

May 1987

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Recommended Citation

Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817 (1987).

Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol75/iss3/3>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z383Q8B>

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Antitrust in the Next 100 Years

Robert Pitofsky†

Dateline: Washington, D.C., June 15, 2086

The Supreme Court today had its first opportunity to review a case based on new section 7 of the Clayton Act. The statute, amended ten years ago, provides that “No person engaged in commerce . . . shall fail to acquire the whole or any part of the stock or assets of any other person engaged in commerce . . . when the effect of such acquisition . . . may be to enhance efficiency.”

In *United States v. Brown Shoe*, the Bureau of Economics of the Department of Justice sued Brown Shoe for failing to acquire Kinney despite convincing evidence that the acquisition would assist allocative efficiency and help sell sneakers in Italy. In reaching its decision against Brown Shoe, the Court rejected three defense arguments:

(1) Brown Shoe claimed that the effect on competition would be negligible because the relevant product market, properly viewed, consisted of shoes, sneakers, skate boards, and bottled water. The Court agreed that the effects would be slight, but noted that it hoped the deal would trigger a wave of mergers leading to efficiencies.

(2) Brown Shoe argued that if the merger had been such a good idea, they would have been driven to it by market forces. “Market failure,” the Court replied, noting that “some business people have a perverse love of smallness that Congress believes should be nipped in the bud.”

(3) Finally, Brown Shoe pointed out that it had admitted more than a hundred years earlier that the merger was a dumb deal and there were no efficiencies.¹ “Perhaps,” the Court said, “but there is a rising tide of inefficiency in this industry and you are the two most inefficient sellers left in the market. Hence, no worse non-merger is conceivable.”

Justice Pauline Stewart dissented: “The sole consistency I can find in this line of cases is that the government always marches in the wrong direction.”

* * *

Is this the future? Will a future generation of post-Posnerians or neoBorkists grow tired of waiting for the market to produce efficiency and take matters into their own not-so-invisible hands?

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1. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

Of course, the only reliable hundred-year prediction about almost anything is that the future will develop in surprising ways. I am too cautious to try seriously to predict in detail the future of antitrust in the next century. I have, therefore, set for myself a less hazardous task. I start from the premise that antitrust in the last twenty years has undergone a radical redefinition. Today we pursue a "minimalist" antitrust enforcement policy. The question I address is whether this policy is the wave of the future, or whether in future decades we are more likely to adopt a different approach.

Part I describes and evaluates the current minimalist approach to antitrust enforcement, focusing on current policy toward cartels, mergers, and predation. Part II analyzes the reasons—both practical and theoretical—for the present decline in antitrust enforcement. My selection of these starting points reflects my view that predictions about the future require an accurate description of the present. On the assumption that the minimalist policy of the 1980's will not continue in coming decades, Part III advances some predictions about antitrust enforcement in the future.

I ANTITRUST TODAY—A POLICY OF MINIMAL ENFORCEMENT

The antitrust laws are enforced more leniently today than they have been for the last fifty years. The only matters that regularly attract the attention of the enforcement authorities are cartels, horizontal mergers tending to create a monopoly, and various forms of predation. Other practices and transactions that have been the conventional stuff of antitrust—including all vertical restrictions, price discrimination, vertical and conglomerate mergers, and non-price connected boycotts—are either per se legal or challenged only in exceptional circumstances. Even in the cartel, horizontal merger, and predation cases, enforcement agencies have introduced various exceptions and qualifications into prior law and today tend to resolve most doubts in favor of nonintervention.

A. Cartel Policy

Although cartels are recognized as inherently unstable,² antitrust in the 1980's has not adopted the libertarian view that market forces will contain and eventually erode cartel behavior. Although the sheer number of cartel cases brought during the Reagan years compares favorably with prior administrations, one would hardly describe the Reagan administration's enforcement in this area as aggressive.

2. McGee, *Cartels: Organization and Functions*, 27 U. CHI. L. REV. 191, 197-99 (1960).

To a large extent, this administration has only brought the same case over and over again—a long series of challenges to interrelated regional and local conspiracies in the construction industry. It has shown little inclination to use its considerable economic sophistication to develop innovative ways to detect non-construction industry cartels. Furthermore, while naked cartels remain illegal per se, conservative anti-trust thinking is quick to perceive efficiencies or connections to legal arrangements. Such thinking converts conduct that might otherwise have been considered a naked cartel, and therefore per se illegal, into a “joint venture” tested under a rule of reason.³

Despite these criticisms, current enforcement is really not much less aggressive than in earlier decades; the level of anticartel enforcement and the severity of anticartel penalties have always been lower than the volume of anticartel rhetoric. Indeed, in pressing for criminal enforcement, this administration has probably been a touch more determined than its predecessors.⁴

B. Merger Policy

The antitrust policy of the 1960's, as represented by a long series of Warren Court decisions, was excessively hostile to mergers. The government ignored claims of efficiencies when challenging mergers involving companies with combined market shares so small that they could not possibly threaten competitive markets.⁵

Merger enforcement became progressively more lenient through the 1970's, culminating in the 1982 and 1984 Merger Guidelines.⁶ These Guidelines are considerable intellectual achievements. They retain the structuralist approach to merger enforcement, which recognizes that concentration can lead to anticompetitive effects. They suggest that in moderately concentrated markets⁷ where serious barriers to entry exist,

3. See *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 880 (1987); *National Bancard Corp. (NaBANCO) v. VISA USA*, 779 F.2d 592 (11th Cir. 1986).

4. See Lipsky, A Brief Review of Department of Justice Policy Regarding the Criminal Prosecution of Price Fixing, Bid Rigging, and Other Private Cartel Activity 5 (July 31, 1981), (unpublished manuscript) reprinted in part in M. HANDLER, H. BLAKE, R. PITOFKY & H. GOLDSCHMID, *CASES AND MATERIALS ON TRADE REGULATION* 139 & n.43 (2d ed. 1983).

5. See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) (horizontal merger illegal where combined market share was 7.5%); cf. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (vertical merger resulting in market foreclosure of 1.2 or 1.6% in the vertical line found to be a violation of § 7 of the Clayton Act).

6. Department of Justice Merger Guidelines, 2 Trade Reg. Rep. (CCH) ¶¶ 4500-03 (June 14, 1982); *Id.* at ¶¶ 4490-93 (June 14, 1984) [hereinafter Merger Guidelines].

7. Moderately concentrated markets are described in the Guidelines as those with a Herfindahl-Hirschman Index (HHI) of between 1000 and 1800. The Guidelines indicate that these HHI thresholds correspond to four-firm concentration ratios of approximately 50% and 70%. *Id.* at ¶¶ 4503.10, 4493.3.1.

horizontal mergers with combined market shares in the fifteen to twenty percent range will be examined closely. In highly concentrated markets, where four-firm concentration is seventy percent or more,⁸ they suggest that such mergers are presumptively illegal.

Actual enforcement has fallen short of the Guidelines.⁹ Since the Supreme Court sensibly concluded that concentration levels and market share percentages should not be dispositive,¹⁰ the Guidelines propose a generous range of other factors to be taken into account.¹¹ In the zone of moderately concentrated markets, defendants have been able regularly to cite "other factors" that make threats to competition appear insignificant. Thus, defendants usually assert that any cartel opportunities created by the merger will be defeated by sales from foreign competitors, existing underutilized capacity, eventual entry, or a determination by customers to make instead of buy. These arguments seem to prevail with impressive regularity.¹² In those rare instances where a defendant's imagination was so impoverished that it could not identify "other factors" that allegedly would defeat a cartel, the enforcement agencies have been willing to abandon the structuralist approach and allow the merger on the grounds that prices and profits were low and that competition appeared intense.¹³

In his professorial days, Judge Bork once suggested that a sensible antitrust policy would allow all mergers up to a point where three significant competitors remained in the market.¹⁴ Although the Guidelines do

8. Highly concentrated markets are described in the Guidelines as those with an HHI above 1800. *Id.* at §§ 4503.10, 4494.3.1. The Guidelines assert that where mergers in that range of concentration produce an increase in the HHI of more than 100 points, the Justice Department "is more likely than not to challenge" the transaction. *Id.* at § 4503.101(b).

9. Leddy, *Recent Merger Cases Reflect Revolution in Antitrust Policy*, *Legal Times*, Nov. 3, 1986, at 18, col. 2.

10. *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) ("statistics concerning market share and concentration, while of great significance, [are] not conclusive indicators of anticompetitive effects") (citing *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)).

11. Merger Guidelines, *supra* note 6, at §§ 4503.3.0-4503.301, 4493.3.4-4493.413.

12. The record shows that since the Department of Justice Merger Guidelines were adopted in 1982, there has been only one case as of March 1, 1987 involving a horizontal merger challenge by the Department of Justice where there were no allegations that the level of concentration, as measured by the HHI, was in excess of 1800. The sole exception was *United States v. Domtar, Inc.*, Civil Action No. C87-0689 RFP (N.D. Cal. Feb. 26, 1987).

There have been four other Department of Justice complaints challenging mergers in multiple markets, where anticompetitive effects were alleged in markets showing HHI concentration levels both above and below 1800. See *United States v. Waste Management*, 743 F.2d 976 (2d Cir. 1984); *United States v. ARA Services, Inc.*, Civil Action No. C-2-82-436 (S.D. Ohio April 26, 1982); *United States v. Beverly Enterprises*, Civil Action No. 84-70-1-MAC (M.D. Ga. Jan. 18, 1984); and *United States v. LTV Corp.*, Civil Action No. 84-0884 (D.D.C. March 21, 1984); cf. Leddy, *supra* note 9, at 18, col. 2.

13. See *B. F. Goodrich Co.*, F.T.C. Docket No. 9159 (Sept. 24, 1985), reported in 49 *Antitrust & Trade Reg. Rep. (BNA)*, No. 1235, at 628 (Oct. 10, 1985).

14. R. BORK, *THE ANTITRUST PARADOX* 406 (1978).

not accept that approach, and enforcement has not been quite so lenient, my sense is that the realities of enforcement in the 1980's have been closer to the Bork line than to the published limitations of the 1982 and 1984 Guidelines.

C. Predation Policy

Theoretically, predation remains an antitrust violation, but the enforcement agencies (and most lower courts) have adopted the Areeda-Turner view that price predation cannot occur unless the seller prices below average variable cost¹⁵—that is, the cost of ingredients alone, omitting all overhead expenses. That rule is so generous that it is almost impossible for a seller to violate the law. Thus, in the scores of predation cases decided in the last decade, the defendant rarely lost; when one did, as the defendant did (briefly) in *Borden, Inc. v. FTC*,¹⁶ it was because the Federal Trade Commission and the court modified the Areeda-Turner rule.¹⁷

II

REASONS FOR THE PRESENT DECLINE IN ANTITRUST ENFORCEMENT

There are two reasons for the emergence of this “minimalist” policy. First, national and international developments made earlier aggressive levels of antitrust enforcement politically impracticable. Second, antitrust policy responded to a powerful set of ideas about the nature of markets and competition, giving rise to a theory of minimal enforcement.

A. Practical Objections to Antitrust Enforcement

Antitrust enforcement has declined because some of its older rules unnecessarily impaired both the ability of firms to compete and the efficient functioning of the economy. Some of those rules depended on theories that one could export market power horizontally from market to market through “leverage” devices,¹⁸ or assumed that short-term contracts between sellers and buyers could exclude actual or potential rivals from markets.¹⁹ More sophisticated economic analysis blew those theo-

15. 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 154-172 (1978).

16. 674 F.2d 498 (6th Cir. 1982), *vacated*, 461 U.S. 940, *on remand*, 711 F.2d 758 (6th Cir. 1983).

17. *Id.* at 515-16 (price predation occurs where competitors forced, as a result of heavy advertising expenditures by the alleged “predator,” to sell below *their* average variable costs).

18. *See, e.g.*, *United States v. Griffith*, 334 U.S. 100 (1948) (film exhibitors used monopsony power in some markets to obtain exclusive first- and second-run film exhibiting rights in competitive markets).

19. *FTC v. Brown Shoe*, 384 U.S. 316 (1966).

ries out of the water.²⁰ Another line of cases blocked mergers among relatively small firms—regardless of efficiencies or ease of entry—to prevent small, worthy businesses from being swallowed up by larger corporations.²¹ Perhaps the most intrusive antitrust enforcement is found in the Robinson-Patman cases that declared all sorts of price and term discrimination illegal, sometimes in an effort to protect smaller companies from the consequences of their own inefficiencies.²²

These enforcement initiatives also declined because many pre-1965 attitudes about antitrust were predicated on the idea that efficiencies were expendable and that certain goals of antitrust, such as preventing monopolized or highly concentrated markets, could be pursued without taking account of the magnitude of loss in terms of efficiency. As the 1960's and 1970's progressed, and firms in the industrial sector found themselves challenged abroad and at home by foreign rivals, one had to reconsider whether the country could afford an antitrust policy that was profligate in its efficiency considerations.

Finally, the mythology on which some 1960's-style antitrust depended—the notions that big is bad and that small is somehow beautiful—steadily eroded. Although it certainly has not entirely disappeared, inherent distrust of the business community has decreased, perhaps because the influence of the labor union movement has declined, or because ownership of stock in corporations has become more widespread.²³

I believe that these practical reasons for the decline of antitrust are relatively permanent. Barring a catastrophic economic decline, antitrust is unlikely to return to the anti-bigness, anti-business, anti-efficiency posture of some cases decided in earlier years. But this pragmatic shift in domestic attitudes and these changes in the international business environment cannot alone account for the *minimalist* antitrust policy that we see today in the Chicago School program. That program depends on a set of controversial theories of minimal enforcement.

B. *The Theory of Minimal Enforcement*

Ideas count, and the conservative theoretical assault on antitrust has

20. For example, see the Supreme Court's analysis and the literature cited in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), *on remand*, 764 F.2d 1139 (5th Cir. 1985), and *United States Steel Corp. v. Fortner Enterprises, Inc.* 429 U.S. 610 (1977).

21. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), *on remand*, 296 F. Supp. 994 (E.D. Wisc. 1969).

22. See, e.g., *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), *reh'g. denied*, 387 U.S. 949, *on remand*, 396 F.2d 161 (10th Cir.), *cert. denied*, 393 U.S. 860 (1968).

23. The 1980's probably reflect a political reality that has been seen repeatedly in the country. There is a pendulum effect in political affairs, and the 1980's, like the 1920's, is a period where willingness to place faith in government regulation is at a low ebb.

been powerful. As noted earlier, there are several areas—notably, emphasis on conditions of entry, criticism of leverage and foreclosure concepts, and exploration of the market effects of discrimination—where prior antitrust theorizing proved to be highly dubious under more sophisticated economic analyses.

But the program that I have described as “minimal enforcement” goes beyond these critical economic analyses; it depends on a belief that the market will almost always inhibit monopoly and encourage efficiency to a greater extent than antitrust enforcement ever can. This in turn has generated three interrelated ideas:

- (1) Arrangements or transactions that do not lead to restrictions in output cannot have anticompetitive effects;
- (2) Output will not be restricted by an arrangement or practice if the parties lack market power; and
- (3) In the absence of restrictions on output or market power, it is a fair inference that any transaction or practice is designed to achieve efficiencies.²⁴

I suggest that these assertions about competition and markets—at least in the extreme and unqualified way they frequently are stated and applied—are incorrect. For that reason, I believe that current policy, whose legitimacy depends on the validity of these ideas, is unlikely to prevail in future years.

1. *Theories About Output*

One key assumption of classical antitrust theory is that anticompetitive effects occur when a monopolist or a group of oligopolists reduces output below competitive levels. When output drops, buyers pay more; and when buyers then switch to less desirable substitutes, society's resources are used inefficiently. Following these principles, some Chicago theorists have argued that when a transaction or practice does not result in reduced output, competition cannot be adversely affected. Correlatively, they have further argued that if output increases, the practice or transaction must represent an efficient use of resources.²⁵

In some situations, this output test illuminates antitrust analysis, and the apparent range and simplicity of its underlying theory add to its

24. See *Fishman v. Estate of Arthur Wirtz*, 807 F.2d 520, 568 (7th Cir. 1986) (Easterbrook, J., dissenting) (“Liability in antitrust law almost always requires proof of market power”); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.) (concluding that because defendants in a joint venture had little market power, their agreement could not have been part of a plan to affect competition adversely), *cert. denied*, 107 S.Ct. 880 (1987); accord Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984). Literature pro and con on this subject is reviewed in Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985).

25. See Easterbrook, *supra* note 24, at 31-33.

persuasiveness. Nevertheless, there are three reasons why it is inadequate as an across-the-board test of whether a practice is acceptable.

First, the output test depends on a premise that only efficiency counts, and that no other aspect of the practice should be relevant in its review. Such a single-factor test has never been the law,²⁶ does not appear to be the view of the present Supreme Court,²⁷ and is undesirable.

Its undesirability can be demonstrated by a simple hypothetical. Assume that three firms compete in a market, all selling at less than minimum efficient scale. Assume further that one of the firms eliminates a rival through totally unacceptable means—it blows up its rival's factory, engages in a predatory campaign to induce the government to close the factory, or agrees with a third firm to boycott suppliers who deal with the targeted rival. Once the victim goes out of business, its sales are picked up by the two survivors so that each firm's output increases. Since each of the survivors now operates at a more efficient level of capacity, each can reduce costs, lower prices, and take business away from imperfect substitutes. Thus, output may increase not only for the two survivors, but for their whole "industry." Now it would be a remarkable view of the role of antitrust—one inconsistent with much legislative history and many cases—to declare that so long as output rises, antitrust laws are indifferent to the use of such techniques to eliminate rivals.²⁸

Second, the output test is unacceptable because a "before and after" measure of firm or industry output is impractical. It assumes that all other conditions are constant except the practice at issue and its consequences with respect to output. In any real market, however, output may be affected by changes in consumer tastes, diminished attractiveness of substitutes, or government policies concerning tax, labor, or the environment. These external events have nothing to do with competitive markets, and frustrate attempts to determine whether and how a practice affected output.

Finally, the output test ignores the issue of "less restrictive alternatives," a mainstay of rule of reason analysis. Even if a practice could be shown to increase output and thereby produce desirable efficiencies, it

26. For example, see Judge Hand's opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416, 427-29 (2d Cir. 1945).

27. See *FTC v. Indiana Fed'n of Dentists*, 106 S. Ct. 2009 (1986); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

28. Destruction of a rival's factory arguably can be deterred or punished through criminal or tort laws. The other two examples, however, are trade practices characteristically regulated through antitrust enforcement. See *United States v. Otter Tail Power Co.*, 331 F. Supp. 54 (D. Minn. 1971) (litigation designed to hamper the marketing of bonds needed by potential competitors actionable under the Sherman Act), *aff'd*, 410 U.S. 366 (1973), *reh'g denied*, 411 U.S. 910, *on remand*, 360 F. Supp. 451, *aff'd*, 417 U.S. 901 (1974); *cf. Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (newspaper's organization of a boycott by advertisers, inducing them not to deal with radio station rival, found to be an attempt to monopolize under § 2 of the Sherman Act).

may be that an alternative approach could have achieved the same efficiencies with less anticompetitive effect. Of course, the government ought not to be in the business of unrestricted second-guessing, and practices should not become illegal because someone with the benefit of hindsight can think of a less anticompetitive device. But where roughly equal results can be achieved with far less undesirable anticompetitive consequences, that ought to be a factor in any antitrust analysis.

2. *The Market Power Requirement*

A second, related principle of conservative theory is that monopoly effects cannot be achieved by a firm or group having insubstantial market power. That theory supposes that monopoly effects are achieved through curtailing output and raising prices. If a firm or group with insubstantial market power attempts that strategy, its market share would be taken over by rivals accounting for the overwhelming majority of the market.

Focusing on market power is hardly an innovation in antitrust; it has been the mainstay of all rule of reason analysis from the earliest interpretations of the Sherman Act. Market power is entirely ignored only in cases involving "naked restraints"—transactions that have no plausible efficiency or other reasonable business justification, and so are treated under a *per se* rule. Conservative theory, however, does not treat market power just as a factor in a balancing analysis; rather, it treats market power as an independent requirement, such that all practices by companies lacking it are automatically considered innocuous from a competitive point of view.²⁹

There are three problems with treating the absence of market power as virtually a complete defense to all antitrust charges.

First, the measurement of market power, which requires the definition of relevant product and geographic markets, is the most elusive and unreliable aspect of antitrust enforcement. A defense based on the absence of market power is only as valid and reliable as the measurement process itself. While techniques for measuring market power are probably more reliable and more sophisticated than they have been in previous years, one should nevertheless be cautious about adopting market power as a screening device that will dominate all aspects of antitrust enforcement.

Second, and more important, the absence-of-market-power approach assumes that if many sellers of competing products occupy the same product and geographic markets, they can frustrate an attempt by any one of their number to achieve anticompetitive results. This view effectively eliminates all market power based on product differentiation

29. *See supra* note 24.

because similar products, distinguishable only by brand name or minor ingredient variations, all occupy the same "market."

For example, different firms selling, respectively, lite beer, regular beer, and premium beer may well be in the same "market" in the sense that a group controlling one type of beer could not raise prices substantially without suffering considerable inroads by the manufacturers of the other beers. But that does not mean that a cartel consisting of all manufacturers of lite beer would be entirely lacking in market power. On the contrary, they could probably agree to raise prices five or ten percent, reap supercompetitive profits, and not lose enough business to make the price rise unprofitable. Absent any legitimate business justifications, there is no reason a priori to assume that those deviations from the competitive norm should not be the target of an antitrust challenge.³⁰

A similar point can be made with respect to intrabrand effects. The present administration simply disregards such effects where the brand accounts for a modest market share.³¹ But every businessman knows that the most direct and effective competition for a branded product, especially one that is highly advertised, is a firm selling the same brand. To revert to the beer example, competition for Schlitz will almost always be most intense when provided by another Schlitz dealer. Once all the Schlitz dealers can be brought into a cartel relationship, whether they are organized horizontally or through the good offices of the brewer, they can raise prices before suffering inroads by competing brands. Although the magnitude of such price hikes will vary in different markets, it seems indefensible to assume that they should not be a concern of antitrust enforcement absent some indication that the arrangement has significant procompetitive effects.

Finally, a screening test based on market power assumes that economic effects—and only economic effects—count. For example, where the distributor accounts for an insubstantial market share, a boycott by suppliers of that distributor would not, according to conservative theory, violate the antitrust laws because it could not affect market prices or efficiency.

30. Conservative criticism of the Supreme Court's decision in *United States v. Topco Assocs.*, 405 U.S. 596 (1972) turns to a great extent on this difference of view. Topco was a cooperative association of regional supermarkets engaged in private label sales that was found to have violated the Sherman Act because it divided markets among its members. Private label sales only constituted 10% of total goods sold, and members averaged only a 6% market share in markets where they operated. It has been argued that the Topco arrangement could not have resulted in anticompetitive effects. That argument, however, assumes that Topco's private label brand had no separate consumer allegiance, and that sellers of Topco products in each city ("monopolists" by virtue of the division of markets) could not raise prices free of competition from other stores in the same city selling the Topco brand.

31. See Department of Justice Vertical Restraint Guidelines, 48 Antitrust & Trade Reg. Rep. (BNA) No. 1199, at 3 (Jan. 24, 1985).

A different result would be reached in a limited number of cases if one took into account noneconomic values in interpreting and enforcing antitrust laws. This difference of view probably explains the conservative criticism of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,³² where the Supreme Court sustained a complaint charging a concerted refusal to deal by suppliers. Defendants had moved to dismiss, arguing that the demise of the boycott victim could not have much effect on market price. The conclusion in a case like *Klor's* is defensible, even if there were no effect on market price, on the ground that the antitrust laws are opposed to "bullying" rivals or customers, at least where no plausible business justification is offered.³³

3. Inferences of Efficiency

In most markets, an anticompetitive result is unlikely unless the challenged party has significant market power and the transaction results in a restriction on output. But there are many situations where this simply has not been the case. In such cases, the Court explicitly found, or the facts clearly indicated, that companies had engaged in illegal anticompetitive behavior even though they lacked market power and had not significantly restricted output.³⁴ Overlooking market power and output considerations, the Court relied on direct evidence showing that the challenged transactions had anticompetitive purposes and effects but no significant business justifications.

The conservative school has argued that despite that sort of evidence, the absence of market power and restrictions on output dictate a conclusion that the purpose of a transaction must be to achieve efficiency. Fortunately, the Supreme Court rejected that approach as recently as last term in *FTC v. Indiana Federation of Dentists*.³⁵

III

THE FUTURE OF ANTITRUST—A NEW SYNTHESIS?

I have tried to describe the forces that have made a radical difference in antitrust thinking in recent years. If my descriptions are correct,

32. 359 U.S. 207 (1959).

33. The Supreme Court's recent unanimous decision in *FTC v. Indiana Fed'n of Dentists*, 106 S. Ct. 2009 (1986) is encouraging in concluding squarely, in line with *Klor's*, that an arrangement with the potential for genuine anticompetitive effects constitutes an antitrust violation, without proof of an actual effect on market price.

34. *Indiana Fed'n of Dentists*, 106 S. Ct. 2009 (1986) is a recent example; see also *Klor's*, 359 U.S. 207 (1959) (boycott of suppliers allegedly designed to eliminate a price cutter from the market found illegal); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (coercion by a newspaper to create a boycott by advertisers of a competing radio station found illegal); cf. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (refusal of ski area owner to continue to offer six-day lift ticket in conjunction with competing owner held to be a violation of Sherman Act § 2).

35. 106 S. Ct. 2009 (1986).

my predictions about the future of antitrust should be roughly accurate. Before turning to those predictions, however, a few caveats are in order.

First, all of these predictions assume that world economic conditions are relatively stable. If, for example, there were to be a world depression, all bets would be off. There is no way to predict what economic system would develop in the United States or elsewhere in the wake of that sort of catastrophe.

They also assume no sudden disruptions in two trends that have already influenced antitrust: (1) the continued impact of increasing international competition on U.S. firms and markets, and (2) the ownership of American corporate stock by a larger segment of the American people. The acceleration of either or both of these trends might further diminish the role of antitrust. For example, the increased importance of world trade considerations could lead to an American equivalent of Japan's MITI—a national effort to coordinate and direct competitive efforts. In that event, antitrust might take a back seat in national economic policy, like it did from 1933 to 1936, when industrial cooperation through the NRA codes led to the suspension of antitrust enforcement. Similarly, wider distribution of stock ownership through the U.S. population could radically reduce any constituency for antitrust enforcement. My assumption is that both these trends will continue, but are unlikely to become so pronounced as to completely eliminate the notion of free competition protected by an antitrust system.

If these assumptions are correct, the future of antitrust might well bring a synthesis between the activism of the 1960's and the minimalism of the 1980's. An activist antitrust policy that ignores efficiencies, lacks a solid grounding in economics, and shows a bias against bigness is unlikely to prevail. But so is the minimalist approach of the 1980's, which is little more than an anticartel policy at the federal level. While economically sophisticated, it is based on flawed premises and ignores some values in antitrust enforcement that Congress intended and appears still to support. A synthesis of these divergent approaches would not be impossible; their goals are not paradoxical or irreconcilable if one accepts the view that an economically enlightened but more aggressive antitrust enforcement policy would not seriously impair the national pursuit of an efficient industrial organization.

The remainder of Part III speculates on how this new synthesis might affect the development of enforcement policy in several different areas of antitrust law.

A. Deconcentration

Proposals for deconcentration, advanced as recently as the mid-1970's, have taken three forms:

(1) So-called "no-fault monopoly" proposals to amend section 2 of the Sherman Act to provide that substantial, persistent, single-firm monopoly power violates section 2 regardless of whether it was achieved or maintained by objectionable conduct;³⁶

(2) Suggestions that mergers consummated many years ago that have led to monopoly power or oligopoly market structure be challenged on the basis of present market effects;³⁷ and

(3) Sweeping legislative proposals, like the Industrial Reorganization Act introduced by Senator Hart in 1972, creating a commission with a mandate to examine industries in which concentration is high and, where appropriate, to arrange for dissolution or divestiture.³⁸

I doubt that any such proposals will be seriously advanced in the foreseeable future, regardless of election results. All of them have in common a willingness to incur enormous administrative costs in order to achieve the speculative advantages of improved competition in less concentrated markets. And while all pay lip service to claims of efficiency, they are relatively insensitive to that concern. In a world where our national interest requires that U.S. firms compete successfully in international markets, this kind of restructuring will remain unlikely.

B. *Robinson-Patman Enforcement*

FTC and private enforcement of the Robinson-Patman Act has often ignored defendants' claims of efficiency. Unfortunately, vigorous enforcement in the 1950's and 1960's, frequently relying on per se approaches to illegality, often prevented aggressive pricing and frustrated efforts to introduce new forms of distribution systems.

In contrast, and despite occasional instances of government enforcement, the Robinson-Patman Act has almost been a dead letter for the last ten years. I do not believe that price or term discrimination can never yield anticompetitive effects, but cases should be selected carefully, with a lively regard for the kind of competition called for by the Sherman Act.³⁹ An increased emphasis on efficiency should temper the declining

36. Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures, Antitrust & Trade Reg. Rep. (BNA) No. 897, Special Supplement, at 46-50 (January 18, 1979).

37. *Cf.* United States v. E. I. DuPont de Nemours & Co., 353 U.S. 586 (1957) (violation of § 7 of the Clayton Act must be judged at the time of suit).

38. *See, e.g., The Industrial Reorganization Act: Hearings on S. 1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. 1, at 3-34 (1973) (text of The Industrial Reorganization Act).

39. The Supreme Court has said as much. *See* Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 78-81 (1979).

commitment to the "small is beautiful" notion, ensuring that future Robinson-Patman enforcement will be selective and comparatively restrained.

C. *Cartels and the Per Se Rule*

There is very little difference of opinion among liberals, moderates, and conservatives with respect to cartel enforcement. All agree that naked agreements with a direct effect on price almost always have undesirable economic effects and almost never have any legitimate business justification.

In *Continental T.V., Inc. v. GTE Sylvania, Inc.*⁴⁰ and elsewhere, courts have indicated that the common standard to judge anticompetitive effects is the rule of reason. Per se rules will be adopted only after parties challenging a transaction show that the conduct under review almost always results in anticompetitive effects and almost never is justified by sound business reasons.⁴¹ As a result, per se treatment has come to be applied reliably only to horizontal and vertical price fixing, horizontal market division, and boycotts designed to maintain a cartel. I would expect that per se rules against tie-in sales, non-price related boycotts, and various kinds of price and term discrimination will soon disappear, if they have not disappeared already.

For the practical reasons cited by the Court for adopting per se approaches,⁴² I expect that the rules governing horizontal price fixing, market division, and price-related boycotts will survive for the foreseeable future.

The main point of contention about the appropriate role of per se rules concerns vertical price fixing. Although Congress and the Supreme Court have been clear in supporting a per se approach, a growing body of scholarship has questioned the wisdom of across-the-board per se rules for both maximum and minimum resale price maintenance.⁴³ Opponents of the per se approach argue that manufacturers set minimum resale prices in order to encourage their dealers to provide a variety of services. They claim that dealers will hesitate to make investments in services if other dealers, unburdened by comparable costs, can "free ride" by offer-

40. 433 U.S. 36 (1977).

41. *Id.* at 49-50.

42. *See* United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (citing the practical difficulties of minute inquiry into economic organization, complicated by fluctuating market conditions, as grounds for refusing to apply the rule of reason to an agreement among companies controlling more than 80% of U.S. manufacturing and distribution of sanitary pottery).

43. *See, e.g.,* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373 (1966); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283-99 (1975).

ing the same product at lower prices. I have urged elsewhere that the free rider explanation for vertical price fixing is one of the blind spots in conservative criticism of antitrust.⁴⁴ In most instances, vertical price fixing is adopted to placate powerful groups of distributors who induce suppliers to assist dealer cartels by eliminating intrabrand competition.

Whatever the merits of that debate, it is difficult to imagine a plausible argument that the elimination of free riders contributes to lower prices or greater efficiency. In the vertical price fixing area, conservatives find themselves arguing against the right of dealers to lower prices or introduce efficient distributional innovations, and for the idea that the manufacturer knows the proper mix of price and service better than the dealer does.

I hope that courts will continue to see the wisdom of a clear rule making vertical minimum price fixing illegal per se. If they do not, and if the Supreme Court eventually overrules *Dr. Miles*,⁴⁵ I should think that Congress would promptly reestablish the rule outlawing vertical price fixing.

D. Merger Enforcement

As I noted above, merger enforcement is already relatively lenient, allowing horizontal mergers where the combined market shares of the merging parties are in the fifteen- to twenty-percent range.⁴⁶ Where barriers to entry are low or nonexistent, or the firms are operating in a seriously depressed market, mergers will be accorded even more generous treatment.⁴⁷

My sense is that merger enforcement will become more aggressive. Another likely development is that a separate efficiency defense will be allowed in the merger area, just as it seems to have developed de facto in enforcement against joint ventures.⁴⁸ The interesting question is whether an even more lenient policy will evolve, allowing combinations up to the point where two or three competitors remain—that is, horizontal mergers in the thirty- to forty-percent range. My impression is that those were the real policy issues involved when Coca Cola recently tried to buy

44. See Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1492-93 (1983).

45. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911) (“[a]greements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.”).

46. See *supra* text accompanying note 7.

47. See *supra* text accompanying notes 11-13.

48. See *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979). The arguments in favor of this approach are developed by Professor Turner in his Article in this symposium. See Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 806-09 (1987).

Dr. Pepper and Pepsi Cola tried to buy Seven Up. Enforcement agencies and courts were not prepared to go that far; the question remains, however, whether they will take that step at some point down the road.

I do not think they should. Even if one grants that merger enforcement should be solicitous of efficiency arguments, it is doubtful that the current wave of large mergers is driven by efficiency considerations. Despite the computer revolution and other high-tech changes, it still appears that most efficiencies occur at the plant level, so that mergers of firms with several plants each do little or nothing to improve efficiency. Also, if there really were efficiencies available through increases in industrial size, one would expect that single firms would pursue those efficiencies through increased internal growth. Yet in most industries, including specifically those where merger activity is most pronounced, there is no evidence that the larger players are leaving the smaller ones further behind.

In short, there is no economy-wide reason to incur the competitive disadvantages of extremely high concentration. On the other hand, a continuing and accelerating wave of mergers will eventually lead to a situation in which three or four companies dominate many major industries in the United States. That kind of concentration would have a profound effect on political power and the quality of life in this country.⁴⁹ Surely Congress did not intend such results when it amended section 7 of the Clayton Act in 1950.⁵⁰

E. Private Enforcement

In recent years there has been a good deal of criticism of private enforcement of the antitrust laws, much of it well taken. The Georgetown study of private treble damage litigation shows a sharp increase in the number of private complaints in the 1970's.⁵¹ Many of these cases were of little merit and were instigated in the hopes of securing generous settlements or healthy attorneys' fee awards.⁵²

But treble damage litigation is not, as occasionally argued, out of control. Although the duration of treble damage litigation from complaint to conclusion is somewhat longer than other civil litigation in the federal system, the median trial length is the same as all civil litigation. Awards to plaintiffs are about average. Roughly seventy-five percent of

49. Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

50. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234-37 (1960) (reviewing the legislative history and describing the many "sociological arguments raised in criticism of increased concentration" by the amending Congress).

51. The average in each year from 1975-1980 was about 1500 per year, but is now down to about 1100; during the entire period 1952-1958, 144 private treble damage cases were filed. See Salop and White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1003 (1986).

52. Salop and White, *supra* note 51, at 1011.

private cases settle—a little high for the federal system. Of those that go to trial, however, plaintiffs win about thirty percent, which is not too far from the plaintiff-win average in all civil litigation.⁵³ The most striking finding of the Georgetown study is that judges are today granting summary judgment and motions to dismiss far more frequently than in recent years. Thus if plaintiffs are still filing frivolous cases in the hopes of securing a quick settlement, federal judges have caught on and the system has adjusted effectively to screen out such cases.

With the “blackmail suit” problem under control, there seems to be good reason to retain private enforcement.⁵⁴ Given the limited government enforcement resources and the disinclination of courts to impose severe penalties on white collar criminals, private treble damage actions may be the only real deterrent to serious anticompetitive behavior. More important, as long as antitrust policy remains controversial—which is the only really safe prediction about the next hundred years—there is good reason not to place control of antitrust enforcement in the hands of any one group from any single segment of the political spectrum.

53. See Calkins, *Summary Judgment, Motions to Dismiss and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1127-37 (1986).

54. Reform is a different matter; *mandatory* treble damages could very well be reconsidered.

