The Antitrust Revolution

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The history of antitrust law over the past four decades has been one of drastic, indeed it is not too much to say, revolutionary change. Almost every significant antitrust doctrine was modified or reversed in the direction of lessening liability. The Warren Court (1953-'69) functioned in an era—the era that culminated in Great Society optimism and student-led utopianism—when the general view seemed to be that there could hardly be too much law and regulation, at least economic regulation. The Court's majority, and to a large extent the Department of Justice, seemed to operate with a suspicion of and presumption against the operation of free markets. The astounding result is that, with a single exception in a peculiar private case, over a period of eighteen years (1956-'74) no antitrust plaintiff, government or private, lost in the Supreme Court.[1] Antitrust had almost achieved the legal system's ideal of complete predictability.

The purpose of antitrust has been a matter of uncertainty and controversy from the beginning. Was it meant to serve political, social, or (even) moral ends? Or was its purpose purely economic? More specifically, was it meant to protect competition in the interest of consumer welfare that is served by low prices and high output or, on the contrary, to protect small business from competition? Judges tended from the beginning to favor the latter view,[2] and in the Warren Court efficiency and low prices could be reasons to condemn rather than approve challenged conduct.[3]

It is interesting to compare later Courts' treatment of the Warren Court's expansion of antitrust to their treatment of its even greater and more important expansion of constitutional law. President Nixon was extremely fortunate in being able to make four Supreme Court appointments early in his first term, including the chief justice, Warren Burger. As to constitutional law, the Burger Court's performance proved to be extremely disappointing to those who expected a change of direction—turning out to be, as a book title put it, "The Counter-Revolution That Wasn't."[4] In fact, the Burger Court continued the constitutional revolution.[5]

The situation as to antitrust was very different. The reason may be that constitutional law is pure policy judgment, while antitrust has a connection to reality that makes a degree of objective evaluation possible. Critics of the Warren Court's antitrust decisions could show that they were often based on factual assumptions that, as nearly everyone now agrees, were simply mistaken.[6] The Burger Court sat in an era, influenced by Milton Freedman, George Stigler, and other Nobel prize-winning economists at the University of Chicago, of lowered expectations and increased skepticism of government economic regulation. The result was widespread deregulation of industries subject to specific economic regulation and a lessening of antitrust restrictions on industries supposedly subject to free market competition.

Although Section 1 of the Sherman Act prohibits "every contract, combination…, or conspiracy, in restraint of trade,"[7] it was early and necessarily—since the purpose of every contract is to restrain—decided that it prohibited only "unreasonable" restraints on trade.[8] Under the resulting "Rule of Reason," only business practices found to be net anticompetitive and without efficiency justification were (and are) illegal. Some practices, however, have been declared to be always or almost always anticompetitive and without justification—and therefore are said to be illegal per se. Because a challenged practice's anticompetitive effects and lack of justification are typically very difficult to show—largely because they characterize few business practices—the Rule of Reason tends to become a rule of legal per se.[9] The Rule of Reason means that antitrust plaintiffs will rarely win and, therefore, that few antitrust suits will be brought. The liberal justices of the Warren Court dealt with the "problem" by tending to declare nearly all challenged practices illegal per se.

The Warren Court

Minimum price fixing agreements, both horizontal (between or among competitors) and (dubiously) vertical (between buyers and sellers) were held illegal per se from the beginning.[10] The Warren Court extended the prohibition to vertical maximum price fixing agreements,[11] i.e., agreements to keep prices down. A pre-existing supposed per se rule against tying arrangements was solidified and extended by the Warren Court to the point that it could be a violation of the Sherman Act for a manufacturer to sell its product on favorable credit terms.[12] Such a sale, the Court held, could be an illegal per se tie of the product to the availability of the credit. The Court similarly reaffirmed and extended a supposed per se rule against boycotts or concerted refusals to deal to the extent that a violation could be found in a manufacturer's refusal to sell to a particular dealer.[13]

The apparent Warren Court rule as to mergers was, as Justice Stewart once pointed out in dissent, that "the Government always wins."[14] Mergers of small companies in highly competitive industries that would hardly be noticed today were found to be antitrust violations.[15] Competition by firms with a large market share put them in danger of being found guilty of monopolization.[16] Combinations of competitors in productive joint ventures were held illegal per se despite the fact that their apparent effect was to increase rather than lessen industry competition.[17] Regional price cutting by a large firm competing with a smaller firm could result in liability for illegal price discrimination under the Robinson-Patman Act[18] or attempted monopolization by predatory pricing under Section 2 of the Sherman Act.[19]

The acme of the Warren Court's drive for universal per se antitrust liability was undoubtedly reached in its 1978 decision in *United States v. Arnold Schwinn & Co*.[20] To the disbelief of nearly all commentators and lower court judges, the Court declared illegal per se all restraints placed on dealers by manufacturers in connection with the sale of their goods. The result was a bonanza for plaintiff antitrust lawyers who could almost surely find some

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restraint on a dealer in every manufacturer-dealer agreement and therefore establish a violation with no need to show an anticompetitive effect or lack of justification. Combined with antitrust's mandatory treble damages and attorney's fees for successful plaintiffs and the Warren Court's virtual preclusion of summary judgment for antitrust defendants,[21] the extortion potential was unparalleled.

The Burger Court

In what is surely one of the most amazing reversals of direction ever in a major field of law, nearly all of this was changed in the Burger (1969-'86) and Rehnquist (1986-'05) Courts and continues to be changed in the Roberts Court. After an era of continuous expansion, antitrust has entered an era of almost continuous contraction. The per se rule is essentially gone, rejected explicitly in some areas and implicitly in others, giant mergers are regularly approved, monopolists are permitted to compete vigorously, predatory pricing claims are treated with extreme skepticism, price discrimination is treated like predatory pricing, conspiracies have been made more difficult to prove, the paradoxical single-firm conspiracy concept is gone, and summary judgment is available to antitrust defendants.

The first indication of a change came in 1974 in *United States v. General Dynamics Corp.*,[22] ending the government's unbroken streak of victories in merger cases. Instead of finding a violation, as before, on the basis of statistics by simply manipulating market definitions to find that the merged company had a substantial market share and that the merger significantly increased market concentration, the Court upheld the merger by looking at actual industry conditions and likely competitive effects. In an opinion by Justice Stewart, the former dissenter, with four justices formerly in the majority dissenting—itself a strong indicator of change—the Court found the merged coal company's current market share less important than its future prospects, which were limited because of diminishing coal reserves.

The change of direction became clear three years later with the Court's 1977 decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.,*[23] essentially initiating the modern antitrust era. The fact of change was evident enough from the Court's willingness to explicitly overrule—overrulings being virtually unknown in the history of antitrust—the *Schwinn* decision of ten years earlier that epitomized the Warren Court's attraction to the per se rule. The revolutionary significance of *Sylvania* lay, however, primarily in the fact that Justice Powell's opinion for the Court, with only Justices Brennan and Marshall dissenting and Justice White concurring separately, was based upon and strongly endorsed the view of antitrust taken by the Chicago School of economics. The sole objective of antitrust, the Court agreed with the Chicago School, should be the purely economic one of maximizing consumer welfare.[24] Only practices which may result in limiting output and raising prices, therefore, should be matters of antitrust concern. The writings of the two leading proponents of the application of Chicago School economics to antitrust, Robert Bork and Richard Posner, are cited and relied on throughout the *Sylvania* opinion.[25] The historic debate as to whether the purpose of antitrust is to protect competition or, on the contrary, protect small businesses from the rigors of unrestrained competition was definitively settled in favor of the former.

Reversing the Warren Court's affinity for per se rules, Justice Powell began his discussion of the relevant law with the assertion that that the Rule of Reason is "the prevailing standard of analysis." "*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." Only agreements or practices that have a "pernicious effect on competition and lack any redeeming virtue" can be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[26] Under these "demanding standards,"[27] as he put it, it is doubtful that any business agreement or practice is illegal per se other than naked agreements—involving no integration of facilities or operations—not to compete. *Schwinn* had to be overruled, therefore, because vertical territorial restraints imposed by manufacturers on dealers are not necessarily lacking in redeeming virtue. They may, in fact, be useful or essential to efficient distribution by, for example, enabling dealers to make necessary investments in facilities or marketing without fear that their prices will be undercut by other dealers in the brand who benefit from but do not make such investments. The restraints may thus enable manufacturers to overcome the "free rider" problem.[28]

The promise of *Sylvania* has been kept by the Supreme Court in nearly all of its later decisions (although complete consistency is, of course, too much to expect). In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[29] two years after *Sylvania*, the Court in effect abolished the per se rule even as to horizontal price fixing, the paradigm of antitrust offenses. Composers and other owners of copyright music organized two selling agencies to market copyright licenses to television networks and other users. They sold the music exclusively through a "blanket license" which entitled the buyer for a fixed price to use all or any of the music in any amount. Although composers retained the right to market their music separately, the practical effect of the arrangement was to end price competition among them. The Court reversed a court of appeals holding that the arrangement constituted horizontal price fixing illegal per se. The question, the Court said, was not whether "the blanket license involves 'price fixing' in the literal sense." "Price fixing," it explained, is merely a "short-hand way of describing certain categories of behavior to which the *per se* rule has been held applicable."[30] But the per se rule is applicable, as the Court pointed out in *Sylvania,* only to practices that are "plainly anticompetitive" and without "redeeming virtue." The competitive effect and possible redeeming virtue of a practice, that is, must be investigated before it can be condemned, which is to say in effect that there is no per se rule.

The Court purported to revive the per se rule for horizontal price fixing four years later in *Arizona v. Maricopa County Medical Society*.[31] A large number of doctors in Maricopa County, Arizona, agreed on a schedule of maximum prices for various medical services to be charged patients insured under a program in which the doctors participated. Justice Stevens, the sole dissenter in *BMI,* joined by Justices Brennan and Marshall and the unpredictable Justice White, wrote the opinion in a

4-3 decision, supposedly holding the arrangement illegal per se. He did so, however, only after substantial discussion of the arrangement's alleged anticompetitive effects and justifications. Justice Powell's dissent, joined by Chief Justice Burger and Justice Rehnquist, seems clearly correct that the arrangement was not plainly anticompetitive and without redeeming virtue—it permitted creation of an arguably efficient and convenient health plan—and therefore could not be declared illegal per se consistently with *Sylvania* and *BMI*. The liberals, it seemed, simply enjoyed a brief return to power on a short-handed Court.

Two practices in addition to horizontal (and vertical) price fixing and market division often said to be illegal per se are group boycotts or concerted refusals to deal and tying arrangements. In 1988, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*,[32] the Court, in an opinion (surprisingly) by Justice Brennan, in effect did to the supposed *per se* rule as to group boycotts what *BMI* had done as to horizontal price fixing. The rule applied, the Court announced, not to all but only "certain concerted refusals to deal or group boycotts," namely those "likely to restrict competition without any offsetting efficiency gain." The rule has "generally" been applied, Justice Brennan said, to efforts by "dominant" firms to deny competitors necessary suppliers, facilities, or markets by practices "not justified by plausible arguments that they were intended to enhance overall efficiency."[33] Group boycotts are illegal per se, therefore, only when shown to fail the Rule of Reason.

Tying arrangements—the sale of product A, the tying product, on condition that the buyer also take product B, the tied product—are also said to be subject to a per se rule. This was always dubious, however, as the rule supposedly required some degree of market power in the tying product and some effect in the market for the tied. The supposed anticompetitive evil of tying, the use of monopoly power to gain additional monopoly power, was shown by simple economic analysis to be baseless. Tying can be used as a price discrimination device (which is not necessarily objectionable), but not to increase or multiply monopoly power, and it can have efficiency justifications, such as quality control or reducing production or marketing costs.[34]

It appeared, therefore, that the supposed tie-in per se rule could not survive *Sylvania*. This was the position take by four justices, Justice O' Connor, joined by Chief Justice Burger and Justices Powell and Rehnquist, concurring in *Jefferson Parish Hospital District No. 2 v. Hyde*.[35] The majority, however, in an opinion by Justice Stevens, asserted that it was "too late in the day" for such a drastic move, whatever its merits.[36] Although the Stevens opinion refused to explicitly abolish the supposed per se rule for tie-ins, it very much limited its application by insisting that the power requirement, previously reduced to a formality, was to be taken seriously. The defendant hospital was found not guilty of tying anaesthesiological services to surgery, not because the idea is preposterous, but because its 30% market share in the tying product (surgery) market was found insufficient to meet the power requirement.

It was only a matter of time, it seemed, before the supposed per se rule for tie-ins would be explicitly rejected. In *Eastman Kodak Co. v. Image Technical Services, Inc.*[37] (1992), however, it was applied in the context of a motion for summary judgment with no question raised as to its validity. In an opinion by Justice Blackmun, the Court held that the plaintiff was to be heard on its claim that Kodak tied machine service to machine parts. Since Kodak was the sole source for many of its machine parts, the parts were found, ludicrously, to meet *Hyde's* power requirement. The Court also considered it significant that Kodak imposed the tie after some machines had already been sold, i.e., to some customers who were "locked-in." Only Justices O'Connor and Thomas joined Justice Scalia in dissent, pointing out that it made no sense to condemn the parts-service tie when Kodak could have without question tied both parts and service to its machines, which, being in a competitive market, did not meet the power requirement. The Court, it seems, in a temporary throwback to the use of antitrust to protect the little from the big, came to the aid of cut-off independent service providers and hapless machine purchasers. That the state of the per se rule as to tie-ins remains precarious, nonetheless, is indicated by its explicit rejection by the Court of Appeals for District of Columbia Circuit in *United States v. Microsoft Corp.* (2007)[38] as inapplicable in the software context.

Perhaps the earliest example of the creation of a per se rule in antitrust was the Court's 1911 decision in *Dr. Miles Medical Co. v John D. Park & Sons, Co.,*[39] holding illegal per se under Section 1 of the Sherman Act a minimum resale price agreement between a manufacturer and its dealer. The decision was based on the misapplication of an irrelevant common law rule against restraints on alienation and the erroneous assumption that a vertical, manufacturer-dealer, price fixing agreement is necessarily equivalent to a horizontal agreement among dealers. In 1968 in *Albrecht v. Herald Co.*,[40] a suit by a cut-off newspaper deliverer who charged more than the agreed-upon price, the Warren Court's enthusiasm for antitrust liability was such that it extended the prohibition to maximum vertical price fixing agreements, a clear example of using antitrust to favor small businessmen over consumers.

Since vertical minimum price restraints serve very much the same purposes, such as avoiding the free-rider problem, as vertical non-price restraints, it seemed clear that *Dr. Miles* (much less *Albrecht*) could not survive *Sylvania*, as Justice White's concurring opinion in *Sylvania* pointed out. Congress, however, had seemingly expressed its approval of *Dr. Miles* just two years earlier by enacting the 1975 Consumer Protection Act.[41] The Act repealed the 1936 Miller-Tydings Act, which authorized the states to enact "fair trade" laws permitting manufacturers to escape *Dr. Miles*. The *Sylvania* Court was therefore understandably reluctant to explicitly overrule *Dr. Miles*, and instead undertook (unsuccessfully) to distinguish it.[42]

Dr. Miles and *Albrecht* clearly, it seemed, had to go. Beginning with the easier task, the Court explicitly overruled *Albrecht's* prohibition of vertical maximum price fixing in 1997 with *State Oil Co. v. Khan.*[43] Then, finally, two terms ago in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[44] the newly reconstituted Roberts Court explicitly overruled the ninety-six-years-old *Dr. Miles* over the stare decisis-based objections of the minority.

Although antitrust law is essentially anti-monopoly law, monopoly as such is, for good reason, not prohibited. It may, after all, be the result of a patent, exceptional business skill, or a market able to support only one efficient firm. It can therefore sensibly be condemned only if it is the result of merger(s) or of anticompetitive conduct. The evil of monopoly is that a monopolist may maximize profits by restricting output and raising prices. However, in *United States v. Aluminum Co. of America* (Alcoa),[45] the leading monopolization case of the mid-twentieth century, the Second Circuit held an alleged monopolist guilty of monopolization not for restricting but for expanding output and keeping prices low. This was an "exclusionary practice," the court reasoned, because it made it more difficult for new companies to enter the industry. The result was to institute a regime of soft competition in which it was dangerous for a company with a large market share to compete lest it be found guilty of monopolization by excluding or injuring smaller competitors. Antitrust became, at least for dominant firms, a means not of protecting but of discouraging competition.

That, too, saw a drastic change in the Burger Court era. The most important monopoly case of the era was the government's suit against IBM, which the government dismissed in 1982 as baseless after a costly thirteen-year struggle.[46] A dozen private suits against IBM spawned by the government case also ended in IBM's favor.[47] Perhaps the only real monopolization suit to reach the Burger Court was *Berkey Photo, Inc. v. Eastman Kodak Co.*, a suit by a small camera manufacturer against Kodak, complaining that Kodak, a film monopolist, drove it out of business by introducing a new size of camera and matching film without giving the plaintiff advance notice. The Second Circuit, explicitly rejecting its earlier *Alcoa* decision as "a litigant's wishing well," and making clear that even a monopolist is permitted and indeed encouraged to compete, reversed a jury verdict for the plaintiff.[48] The Supreme Court, rejecting a rare opportunity to explicate monopolization law, denied plaintiff's petition for certiorari, letting the decision stand.[49] Justice Powell, joined by Justice Rehnquist, dissented from the denial, finding it "little less than bizarre" and "difficult to fathom" that a claim could be based on a monopolist's failure to assist a competitor.[50]

Having declined to hear a real monopolization case, the Court, a few years later, as if to prevent the law from falling into boring rationality and predictability, agreed to hear a specious one, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*.[51] Defendant Aspen Skiing, operator of skiing facilities on three mountains in Aspen, Colorado, declined to continue an agreement with plaintiff Highland, operator of a somewhat lesser skiing facility on a fourth mountain, to sell a multi-day all-lift ticket, granting skiers access to any of the mountains. Antitrust, one might think, would be more concerned with the agreement that ended price competition between the parties than with its termination. The Court, however, in an opinion by Justice Stevens, first assumed that Aspen Skiing was a monopolist, despite the fact that it was in competition with many other "destination" (non-regional) skiing facilities in Colorado and elsewhere. Then, doing precisely what Justices Powell and Rehnquist considered "bizarre" in *Berkey Photo*, found Aspen Skiing guilty of illegal monopolization for failing to continue to cooperate with and assist its smaller competitor. As in *Kodak*, the Court seemed to succumb again to the pre-Chicago School temptation to use antitrust to protect not competition, but a small competitor injured by competition. Fortunately, the decision is peculiar enough—Aspen almost surely would not have incurred antitrust liability if it had never cooperated with Highland in the first place—that it has had very little precedential value.[52]

Except for the fact that decisions made by a committee cannot be expected to be consistent, it would be difficult to believe that the Court that decided the *Kodak* tie-in case in 1992, apparently letting sympathy trump economics, could decide *Brooke Group v. Brown & Williamson Tobacco*[53] a year later, arguably letting economics trump reality. Predatory pricing, selling below cost by a large and wealthy company to drive a smaller competitor into bankruptcy, has been the *bête noir* of antitrust from the beginning.[54] Economic analysis indicates that for many reasons it is not likely to be a successful business strategy, but it has nonetheless been the basis of many monopolization, and probably most attempt-to-monopolize, suits. The small competitor who cannot meet the lower prices of a large competitor is strongly tempted to charge and even believe that he was crushed not by a superior product but just by greater wealth. One of the most important steps taken by the Burger Court to reduce antitrust liability was its virtually total elimination of predatory pricing as a viable basis for an antitrust claim.

The Court's 1986 decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[55] is significant in two respects. First, it demonstrated that summary judgment had become a realistic possibility for antitrust defendants, which was not the case in the Warren Court era.[56] Second and perhaps even more important, Justice Powell's opinion for the Court adopted the Chicago School's extreme skepticism as to the anticompetitive potential of predatory pricing. Incurring present-day losses from below-cost pricing to drive an equally efficient competitor from the market and gain monopoly power is a rational business strategy only if the losses can be recouped, with interest, from monopoly profits in the future, but that is highly speculative. The competitor may, for example, obtain funding and not go bankrupt, a bankrupt competitor may reorganize and reenter the market with a low cost overhead, or monopoly prices may quickly cause old or new competitors to enter the market.[57] The result, the Court concluded in *Matsushita,* is that "predatory pricing schemes are rarely tried, and even more rarely successful."[58]

Brooke Group presented the very rare situation in which it appeared that the plaintiff's claim of predatory pricing had a degree of plausibility. Unlike in the usual case, the plaintiff was able to show that the defendant did in fact sell its product below cost—and not only full cost, which may minimize loss, but apparently variable or incremental cost, which is loss-increasing—and did so for a very substantial period of time (eighteen months).[59] The plaintiff was further able to show from the defendant's files, also quite unusually, that the defendant acted with the specific intent to hinder competition.[60] All of this was not enough to prevent grant of summary judgment to the defendant. Below-cost pricing does not of itself establish a predatory pricing claim; that it "may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured." There is a "second prerequisite." Plaintiff must be able to show that defendant had "a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." Without recoupment the predatory pricing scheme will be unsuccessful and "unsuccessful predation is in general a boon to consumers."[61] Because of competitive conditions in the cigarette industry—not historically noted, however, the dissent pointed out, for intense competition—the plaintiff would not be able, the Court determined, to make this showing.

With *Brooke Group*, predatory pricing essentially dropped out of antitrust as a feasible means of establishing a monopolization or attempt to monopolize claim. As if that were not enough, *Brooke Group* also, simultaneously, virtually eliminated from antitrust the likelihood of a successful suit for primary line price discrimination (injuring competition with a competitor of the seller) under the Robinson-Patman Act. The Act prohibits, with various exceptions and qualifications, sales of a product to different buyers at different prices "where the effect… may be substantially to lessen competition or tend to create a monopoly."[62] Such price discrimination can injure competition, *Brooke Group* holds, only when the complained-of lower price is predatory, and the meaning of predatory is essentially the same for a price discrimination case under the Robinson-Patman Act as for a monopolization or attempt-to-monopolize case under Section 2 of the Sherman Act. In both cases, in addition to a showing of a price below some measure of cost (which the Court has repeatedly declined to specify)[63] there must be a showing of (for the Robinson-Patman Act) a "reasonable prospect" and (for Section 2 of the Sherman Act) a "dangerous probability" of recoupment.[64] The Robinson-Patman Act, enacted less to protect competition than to protect small businessmen from competition, was in effect converted into a true antitrust law.

The "attempt to monopolize" offense under by Section 2 of the Sherman Act seemed perhaps to have the greatest potential for antitrust plaintiffs. Section 1 has the threshold requirement of proof of a conspiracy or some concert of action. Section 2's monopolization offense applies to single firm conduct, but requires a showing that the defendant has monopoly power, which usually requires showing that the defendant has a large share (perhaps 70% or more) of a defined relevant product and geographic market. The attempt offense, however, requires proof of neither a conspiracy nor monopoly power. It presumably requires only anticompetitive conduct and a degree of market power sufficient to create a "dangerous probability" that a monopoly will result. Courts sympathetic to small firms crushed by larger competitors often had little difficulty in finding this lesser power requirement met.

In 1964, the highly sympathetic Ninth Circuit effectively dispensed with the power requirement entirely by simply holding, uniquely, that it could be inferred from the fact of the allegedly anticompetitive conduct.[65] Incredibly, the Supreme Court allowed this anomaly to stand for thirty-nine years, until its 1993 decision in *Spectrum Sports*, *Inc. v. McQuillan* (1993).[66] The attempt to monopolize offense, the Court finally announced, requires plaintiff to define the market defendant is allegedly attempting to monopolize and to show that "defendant's economic power in that market" is sufficient to create a "dangerous probability of monopolization." The result, especially in combination with the Court's skeptical view of predatory pricing claims, is largely to pull the teeth of the attempt offense, depriving it of much of what was thought to be its potential.

In a decision of lesser but still some importance, the Burger Court definitively rejected the possibility of basing Section 1 liability on an intra-enterprise (or "bathtub," as it was sometimes called[67]) conspiracy. In *Copperweld Corp. v. Independence Tube Corp.* (1984),[68] the Court held that a corporation cannot conspire with a wholly owned subsidiary, as had sometimes earlier been held or assumed, even if it is separately incorporated. Another route of possible escape from Section 1's conspiracy requirement has been shut off.

The Roberts Court

The Burger and Rehnquist Courts have so thoroughly revised antitrust law in accordance with the Chicago School's purely economic approach and in the direction of lessening liability as to leave little more, it would seem, for the purportedly more conservative Roberts Court to do. In fact, however, the Roberts Court has been unusually active in antitrust, deciding three cases with full opinion in the 2005 term and four in the 2006 term, all in favor of the defendants. An antitrust plaintiff that seemingly could not lose in the Warren Court, now, on the basis of results to date, seemingly cannot win.

In *Texaco, Inc. v. Dagher* (2005),[69] the Court held that it was not illegal price-fixing for two oil companies that had formed a joint venture to refine and sell gasoline to agree on the product's selling price, even though it was sold under their individual brand names. In *Illinois Tool Works, Inc. v. Independent Ink, Inc.* (2005),[70] involving the tying of unpatented supplies to a patented machine, the Court rejected the presumption of earlier cases that a patent is evidence of market power. The Court explained that its former "strong disapproval of tying arrangements has substantially diminished." As a result, a plaintiff alleging illegal tying must make "a showing of market power in the tying product" and that requirement is not met by the fact that the product is patented.[71]

The Court's decision in the third case, from the October 2005 term, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,[72] is not likely to have wide application, but illustrates the Court's continuing limitation of the scope of the Robinson-Patman Act by insisting that its requirement of injury to competition is to be taken seriously. A manufacturer did not commit illegal secondary line price discrimination (discrimination injuring competition between buyers) under the Act, the Court held, by making some sales to other dealers on more favorable terms than some sales it made to the plaintiff. Reversing the court of appeals, the Court held that there could be no illegal secondary line price discrimination absent proof that plaintiff and other dealers competed for sales to the same customer.

In the 2006 term, in *Credit Suisse Securities (USA) LLC v. Billing*,[73] the Court dismissed as precluded by securities law a suit by investors claiming a conspiracy by underwriting firms in violation of Section 1 of the Sherman Act. In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*,[74] the Court held that the *Brooke Group* test for predatory selling—sales below an appropriate measure of cost plus a reasonable probability of recoupment—applied also to the unusual situation of alleged predatory buying, i.e., buying at high prices to deny competitors needed supplies. Plaintiff must show, first, that the predatory (high-cost) buying led to below-cost sales of the product and, second, that the defendant had a reasonable probability of recoupment by obtaining a buying monopoly that would enable it to recover (with interest) its costs. The chief significance of the decision probably lies, again, in the Court's insistence that antitrust plaintiffs show actual or potential injury to competition.

The most litigated issue in antitrust law is the existence of a conspiracy in a suit under Section 1 of the Sherman Act. In the usual case, plaintiff alleges a conspiracy in very general or conclusory terms and hopes then to find enough evidence through discovery proceedings to bring the issue to a jury. In *Bell Atlantic Corp. v. Twombly*,[75] a potentially highly significant decision, the Roberts Court made this harder for plaintiffs to do. After quoting the statement from *Brooke Group* that mere parallel action by competitors, even interdependent parallel action, is "not in itself unlawful," the Court held that to avoid dismissal plaintiff must allege "enough facts to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement."[76] The Court explicitly rejected the statement in an earlier case that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The plaintiff must allege facts that "suggest[] an agreement."[77]

Finally, in *Leegin*,[78] as already noted, the Roberts Court overruled the venerable *Dr. Miles* decision making resale price maintenance illegal per se, completing the movement from a regime where almost everything to a regime where nothing is illegal per se. The Court has effectively come close to recognizing this by agreeing that "there is no bright line separating *per se* from Rule of Reason analysis."[79]

More useful and accurate than trying to maintain the Rule of Reason/illegal per se distinction might be the proposition that the law today is that only naked agreements not to compete are necessarily illegal. Such agreements are, by definition, anticompetitive, and that should be enough, in the interest of legal clarity and certainty—whatever their possible merits in some cases—to condemn them. In all other cases, the antitrust plaintiff should be required to show actual or potential anticompetitive effects possibly raising the monopoly problem of output reduction. The result is that antitrust law and litigation have been much reduced and antitrust has at last become, at least arguably, a genuine public welfare measure.

Endnotes

1 From 1956 when the government lost *United States v. E. I. Dupont de Nemours & Co.*, 351 U.S. 377 (the Cellophane Case) until 1974 when it lost *United States v. General Dynamics*, 415 U.S. 486, it won all of its cases in the Supreme Court except *White Motor Co. v. United States*, 372 U.S. 253 (1963), which was remanded to the lower courts for further consideration. The only exception was *Tampa Electric Co. v. Nashville Coal Co.* (1961), a private action against a defendant who was obviously using antitrust as an excuse to renege on a contract. Even that, however, did not keep Justices Black and Douglas from dissenting.

2 In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 333 (1897), the first antitrust case decided by the Supreme Court, the Court stated that a combination that "may even temporarily or perhaps permanently, reduce the price of an article" should nonetheless be found to violate the Sherman Act if the effect is to drive "out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings."

3 In *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962), the Court considered it a reason to condemn a merger that national shoe chains "can market there own brands at prices below those of competing independent chains." Congress sought to protect "viable, small, locally-owned businesses," the Court said, even if "occasional higher costs and prices might result."

4 Vincent Blasi, The Counter-Revolution That Wasn't (1983).

5 *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

6 *See, e.g.*, Robert Bork, The Antitrust Paradox (1978); Richard Posner, Antitrust Law (2nd ed. 2001).

7 26 Stat. 209; 15 U.S.C.A. §§ 1-7.

8 Standard Oil Co. v. United States, 221 U.S. 1 (1911).

9 *See*, Richard A. Posner, *The Rule of Reason and the Economic Approach, Reflections on the Sylvania Decision,* 45 U. Chi. L. Rev. 1, 14 (1977) (the rule of reason is "in practice… little more than a euphemism for non-liability").

10 United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (horizontal); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (vertical).

11 Albrecht v. Herald Co., 390 U.S. 145 (1968).

12 Fortner Enter., Inc. v. U.S. Steel Corp., 394 U.S. 4951 (1969).

13 Klors v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959). (plaintiff alleged a manufacturer conspiracy).

14 United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966).

15 *Id.*

16 United States v. Aluminum Co. of America, 148 F2d 716 (2nd Cir 1945); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curium*, 347 U.S. 521 (1954).

17 United States v. Topco Assoc., Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc. 388 U.S. 350 (1967).

18 49 Stat. 1526 (1936), 15 U.S.C.A. f 13.

19 Utah Pie Co. v. Cont'l Bakery Co., 386 U.S. 685 (1967).

20 388 U.S. 365 (1967).

21 Poller v. Columbia Broad. Sys., 368 U.S. 464 (1962).

22 415 U.S. 486 (1974).

23 433 U.S. 36 (1977).

24 It is not a function of antitrust, the Court said, to protect the "autonomy of independent businesses," for "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Id.* at 53 n. 21.

25 *Id.* at, *e.g.*, 48 n.13, 51 n. 18, 53 n. 21, 55, 56.

26 *Id.* at 49-50, quoting Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958).

27 *Id.* at 50.

28 *Id.* at 55.

29 441 U.S. 1 (1979).

30 *Id.* at 9.

31 457 U.S. 332 (1982).

32 472 U.S. 284 (1985).

33 *Id.* at 290, 294.

34 *See, e.g.*, Fortner Enter., Inc. v. U.S. Steel Corp., 394 U.S. 495, 514 n.9 (White, J. dissenting).

35 466 U.S. 2 (1984).

36 *Id.* at 9.

37 504 U.S. 451 (1992).

38 253 F. 3d 34 (D.C. Cir. 1998).

39 220 U.S. 373 (1911).

40 390 U.S. 145 (1968).

41 89 Stat. 801 (1975), amending 15 U.S.C. f.1, 45(a).

42 *Sylvania*, 433 U.S. at 51 n.18.

43 522 U.S. 3 (1997).

44 127 S.Ct. 2705 (2007).

45 178 F. 2d 416 (2nd Cir. 1945) (lack of a quorum precluded Supreme Court review).

46 *In re IBM Corp.*, 687 F. 2d 591 (2nd Cir. 1982).

47 *See, e.g.*, Telex Corp. v. IBM, 510 F. 2d 894 (10th Cir. 1975); California Computer Products v. IBM, 613 F. 2d 727 (9th Cir. 1979).

48 603 F. 2d 263 (2nd Cir. 1979).

49 444 U.S., 1093 (1980).

50 *Id.* at 1094.

51 472 U.S. 585 (1985).

52 *See, e.g.*, Olympic Equip. Leasing Co. v. Eastern Union Telegraph, 797 F. 2d 370 (7th Cir. 1986) (opinion by Posner, J.)

53 509 U.S. 209 (1993).

54 It was an element of the finding of monopolization by the Standard Oil Co., United States v. Standard Oil Co., 220 U.S. 1 (1911), though later analysis indicates it may have never occurred. John McGee, *Predatory Pricing Revisited*, 23 J. Law & Econ. 289 (1980).

55 475 U.S. 574 (1986).

56 *See*, Poller v. Columbia Broad. Sys., 368 U.S. 464 (1962).

57 *See*, Frank Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263 (1981).

58 *Matsushita*, 475 U.S. at 589.

59 *Brooke Group*, 509 U.S. at 231.

60 *Ibid.* (a reasonable jury could conclude that Brown & Williamson "envisioned or intended this anticompetitive course of events").

61 *Id.* at 234.

62 49 Stat. 1526 (1936), 15 U.S.C. n.§ 13.

63 *Brooke Group*, 509 U.S. at 222 n. 1.

64 *Id.* at 224.

65 Lessig v. Tidewater Oil Co., 327 F. 2d 459 (9th Cir. 1964).

66 447 U.S. 113 (1993).

67 From the pre-jacuzzi era in which it was assumed that a person in a bathtub was alone.

68 467 U.S. 113 (1993).

69 126 S. Ct. 1276 (2005).

70 126 S. Ct. 990 (2005).

71 *Id.* at 1286.

72 126 S. Ct. 860 (2009).

73 127 S. Ct. 2383 (2007).

74 127 S. Ct. 1069 (2007).

75 127 S. Ct. 1955 (2007).

76 *Id.* at 1964-65.

77 *Id.* at 1968.

78 127 S. Ct. 2705 (2007).

79 California Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999), quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla, 468 U.S. 85, 104 n.26 (1984).