antitrust is ceremonial moralizing.[6] Reformers are attempting reform, not abolition. Reformers, as professors of law, cannot acknowledge that a statute that incorporates "internal contradictions" makes no sense and cannot be reformed. That is not something professors of antitrust law can say. They have to believe that, if federal judges are taught enough microeconomic theory, antitrust law will achieve "a high degree of rationality and predictability" and "become a branch of applied economics."[7]

Economics will not turn antitrust into law enforcement. Theoretical discussion of markets and market power is based on static analysis, not on facts in the real world. The definitions in the analysis assume a world standing still. Belief in market power requires ignoring the long run. In the antitrust world there is no long run. It's all about an imaginary now.

Not all antitrust practitioners are true believers. A few see antitrust as a meaningless word game without merit but rewarding to those who play it well. Others are skeptical about some basic antitrust beliefs but see antitrust as needed protection against short-run market distortions. They recognize that what they see as market imperfections can't survive the long run. They see antitrust as justified by the need for action now. Fixing the point at which the short run turns into the long run is unresolved. The Court of Appeals in the *Microsoft* case spoke of "the relatively near future."[8] The proceedings in that case had an air about them of the need to act quickly before it's too late, before the problem has taken care of itself, before it becomes obvious that antitrust is irrelevant.

Development of a global economy through the Internet is shortening the long run. Long-run results arrive more quickly than they used to. It is becoming more difficult to ignore the long run. And, it is becoming more difficult to sustain belief in a static analysis based on assumptions that the world will stand still.

Antitrust Belief Embedded in American Psyche—Repeal of Antitrust Statutes Politically Impossible

The antitrust community cannot look critically at antitrust. There is "little empirical evidence that past interventions have provided much direct benefit to consumers or significantly deterred anticompetitive behavior,"[9] but the prevailing attitude of most of the antitrust community was expressed in 1982 by professor Milton Handler:

"We now have an excellent body of antitrust doctrines that, over all, have worked extremely well."[10]

Gary Hull of Duke University has written:

> Most Americans believe that the antitrust laws preserve our free market system, protect consumers from rapacious corporations, and ensure fair competition in the marketplace. However, the reverse is true. Antitrust is based on bad economics and on a false interpretation of the history of American business. It violates the sanctity of contract. . . . The laws do not need to be clarified, scaled back or applied more judiciously. Those laws must be abolished."[11]

Economics professor D. T. Armentano has called for repeal.[12] He argues as follows: (1) the antitrust laws misconstrue the nature of competition and monopoly, (2) the laws have often served to shelter inefficient firms from lower prices and innovations, (3) section 2 of the Clayton Act is intended to restrict price rivalry, (4) section 7 of the Clayton Act is destructive of a competitive process, (5) the laws are a form of regulation that makes the economy less efficient, (6) enforcement requires assumption of knowledge that is not available, and (7) the laws have been enforced arbitrarily and interfere with the rights of property owners to make voluntary agreements.

Those arguments, however valid, will not shake the nation's emotional commitment to antitrust because they do not undermine the foundational elements of antitrust belief. Antitrust fills emotional needs. As long as the Standard Oil legend is alive, concentration is feared. As long as "market power" can be believed to exist and be used, antitrust will survive, despite Armentano's case for repeal and despite the lack of evidence that antitrust does much good.

Armentano has described antitrust's primary source of support:

> Antitrust attorneys, private plaintiffs, consultants, and the antitrust bureaucracy have much to gain from a continuation of antitrust regulations and much to lose from any repeal of or reduction of antitrust enforcement. Consequently, the beneficiary groups have every incentive to strenuously resist reform and repeal and to denounce all antitrust critics in the most strident tones. Ordinary citizens and consumers, on the other hand, have little incentive to rally against the antitrust juggernaut, little incentive even to educate themselves as to the antitrust facts of life.[13]

Active members of the antitrust community must constantly articulate and advocate antitrust doctrines. Personal recitation of doctrine instills belief. The doctrines give their advocate a sincere feeling of self-righteousness. He is standing up for fairness and protecting the weak against the greedy and powerful.

The believer personifies antitrust. Antitrust does things. It makes assumptions and seeks results.[14] It makes ''mistakes''[15] and suffers ''defeats.''[16] Antitrust becomes like an old friend who helps the believer feel that his activity is not just profitable for himself, but worthwhile for others. The antitrust community profits handsomely from antitrust, but that is only a reinforcing factor, not proof of insincerity of the community's belief in antitrust.

There is strong support for antitrust outside the antitrust community. Opinion makers in journalism and many intellectuals feel antipathy toward commercial activity. They feel good expressing concern for ''the consumer,'' whom they regard as a potential victim of corporate greed. The anointed see antitrust as important for social justice. They are a formidable obstacle to change.

Repeal of the antitrust statutes might lead to something worse in their place. Antitrust believers assert that antitrust law ''preserves and protects markets as an alternative to a more intrusive regulation or control of the economy.''[17] They believe that overall public control of business in one form or another is absolutely necessary. Thomas DiLorenzo has pointed out, ''There was never any evidence that the trusts and 'combinations' of the late nineteenth century actually harmed consumers in the way that monopolies are supposed to harm consumers—by colluding to restrict production to drive up prices.''[18]

Nevertheless, ''the myth persists that monopoly is an intrinsic feature of capitalism that must be controlled and regulated by enlightened antitrust regulation.''[19]

Something worse than antitrust is already in place—the Federal Trade Commission—a group of five political appointees empowered by the Federal Trade Commission Act of 1914 to define and prevent ''unfair'' methods of competition. That open-ended authority to regulate trade has been left mostly undeveloped. The commission has relied on antitrust doctrines instead. Were the antitrust statutes to be repealed, aggressive use of broad FTC authority could take their place.

Education of judges, government officials, law professors, and journalists could dissolve antitrust. Understanding the nature of antitrust and its lack of factual foundation undermines its appeal. Education about antitrust history not generally known but not difficult to understand might make a difference. History shows that the breakup of Standard Oil accomplished nothing. It was ''part of a moral conflict.''[20] It was like preaching against sin without defining it. Corporate consolidation need not be feared. No amount of magic ''market power'' can force buyers to buy. For anyone interested in developing intelligent public policy, those ideas are not difficult to absorb.

Should Microsoft be allowed to add a media player? Should GE be allowed to acquire Honeywell? Should IBM be broken up? Antitrust supplies a vocabulary to discuss those questions but does not provide answers, no matter how much help is obtained from economic theory. Antitrust judgments are subjective choices of the judge about public policy. Law students should be taught that antitrust is not law enforcement. Journalists and opinion makers should be encouraged to ask themselves, ''Do we really need to fear that some greedy capitalist will monopolize sardine snacks or mashed fruits and vegetables?'' The public should be told what is going on, that antitrust decisions are political decisions misleadingly portrayed as law and economics. Those in a position to do so should force more discussion of such questions as, ''Can salaried government officials in Washington make better decisions about how many distributors of office supplies there should be in, say, Wheeling, West Virginia, than people whose capital is at stake?''

Although today's antitrust community is alive and well, antitrust is atrophying. It is becoming a relic, an anachronism, the irrelevant debris of past political demagoguery. Education in the antitrust facts of life could accelerate the process.

Notes

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Edwin S. Rockefeller graduated from Yale College and Yale Law School. He has a master's degree from Johns Hopkins' School of Advanced International Studies. Following graduation from law school, he spent two years with the Central Intelligence Agency, three years in the U.S. Army Judge Advocate General's Corps, and four years on the staff of the Federal Trade Commission.

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Mr. Rockefeller has served as chairman of the Section of Antitrust Law of the American Bar Association and as an adjunct professor of law at Georgetown University Law Center. Since 1961 he has been chairman of the advisory board of the Bureau of National Affair's *Antitrust and Trade Regulation Report*.

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Antitrust Counseling for the 1980s (Washington: Bureau of National Affairs, 1983).

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