

## IMPROVING COMPETITIVE ANALYSIS

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## INTRODUCTION

It is a challenge nowadays for antitrust lawyers to keep up with their reading. U.S. courts and agencies alone generate volumes of new material that require substantial effort just to identify and collect, let alone to study and understand. Then there is a daily torrent of developments from the European Union and literally scores of other foreign jurisdictions that entered the global antitrust industry in the past few decades. Despite this gushing hydrant of antitrust, surprisingly little of it involves real “competition analysis”—trying to understand how markets function and to determine whether specific transactions or episodes of conduct represent a genuine threat to productivity and competitiveness. In the majority of U.S. cases, at least, full rule of reason analysis is not usually necessary, because the allegations do not hit on all cylinders. Many cases are dismissed or suffer judgment as a matter of law due to some missing element such as concerted action, market power, standing, causation-in-fact, “antitrust injury,” or some other prerequisite to a successful claim. Other cases founder on issues of jurisdiction, the application of exemptions such as *Noerr-Pennington*,<sup>1</sup> or regulatory exceptions exemplified by cases such as *Credit Suisse Securities (USA) LLC v. Billing*.<sup>2</sup> Then there are numerous cartel cases (an increasingly prolific category) in which anticompetitive effect is often only a minor issue (because it is presumed or essentially uncontested).

Those rare decisions that actually analyze how real markets work and assess the competitive impact of specific business conduct often are not very persuasive, although they seem correct for the most part. Any quality deficit might be due to a number of factors. Most importantly, antitrust law has only recently turned the final page of a fifty-year-long chapter in which decisions assessing competitive effect depended more upon categorization of conduct and the applicability of the per se rule, rather than on competition analysis as such. Thus, until recently, intensive analysis of competitive

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<sup>1</sup> *United Mine Workers of America v. Pennington*, 381 U.S. 657, 665-66 (1965) (declining to apply an exemption where a union expressly agreed with one employer to impose a wage scale on other bargaining parties); *see also* *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961) (holding that deception of public officials, while reprehensible, was not itself a violation of the Sherman Act).

<sup>2</sup> 551 U.S. 264, 284-85 (2007) (disallowing antitrust claim in light of scheme of securities regulation).

effects of business conduct was unnecessary, and decisions that depended on such an analysis were therefore rare. The scarcity of decisions involving full-blown competition analysis means that courts and agencies have had limited practice in developing and explaining detailed understandings of real-world markets and the effects of particular instances of competitive conduct.

Second, the antitrust world will always be dominated by lawyers—lawyers who staff government agencies, lawyers who advocate for each party, and lawyers who have become judges who preside in antitrust cases. For cases that require competition analysis, however, the most valuable skill is the ability to understand, apply, and explain microeconomics and industrial organization theory and how these disciplines apply to a specific real-world situation. These skills are rarely taught to law students, and are not tested on bar exams. The skill of understanding markets and analyzing past or predicting future competitive effects is still relatively undeveloped in the lower courts (where judges are almost never appointed based on their credentials as microeconomists) and the community of lawyers, and Supreme Court guidance on competitive analysis has been sparse. Lower courts and agencies need more coherent and practical guidance and, in any event, the art and science of competition analysis could stand a lot of improvement.

For example, most of those who follow the insider's game of oligopoly theory as applied to antitrust analysis of mergers and acquisitions must be worn out by all the game-theoretic models named predominantly after long-dead French mathematicians (Cournot, Bertrand, etc.). While plentiful, such theories still fail to provide sound, testable predictions for behavior in real-world markets whose structure lies somewhere between literal monopoly and perfect competition. Similarly, it does not help that much of the scholarship involving competition analysis occurs within the context of adversary proceedings. Theories are asserted with towering confidence, crowding out thoughtful reflection and balanced understanding. A position that could have seemed plausible if presented objectively, which would include a realistic assessment of its weaknesses, appears less credible when presented as invincible by a motivated advocate—usually a lawyer, but often an expert witness or scholar who may be associated with one side or the other in a live controversy.

Ultimately, it is vital to effective antitrust enforcement to be able to predict the competitive effects of business conduct accurately. Lawsuits that reach incorrect results are of course potentially very damaging to economic performance. But even those that reach the correct result may be unhelpful if they provide little guidance or, even worse, inaccurate guidance as to how the analysis should be conducted. How can one compensate for this quality deficit? What should be done to provide the most powerful and effective set of analytical tools to guide decision-makers toward the best available competitive analysis?

This Article briefly traces the recent history of U.S. antitrust rules for judging the competitive effects of business conduct. It then describes how the need for accurate competition analysis by agencies and courts has intensified in the past twenty or so years as per se rules have been abandoned in a widening array of cases. In the search for worthy models of competition analysis, I provide a few high-quality examples. Finally, drawing on those examples, I make two suggestions for improving agency and judicial analysis of competitive effects.

My first suggestion is that competition analysis should begin with a basic orientation—identifying and describing important competitive characteristics of the field of economic activity involved in the case, including the basic nature of the products and their main functional alternatives, the suppliers, purchasers and various intermediaries (distributors, retailers and other market makers), the processes and transactions that comprise the overall flow of commerce from raw material to final use or consumption, and at least some historical context—where did these products, actors and activities come from and where does it appear they are going? This is not a proposal to require the compilation of an encyclopedic economic history for each industry involved in every antitrust case; it is rather a call to put first things first, instead of diving into the minutiae of elements and subroutines that ultimately resolve specific legal issues of the particular dispute—before the necessary factual background is in place for a sound understanding of the competitive arena for the claim.

My second suggestion is that lawyers, agency officials, and judges maintain a consistent and high level of awareness of the reality that there is no general model of competitive analysis that can be applied mechanically and with success to all antitrust cases—including those cases where the law requires full rule of reason analysis. The simplicity and clarity of legal rules is generally improved by uniformity, but accuracy requires consideration of realities that might require a novel perspective on the likely evolution of competition in a specific setting. No single legal rule can possibly anticipate all the circumstances that could be material to sound competition analysis. Just as the antitrust laws have been cast generally and interpreted broadly to reach anticompetitive conduct in its multifarious and evolving forms, so should the analysis of competition remain open to new justifications and rationales for business conduct.<sup>3</sup> Few real-world industries can be treated exactly like the “widget” industry made famous in textbook abstractions that form the core curriculum for instruction in rudimentary industrial organization theory. Many of our most important, instructive and successful

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<sup>3</sup> *Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.* 129 S. Ct. 1109, 1124 (2009) (Breyer, J., concurring) (“As this Court pointed out in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, the ‘means of illicit exclusion, like the means of legitimate competition, are myriad.’” (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004)) (internal citations omitted)).

antitrust cases—*United States v. AT&T*,<sup>4</sup> *National Bancard Corp. (NaBanco) v. Visa U.S.A., Inc.*,<sup>5</sup> or *NCAA v. Board of Regents*<sup>6</sup>—depend critically upon appropriate recognition of some unique competitive characteristic or combination of characteristics largely unanticipated by precedent. Conversely, some of our most disastrous antitrust cases—*United States v. United Shoe Machinery Corp.*<sup>7</sup> and *Eastman Kodak Co. v. Image Technical Services, Inc.*<sup>8</sup> come to mind—went awry precisely because they failed to address how the basic characteristics of the economic activities involved in the case related to the nature of competition and the goals of antitrust policy. Such unique characteristics would not necessarily have been apparent to anyone trying to understand the legal claim by checking each box in the standard textbook list of relevant market characteristics: structure of supply, structure of demand, nature of the product and its suppliers, distributors, customers, etc.

To picture how this second point applies, consider the cases identified above—*United States v. AT&T*, *National Bancard Corp. (NaBanco) v. Visa U.S.A., Inc.*, and *NCAA v. Board of Regents*. In each of these cases competition analysis required the assessment of characteristics that set these cases apart from the run-of-mill (widget) industry. In each case, the courts successfully recognized those key characteristics and correctly derived the implications for sound competition analysis. *United States v. AT&T* (a consent decree rather than a litigated judgment) recognized the uniquely pervasive effects of a failed system of rate-base/rate-of-return regulation on the ability and incentives of a multiproduct monopolist to suppress emerging competition in various sectors of the telecommunications industry.<sup>9</sup> *NaBanco v. Visa U.S.A.* recognized that a joint venture organized to provide a four-party payment system using credit cards and the supply of bank credit on both the consumer and the merchant sides of the system possessed fundamentally different purposes, mechanisms, and competitive dynamics than a cartel.<sup>10</sup> *NCAA v. Board of Regents* similarly recognized (in refusing to apply a per se rule) that a sports league requires certain forms of horizontal

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<sup>4</sup> 552 F. Supp. 131, 223-28 (D.D.C. 1982), amended by *United States v. W. Elec. Co.*, 714 F.Supp. 1, *aff'd in part, rev'd in part*, *United States v. W. Elec. Co.*, 900 F.2d 283 (noting the entry of the consent decree provided *inter alia* for divestiture of local telephone operating companies comprising the former Bell System).

<sup>5</sup> 779 F.2d 592, 604-05 (11th Cir. 1986) (holding that the district court's factual determination of unique market characteristics was not clearly erroneous).

<sup>6</sup> 468 U.S. 85, 115 (1984) (finding that broadcast rights for college football games constitute a unique product for which there is no substitute).

<sup>7</sup> 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

<sup>8</sup> 504 U.S. 451 (1992).

<sup>9</sup> *AT&T*, 552 F. Supp. at 160-64.

<sup>10</sup> See *NaBanco*, 779 F.2d at 600 n.13.

cooperation and therefore involves competitive dynamics unlike those of a classic cartel.<sup>11</sup>

Nothing in our antitrust jurisprudence prescribed the specific analysis that led to these successful decisions, other than the broad admonition to consider all facts and circumstances material to sound understanding of the specific industry and of the competitive significance of the impugned conduct at issue, and to apply the legal standards most supportive of fundamental antitrust objectives—maximizing economic productivity and competitiveness. It is a credit to our antitrust enforcement system that these cases all came out correctly in their basic elements, both as to competitive analysis and as to real-world results. Had these cases reached the wrong results, they might have crippled some of our most significant industries (telecommunications, bank credit cards, and sports leagues), imposing enormous harm on customers and consumers and significantly reducing wealth generation in our economy. These cases also provide an important lesson to our present system—that our enforcers and decision-makers must always be alert for “non-standard” characteristics that will require an analysis distinct from any situations previously described in guidelines, scholarship, or legal precedents.

#### I. FROM *GENERAL DYNAMICS* TO *LEEGIN*: ESCAPE FROM PER SE ISLAND

For most of the last half-century, the headline antitrust cases dealing with substantive competition analysis concerned the selection of the applicable rule of decision—per se or rule of reason.<sup>12</sup> This led to a focus on characterization of conduct and on the policy considerations that support inclusion or exclusion of various types of conduct from the per se category. Vertical restraints in distribution relationships provide a leading example. In *White Motor Co. v. United States*,<sup>13</sup> the Supreme Court hesitated when asked by the executive branch to condemn as per se illegal a truck manufacturer’s vertical territorial restrictions on dealers, because the Court suspected that such restraints might improve competition rather than the opposite, as alleged.<sup>14</sup> Then in *United States v. Arnold, Schwinn & Co.*,<sup>15</sup> the Court threw all vertical restraints into the per se category. Ten years later all non-price vertical restraints were placed back into the rule of reason cate-

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<sup>11</sup> *NCAA*, 468 U.S. at 101.

<sup>12</sup> As the Supreme Court has mandated increased sensitivity to case-specific competitive circumstances, the main guide to the rule of decision for competitive effect is that the analysis must be “an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.” *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 781 (1999).

<sup>13</sup> 372 U.S. 253 (1963).

<sup>14</sup> *Id.* at 261-65.

<sup>15</sup> 388 U.S. 365 (1967), *overruled by* *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

gory—only vertical price-fixing remained per se illegal.<sup>16</sup> Significantly, the Court in *GTE Sylvania* established economic analysis of competitive effect as the touchstone of antitrust legality for business conduct. Justice White—arguably the best friend that antitrust plaintiffs ever had on the Court<sup>17</sup>—presciently noted that this signaled the end of the per se rule against vertical price-fixing as well.<sup>18</sup>

A further series of decisions created a buffer zone around the non-price vertical restraints to protect them from encroachment by the vestigial per se prohibition on vertical price agreements. The Supreme Court had already delineated such a zone in *United States v. Colgate & Co.*<sup>19</sup> The Supreme Court fashioned additional protections in such cases as *Monsanto Co. v. Spray-Rite Service Corp.*<sup>20</sup> and *Business Electronics Corp. v. Sharp Electronics Corp.*<sup>21</sup> Then maximum vertical price agreements were ex-

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<sup>16</sup> *GTE Sylvania*, 433 U.S. at 58-59.

<sup>17</sup> It is true that Justice William O. Douglas invoked the “glories of Goldendale” to halt a brewery merger, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 543 (1973) (Douglas, J., concurring in part), and Justice Rufus W. Peckham wanted antitrust to protect “small dealers and worthy men,” *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 323 (1897). Such phrases may seem like red meat tossed to the plaintiffs’ bar, but they never gave rise to any operational principle of decision, perhaps precisely because they seemed to express powerful sentiments but did not prove useful for real-world competition analysis. By contrast, White’s vivid and melodic declaration, “plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each,” *Cont’l Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 699 (1962), continues to ensure that conspiracy claims avoid dismissal or summary judgment. Considering that two full days were allotted for oral argument, *Continental Ore* must have been regarded as an important antitrust case by the Court. It appears to have been the first argument heard by Justice White from the bench, since his investiture occurred on the first day of argument—April 16, 1962. As matters happened, he also ended up writing the unanimous (8-0, Justice Frankfurter not participating) opinion. I speculate—although I have not checked whether this is consistent with what is known about Justice White’s participation in *Continental Ore*—that because of this confluence of events, Justice White might have developed a special solicitude for the brand of antitrust theory presented in this particular case. It remained top-of-mind for Justice White a quarter-century later, as shown by his prominent reprisal of this key passage as controlling authority at the start of his now-antique sounding opinion for the four dissenters in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986).

<sup>18</sup> *GTE Sylvania*, 433 U.S. at 70 (White, J., concurring in the judgment) (“The effect, if not the intention, of the Court’s opinion is necessarily to call into question the firmly established per se rule against price restraints.”).

<sup>19</sup> 250 U.S. 300, 307-08 (1919) (noting that restraints are considered merely unilateral where imposed through clearly announced single-firm policy and then enforced without further indicia of collaboration).

<sup>20</sup> 465 U.S. 752, 768 (1984) (stating that proof of vertical price agreement requires evidence tending to exclude the possibility that the restraint was adopted due to the manufacturer’s independent self-interest).

<sup>21</sup> 485 U.S. 717, 731-35 (1988) (holding that the per se rule against vertical price agreements applies only to those agreements establishing “price or price levels” and not those merely influencing or limiting dealer pricing discretion).

cluded from the per se category in *State Oil Co. v. Khan*,<sup>22</sup> and finally the last of the classic vertical distribution restraints (minimum vertical price agreements) came in from the cold in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>23</sup> As matters now stand, aside from classic cartel offenses, the per se rule is restricted to certain tie-ins.<sup>24</sup>

Tying itself has struggled about halfway out of the per se bag during a tortuous legal history stretching back more than sixty years. Originating as the equitable defense of “misuse” in patent infringement cases, tying morphed into a theory of per se antitrust liability in *International Salt Co. v. United States*.<sup>25</sup> The per se rule seemed to broaden out to envelop even the most innocent product combinations, such as in *Fortner Enterprises, Inc. v. United States Steel Corp.*,<sup>26</sup> but over time a buffer zone and even a few limited exceptions were fashioned for tie-ins. “*Fortner II*”—*United States Steel Corp. v. Fortner Enterprises, Inc.*<sup>27</sup>—decided the same year as *GTE Sylvia*, established a minimal tying-product market power hurdle for per se claims. Some tie-ins were actually viewed as lawful in principle if, for example, they were required to assure the integrity of product performance during market introduction of a technically complex new product for which consumer acceptance depends upon proper function.<sup>28</sup> We pick up the tie-in story later on, in the discussion of monopolization law.

Parallel developments were also afoot with regard to horizontal restraints. In the same term that the Warren Court condemned all vertical restraints as per se illegal, it found a joint venture among independent local mattress producers to create a common brand—an arrangement supported by an obvious and powerful procompetitive rationale—per se illegal by virtue of certain territorial restrictions and price-setting elements.<sup>29</sup> *United States v. Topco Associates, Inc.*<sup>30</sup> followed this, sweeping into the per se category a system for collective self-supply of own-brand products by independent grocery stores roughly similar to that of *Sealy*.<sup>31</sup> This venture, by

<sup>22</sup> 522 U.S. 3, 22 (1997).

<sup>23</sup> 551 U.S. 877 (2007) (removing vertical minimum price agreements from the per se category).

<sup>24</sup> Despite the limitations on use of the per se rule, full-blown competitive analysis remains unnecessary where defendant can offer no cognizable and sufficient procompetitive rationale for an “inherently suspect” horizontal restraint. *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29, 36-37 (D.C. Cir. 2005) (affirming FTC’s approach as sound application of *California Dental Association v. FTC*, 526 U.S. 756 (1999), and earlier cases in that same line.).

<sup>25</sup> 332 U.S. 392, 396 (1947) (“Not only is price fixing unreasonable, per se, but also it is unreasonable, per se, to foreclose competitors from any substantial market.” (internal citations omitted)).

<sup>26</sup> 394 U.S. 495, 508 (1969) (finding that credit may be a tied product subject to the Sherman Act).

<sup>27</sup> 429 U.S. 610 (1977).

<sup>28</sup> *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 560 (E.D. Pa. 1960), *aff’d*, 365 U.S. 567 (1961).

<sup>29</sup> *United States v. Sealy, Inc.*, 388 U.S. 350, 357-58 (1967).

<sup>30</sup> 405 U.S. 596 (1972).

<sup>31</sup> *Id.* at 610-11.

which the independent stores were able to create a common house brand to compete with similar brands offered by larger chain store competitors, had powerful procompetitive rationales that had led the district court to approve the arrangement under the rule of reason. Here the Supreme Court's per se classification was based only on a territorial allocation, without the price-setting elements of *Sealy*. *Topco* is the case with the Paleolithic-sounding warning against judicial forays into "the wilds of economic theory" that might result from any relaxation of the per se rule.<sup>32</sup>

A mere seven years later, *GTE Sylvania*, which explicitly required evaluation of competitive effect to be based on sound economic analysis,<sup>33</sup> began to filter into other areas of doctrine. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, seemed to open the door to just the type of foray into "the wilds" that the Court had recoiled from in *Topco*, suggesting that even a practice as traditionally irredeemable as horizontal minimum price-fixing could be justified in particular circumstances—where essential to the creation of a new product, in that specific case.<sup>34</sup>

A quick survey of the other areas of substantive antitrust law shows that the Court has only rarely been called upon to assess competitive effect directly since abandoning the per se approaches. These areas include structural transactions (mergers, joint ventures, and other forms of collaboration involving substantial long-run integration), as well as monopolization and price discrimination.

The recent record on structural transactions is easy to describe: there have been no plenary decisions on the subject of competitive effects of structural transactions since *United States v. General Dynamics Corp.*,<sup>35</sup> which held that a market share metric must be a reasonable proxy for the competitive strength of the market participants.<sup>36</sup> From our present perspective, the holding of *General Dynamics* seems non-controversial. This was a needed antidote to the rigid structuralism that had evolved in Supreme Court merger law after the decision in *United States v. Philadelphia National Bank*.<sup>37</sup> That is pretty much the sum total of Supreme Court merger and structural joint venture analysis within antitrust law's current living memory, leaving aside *Cargill, Inc. v. Monfort of Colorado, Inc.*,<sup>38</sup> rejecting on the facts a competitor's standing to challenge a merger but declining to

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<sup>32</sup> *Id.* at 609 n.10.

<sup>33</sup> *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) ("[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than as in *Schwinn* upon formalistic line drawing.").

<sup>34</sup> 441 U.S. 1, 30-33 (1979).

<sup>35</sup> 415 U.S. 486 (1974).

<sup>36</sup> *See id.* at 501-02.

<sup>37</sup> 374 U.S. 321, 365 (1963) (stating the presumption of illegality applies to a combination resulting in substantial increase in concentration in an already concentrated market).

<sup>38</sup> 479 U.S. 104 (1986).

rule out predatory pricing as a theory for similar challenges,<sup>39</sup> and *Texaco Inc. v. Dagher*,<sup>40</sup> in which the Court, acting in its capacity as range safety officer, sent the destruct signal to a missile sent wildly off-course by the Ninth Circuit.

Monopolization is a zone of activity where Supreme Court competition analysis bears a more searching look. It is a substantive realm in which the Court considered per se rules but for the most part never adopted them. The definition and identification of monopolizing conduct is the one area in which the Court has been presented with repeated opportunities to show the lower courts and the agencies how to perform effective competition analysis: how to weave together facts, microeconomic reasoning, and modern understandings of industrial organization theory to analyze competition and business behavior, to determine what rules of liability will best serve the ends of competition policy, to fashion persuasive understandings of particular industries and cases, and to apply such rules and to reach correct results. In reality, however, the Court's monopolization decisions have not exploited this opportunity very effectively. I have coauthored two articles and written a recent book chapter on this subject and I merely cite those here to limit the length of this article.<sup>41</sup>

The vague definition of monopolizing conduct in *United States v. Grinnell Corp.*<sup>42</sup> as the "willful acquisition or maintenance" of monopoly power, as distinct from "growth or development as a consequence of a superior product, business acumen, or historic accident,"<sup>43</sup> still stands as the main touchstone for analysis. Over time, the courts identified specific categories of monopolizing conduct and defined more explicit subroutines for determining liability for conduct falling within these categories. These include, for example, predatory pricing (requiring pricing below an as-yet undefined measure of cost, exclusion or disciplining of competitors, followed by a reasonable likelihood of loss-recoupment<sup>44</sup>) and sham litigation.<sup>45</sup> The Court has repeatedly refused, however, to endorse broad based lower-court attempts to place analytical gloss on the general standard enunciated in *Grinnell*, through the so-called "intent" test and the "essential facilities" doctrine.

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<sup>39</sup> *Id.* at 120-21.

<sup>40</sup> 547 U.S. 1, 8 (2006) ("[P]ricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is per se unlawful under § 1 of the Sherman Act . . .").

<sup>41</sup> Abbott B. Lipsky, Jr., *Unilateral Refusal to Deal as Monopolization*, in 2 ISSUES IN COMPETITION L. & POL'Y 997, 997-1018 (2008); J. Gregory Sidak & Abbott B. Lipsky, Jr., *Essential Facilities*, 51 STAN. L. REV. 1187 (1999); Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 ANTITRUST L.J. 749 (1995).

<sup>42</sup> 384 U.S. 563 (1966).

<sup>43</sup> *Id.* at 570-71.

<sup>44</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 232 (1993).

<sup>45</sup> *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 51 (1993).

Indeed the Court strongly suggested in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*<sup>46</sup> that neither approach was worthwhile, and some would say the essential facilities doctrine was mortally wounded in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP.*<sup>47</sup> *Trinko* was the third Supreme Court decision to mention the essential facilities doctrine without paying it any compliments. In *Aspen*, the Court mentioned in a closing footnote that it was unnecessary to consider the doctrine (or, for that matter, its alternative, the “intent” test);<sup>48</sup> in *AT&T Corp. v. Iowa Utilities Board*,<sup>49</sup> Justice Breyer pointed out that the essential facilities doctrine was a lower-court invention and lacked Supreme Court endorsement;<sup>50</sup> and in *Trinko*, the Court warned that application of the doctrine could threaten the most sacred antitrust value—namely, preventing cartelization.<sup>51</sup> It is not clear that the Court follows a rule of “three snipes and you’re out,” but this serially dismissive treatment certainly does not suggest a very secure future for the doctrine.

The Court has also made some recent progress in further sorting out the analysis of tie-ins. True, it has wisely raised the bar on proof of market power (or restored it closer to the level originally required,<sup>52</sup>) as in *Jefferson Parish Hospital District No. 2 v. Hyde*,<sup>53</sup> and it has required that such power be proven rather than merely presumed from possession of intellectual property.<sup>54</sup> Not surprisingly, the noticeably sweeter music played behind the analysis of tie-ins in *Independent Ink*—as compared with the ferocious condemnation that thundered through the old per se tie-in cases—has already suggested to some lower courts that the ice is melting with regard to the per se rule itself.<sup>55</sup>

Aside from this limited progress, however, the “distinct demand” formulation of the two-product test in *Jefferson Parish* has simply repackaged old conundrums that haunt the issue of distinct (hence tie-able) products, providing little additional guidance. Worse, the Court managed to lurch off-course with *Eastman Kodak Co. v. Image Technical Services, Inc.*,<sup>56</sup> adding the use of “bait-and-switch” tactics by suppliers of technically complicated long-lived product systems (sophisticated photocopiers, in that case) to the list of alleged evils addressed by the original doctrine. Far worse than that, in the less-noticed but far more destructive second part of the *Image Tech-*

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<sup>46</sup> 472 U.S. 585, 600-09 (1985).

<sup>47</sup> 540 U.S. 398 (2004).

<sup>48</sup> *Aspen Skiing Co.*, 472 U.S. at 611 n.44.

<sup>49</sup> 525 U.S. 366 (1999).

<sup>50</sup> *Id.* at 428 (Breyer, J., concurring in part and dissenting in part).

<sup>51</sup> *Trinko*, 540 U.S. at 408.

<sup>52</sup> *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594 (1953).

<sup>53</sup> 466 U.S. 2, 35-36 (1984).

<sup>54</sup> *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 46 (2006).

<sup>55</sup> *See Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 971 n.2 (9th Cir. 2008).

<sup>56</sup> 504 U.S. 451, 478-79 (1992).

*nical* opinion, dealing with the monopolization analysis rather than the tie-in subroutine, all the old bromides—not only from *Grinnell*, but also from *United States v. Aluminum Co. of America*,<sup>57</sup> as well as three other coal-fired, steam-powered monopolization cases (*United States v. Griffith*,<sup>58</sup> *International Salt*,<sup>59</sup> and *International Business Machines Corp. v. United States*<sup>60</sup>) were dredged up from the eutrophied depths and therefore arguably (although not persuasively and hopefully not authoritatively) recommissioned as living doctrine.

Since *Aspen* and the backward step in the second half of *Kodak*, the Court has not successfully exploited the opportunities provided by its section 2 menu to rationalize the vague and inconsistent threads in its precedents. *Trinko*, at least, endorsed a number of broad policy themes found in earlier cases or articulated by scholars—that antitrust should not punish winners; that courts are poor regulators when it comes to setting and managing the terms, conditions, and price for access to competitors' resources; that mandatory access remedies implied by modern refusal-to-deal and essential facility doctrines carry substantial risks of cartelization, etc.—but *Trinko*'s central idea is that antitrust litigation cannot add anything useful to a preexisting specialized regulatory system established largely for the same purposes by Congress. Visibly cloned from then Circuit Judge Breyer's opinion in *Town of Concord v. Boston Edison Co.*,<sup>61</sup> *Trinko* is arguably restricted for use in the unique borderline between competition law and telecommunications regulation. Thus, the case might be ignored in the wider territory of monopolization cases that do not involve the regulated industry environment.<sup>62</sup> In that case, as in others, at least the Court has wisely resisted the procrustean approaches to the definition of monopolizing conduct offered by the Solicitor General and others—"economic sacrifice," "no economic sense," and the like.<sup>63</sup>

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<sup>57</sup> 148 F.2d 416 (2d Cir. 1945).

<sup>58</sup> 334 U.S. 100 (1948) (illustrating the origin of the "leverage doctrine" in its broadest form).

<sup>59</sup> 332 U.S. 392 (1947).

<sup>60</sup> 298 U.S. 131, 138-40 (1936) (discussing the punch-card case as representing the tie-in doctrine in its least supportable form, namely as a prohibition on the use of a tie between a technically novel business machine and a simple complementary staple product, serving as a convenient device for metering the customer's intensity of use of—and therefore its demand for—the machine).

<sup>61</sup> 915 F.2d 17 (1st Cir. 1990).

<sup>62</sup> To identical effect is the just-released *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*, 129 S. Ct. 1109, 1123 (2009), which strongly reaffirms *Trinko*. A four Justice concurrence also reaffirms *Town of Concord* as a fundamental test for the viability of antitrust claims asserted in the presence of a regulatory scheme that can serve as an alternative means of control for conduct impugned as anticompetitive. *Id.* at 1123-25.

<sup>63</sup> The various approaches are parsed in the recently-repudiated report by the U.S. Department of Justice, Antitrust Division, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 33-47 (2008), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

So the Court is still sitting on the fence, unimpressed by syntheses offered by lower courts, scholars, and executive branch agencies, but unwilling to articulate a richer, more practical framework that would allow the lower courts, enforcement agencies, the private bar, and business counselors to go about the work of figuring out what is legal and what is not for firms with monopoly or near-monopoly power. Admittedly it is a challenge to come up with a framework that is not only well suited to promote the long-run dynamic wealth-enhancing capacities of the economy, but also cognizant of the institutional realities of our enforcement agencies, courts, and the litigation process, as well as sufficiently clear and practical for use as guidance for real-world business decisions. The Glazer and Lipsky article<sup>64</sup> explains why the Court should give up trying to find a single formulation. The best formulation is that, in each case, the Court must analyze the competitive dynamics of the industry involved and predict the competitive effects of conduct on the basis of sound analysis and realistic assessment of real-world facts, as well as empirically supported and persuasive economic reasoning. Since it is hard to describe in the abstract, it may be best simply to provide a few examples.

## II. COMPETITION ANALYSIS—POSITIVE MODELS

To say that antitrust decisions only rarely involve analysis of competitive effects does not necessarily suggest that such decisions are random, incorrect, or devoid of sound economic reasoning. To the contrary, most such recent decisions usually employ economic reasoning but generally reach a conclusion without engaging in full competition analysis of the conduct at issue. Most antitrust decisions arise from private treble-damage litigation. Most such cases involve allegations that can be rejected without full analysis because the claims are missing some essential element. Perhaps the case involves a monopolization allegation against a defendant that has no prospect of obtaining monopoly power, or a vertical restraint having only intrabrand effects, or the plaintiff complains of some market impact that does not constitute a restriction of competition (substitution of one distributor for another).

Rather than try to develop a taxonomy for successful competition analysis in the abstract—a task which I do not think possible in any event beyond the general formulations I have offered above—my approach is to describe three cases and one law review article that do a particularly effective job of using incontestable facts and sound economics to understand the sector involved and its competitive dynamics, and then reaching a sound conclusion under the law (or at least propose a sound conclusion, in the

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<sup>64</sup> Glazer & Lipsky, *supra* note 41.

case of the article) on the basis of that analysis.

A. National Bancard Corp. (NaBanco) v. Visa U.S.A., Inc.<sup>65</sup>

Credit card systems operate in a distinctive competitive setting, referred to as a “two-sided market,” involving separate but interdependent customer groups. TV broadcasting provides an obvious example: the broadcaster provides desirable information to attract an audience of viewers, and then markets the opportunity for sponsors to solicit the viewers to purchase other goods and services. There are powerful and direct relationships between the two: no medium would survive without sponsors, but sponsorship would be worthless without the attention of an audience.

In the major bank credit card systems, card-issuing banks offer credit and a convenient transaction medium to consumers; “merchant” banks enlist providers of goods and services, giving them the ability to offer a convenient transaction format for their customers, the card holders. Card holders pay interest on outstanding credit balances and/or an annual fee to use the card, while merchants honoring the card pay a fee (the “merchant discount”) to their bank for “acquiring” transactions (i.e., for compensating the merchant for goods and services provided to cardholders). The acquiring bank looks to the bank that issued the card for payment, and the card-issuing bank pays the acquiring bank and bills the consumer who made the purchase, closing the loop. The acquiring bank pays an “interchange fee” to the card-issuing bank. In general, the interchange fees are set by the credit-card system, not by individual negotiation between acquiring banks and issuing banks.

Some have argued that interchange fees represent an anticompetitive price premium for processing customer payments, raising merchants’ cost of doing business and ultimately increasing consumer prices. Interchange fees were first challenged as a form of illegal price-fixing in *National Bancard Corp. (NaBanco) v. Visa U.S.A., Inc.* (“NaBanco”). In its defense, Visa U.S.A. presented a competition analysis fashioned by William F. Baxter—an antitrust scholar and later Ronald Reagan’s first antitrust chief—who had previously studied the competitive dynamics of electronic funds transfer systems. He recognized that the bank credit card systems functioned as networks linking cardholders and merchants through the banks that provide credit to each. Baxter later produced a path-breaking article explaining his analysis of how the interchange fee plays an essential role in balancing the incentives of each of the key parties—card holders (consum-

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<sup>65</sup> 779 F.2d 592 (11th Cir. 1986). An expanded discussion of this case may be found in Brian W. Smith et al., *Why the Market Should Set Credit Card Interchange Fees*, 21 BANK ACCT. & FIN. 35, 39 (2008).

ers), card-issuing banks, transaction-acquiring (“merchant”) banks, and the merchants who accept the card—to participate in network transactions.<sup>66</sup>

The court ruled that the setting of interchange fees by the management of the Visa credit card system—an association of banks—did not constitute horizontal price-fixing, despite the fact that the member banks of the Visa system were competitors, and that the interchange fee could in some literal sense be regarded as the “price” of interchange (payment for goods and services provided by the merchant bank’s retail customer to the issuing bank’s card holder) provided by the issuing bank to an acquiring bank. According to the court, interchange fees were a reasonable and procompetitive cost- and risk-transfer mechanism, especially given the absence of less restrictive alternatives. In the court’s opinion any restrictions inherent in the method of determining interchange fees were more than outweighed by the resulting procompetitive gains.

As an example of sound competition analysis, the *NaBanco* decision is a hall of fame shoo-in. It is an early and still-outstanding application of the principle first established in *Broadcast Music Inc. v. Columbia Broadcasting System*.<sup>67</sup> Even practices that superficially resemble horizontal minimum price-fixing—the “supreme evil” of antitrust, as Justice Scalia described in it *Trinko*<sup>68</sup>—may be exonerated where the link between the particular competitive characteristics of the industry and the benefits of the practice are clear. Baxter’s recognition of the unique role of the interchange fee in this particular example of a four-party payment system was a trail-blazing achievement. He could not have produced it by any then existing precedent or industrial organization model relied upon by courts and enforcement agencies. It required recognition of a novel but fundamental pattern of economic relationships.

#### B. *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*<sup>69</sup>

Most antitrust lawyers will immediately recognize *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,<sup>70</sup> as the leading modern precedent

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<sup>66</sup> William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & ECON. 541 (1983).

<sup>67</sup> 441 U.S. 1, 23-25 (1979) (declining to adopt a per se approach for a blanket copyright license, and instead opting to subject the “many manifestations” of the license to a “discriminating examination under the rule of reason”).

<sup>68</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

<sup>69</sup> Full disclosure and disclaimer: I represented the successful defendant in the case in the Fourth Circuit and the Supreme Court. Griffin Bell argued successfully in the Fourth Circuit; Robert Bork argued successfully in the Supreme Court. What follows here is presented solely as my personal opinion.

<sup>70</sup> 509 U.S. 209 (1993).

on predatory pricing. Not many seem aware, however, of the procedural uniqueness of the case. The Court was asked to consider for the first, and so far the only, time whether a claim could be stated under section 2(a) of the Robinson-Patman Act for an offense known as “oligopolistic disciplinary pricing.” This was Professor Philip Areeda’s clever way of threading a needle; his client needed some way to state a viable antitrust claim against a competitor, even though that competitor was a third-ranked firm with market share of about 11 percent in an industry dominated by two much larger firms, each with shares in the 30+ percent range, and the practice challenged was unilateral price cutting. There was no agreement, so section 1 was out. And no firm with 11 percent of a well-defined relevant market could be accused of having, or being dangerously close to having, monopoly power. So—Robinson-Patman to the rescue. The fact that the lower prices may have reflected selective discounting created the so-called “discrimination”—merely a price difference under the statute—and Areeda’s “oligopolistic disciplinary pricing” theory supplied the competitive effect element. The notion was that by selectively pricing below cost in response to the plaintiff’s introduction of low-price generic cigarettes, defendant Brown & Williamson was helping to keep order in a cigarette oligopoly dominated by two other firms. No agreement was needed, according to the theory—it was simply understood that such would be Brown & Williamson’s competitive role, taking a bullet for the group.

It is important to note that the plaintiff Brooke Group actually won the legal point—the Robinson-Patman Act is broad enough, the Court held, to allow a successful claim of oligopolistic disciplinary pricing. And the Court assumed based on the record that below-cost pricing had been shown. So the issue came down to whether the defendant could have anticipated a reasonable possibility of recouping its losses on the below-cost pricing. Part of the reason why the Court did not trouble itself to define the cost standard—a fact much lamented in later antitrust literature from the perspective of cases in which the below-cost element is far more likely to be dispositive, as it was not in *Brooke Group*—is that the recoupment story did not hold together. First were the structural aspects of the claim—that the 11 percent firm had undertaken all the costs of a strategy whose benefits would overwhelmingly go to the two industry giants. Then there was the actual market evolution following the alleged incident of discipline, which showed a constant and robust expansion of the low-cost product-market segment that was supposed to have been snuffed by defendant’s conduct.

The latter point was illustrated in particularly dramatic fashion. You may recall “Marlboro Monday.” As Philip Morris (“PM”), the industry leader, became increasingly impatient with the erosion of its market share and profits due to the growing inroads of generic cigarettes of the type championed by the plaintiff Brooke Group Ltd.—and allegedly suppressed years earlier in the alleged disciplinary episode by Brown & Williamson—PM decided to cut prices, for the first time in modern history, on the

world's leading cigarette brand, Marlboro. It cut them by 20 percent on Friday, April 2, 1993. This produced a collapse in the share prices of a number of famous brand name companies in the next trading session of the New York Stock Exchange, leading to a 68.5 point drop in the Dow Jones Industrial Average on Monday, April 5—about 2 percent at the time. Philip Morris stock dropped 23 percent. This was “Marlboro Monday.” By coincidence, April 2 fell at the end of the week in which the oral argument in *Brooke Group Ltd.* had taken place before the Court. Specifically, the argument had taken place on Monday, March 29. Although I have not bothered to search through the records of the Court to verify this, if the Court was following its tradition of meeting in conference to take preliminary votes on cases argued earlier that week, the Court would have voted to reject the claim on Thursday, April 1, and on the very next day it received market confirmation that it had correctly concluded that the alleged disciplinary behavior by the defendant had been so ineffective that it sent the Dow “down in smoke,” to quote the financial headlines from that following Monday. So the unique procedure was to define the legal test for the offense of oligopolistic disciplinary pricing under section 2(a) of the Robinson-Patman amendments to the Clayton Act, and then to apply it to the undisputed facts of the case.

This is an excellent model for competitive analysis in antitrust cases. The unique claim made it essential to clarify whether the theory of violation was cognizable at all. Having confirmed that it was, the Court took the very thoroughly developed record and was able to describe and analyze the recent competitive history of the cigarette industry, assess its competitive evolution following the alleged disciplining episode, and conclude very convincingly that the facts of the case were inconsistent with the plaintiff's theory. Plaintiff's main theory was that defendant's behavior preserved the oligopoly and extinguished or significantly disciplined any generic competition. The Court's main rejoinder was that generics had continued to grow at a pace totally inconsistent with the belief that price cutters had been disciplined, and indeed eventually the generic product spread to every competitor and took over a major share of the entire cigarette market. The industry leader accommodated the Court by proving its fundamental point with a dramatic and unprecedented competitive move literally before the Court's opinion had been finalized. (The opinion in *Brooke Group Ltd.* was not released until June 21, 1993.)

C. PepsiCo, Inc. v. Coca-Cola Co.<sup>71</sup>

My third example of a well-analyzed competitive situation is *PepsiCo, Inc. v. Coca-Cola Co.*<sup>72</sup> This case involved an allegation by PepsiCo that Coca-Cola had monopolized a specific segment of the carbonated soft drink industry, namely the distribution of fountain syrup through full-line food service distributors. Pepsi poured a lot of its effort into demonstrating the competitive advantages that Coca-Cola enjoyed by virtue of its popularity among firms that specialized in providing a wide variety of food and non-food items to quick-service restaurants (quick-service restaurants meaning the franchise food chains that have become ubiquitous in the United States). Because such distributors are typically bound by some degree of exclusivity in the distribution of fountain soft drinks—the single most profitable item on the menu of most quick-service restaurants—it seemed that Pepsi might be able to prove that this exclusivity was attributable to some kind of exclusionary restriction or strategy followed by Coca-Cola.

As the district court ultimately found in granting summary judgment to Coca-Cola, there were two basic and interrelated problems with Pepsi's version of the industry and Coca-Cola's behavior. First, the slice of the market served by the full-service distributors was gerrymandered—it did not stand up as a relevant market defined by the hypothetical monopolist test. The supply of fountain soft drink syrup to quick-service restaurants is of course only one narrow part of the means of distribution for soft drinks in the U.S. But even taking that segment as a “relevant market” on its own, the largest chains—McDonald's and the other larger purchasers of Pepsi and Coca-Cola beverages in the restaurant segment—generally do not use full-service distributors. Neither do the smallest chains and individual outlets rely on this particular form of distribution. So the area where there was some possibility for exclusionary conduct to affect customers was confined to a narrow band falling between the very small chains or individual outlets—customers of other wholesale distribution channels—and the very largest chains accounting for the bulk of the sales in this part of the broader carbonated soft drink segment. Aside from the point that carbonated soft drinks compete with numerous other beverage categories, even without this fountain soft drink segment Pepsi's narrow market definition seemed gerrymandered and the courts found it unpersuasive.

The second type of problem with Pepsi's claim concerned the history of the alleged restraint. Exclusivity pervades the distribution channels of carbonated soft drinks. No bottler has ever distributed Coke and Pepsi at the

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<sup>71</sup> Full disclosure and disclaimer here, also: I managed Coca-Cola's participation in this case in my then-role as senior global antitrust counsel for Coca-Cola. Again, what is presented here is my personal opinion, which has been neither reviewed nor endorsed by the Coca-Cola Co.

<sup>72</sup> 315 F.3d 101 (2d Cir. 2002).

same time. Very few bottlers, if any, have ever switched from Coke to Pepsi or vice-versa.<sup>73</sup> So we know—because the industry is very intensely competitive despite the historic persistence of some very tangible forms of exclusivity—that exclusivity is not necessarily inconsistent with competition. But the real key to understanding the fountain syrup distribution pattern is found in the origins of the industry and its distribution channels. Carbonated soft drinks were invented as fountain drinks, before the technology for producing and distributing beverages in bottles or cans on a commercial scale was even available. In one of the most curious and often retold stories in business history, the then-proprietor of the Coca-Cola business, Asa Candler, sold for one dollar to a couple of Chattanooga lawyers the perpetual rights to bottle Coca-Cola in most of the United States. So the business of the bottlers was always separate and independent of that of the Coca-Cola Company. The business of the Coca-Cola Company at its origin and right down to the present day was to supply fountain syrup to those who would mix it with carbonated water and sell it as a finished beverage in an open container for on-the-spot consumption. Everything else was bottler business (for which Coca-Cola first supplied syrup, and later “concentrate,” which generally excludes nutritive sweeteners).

This led to an obvious, and indeed almost inevitable, evolution of distribution patterns when a variety of new technologies made automobile travel routine, and the quick-service restaurant emerged to provide a reliable high-quality and convenient dining option for consumers seeking fast food. Because fountain beverages were well suited to delivery and consumption in that high-volume format, their supply grew along with quick-service restaurant chains. It was commercially advantageous for Coca-Cola to seek to have its syrup delivered by distributors who were themselves expanding their business of supplying such outlets with the broad range of food and non-food products they required.

PepsiCo chose a totally different pattern—it had granted exclusive rights to its bottlers for the production and distribution of Pepsi beverages, including the rights to distribute fountain syrup. While Coca-Cola found it easy and natural to develop regional and national beverage distribution patterns commensurate with the wholesalers that served the emerging quick-service restaurant chains, PepsiCo was bound to its local bottlers for fountain syrup distribution and had attempted one strategy after another to knit together something like the Coca-Cola system. But PepsiCo lacked the rights to distribute its own fountain syrup. PepsiCo had structured itself into a constant battle with bottlers about the management of the fountain business. Coca-Cola shot ahead as the economic and technical conditions favoring the growth of full-service distribution persisted throughout most of the

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<sup>73</sup> I am aware of one example: formation of the Coca-Cola/Cisneros bottling joint venture in Venezuela in 1996, which involved a Pepsi bottler choosing to switch to Coca-Cola. Upon formation of the venture Cisneros spun off all its Pepsi operations; it never intended to be involved with both brands.

post-World War II era. Coca-Cola had not excluded PepsiCo—Coca-Cola's business had been borne upward on strong trends in the eating and driving habits of consumers and the economics of restaurant supply. To put it somewhat less kindly to PepsiCo, it hardly seemed serious to propose that Coca-Cola's superior share of beverages sold in outlets of this character resulted from exclusion. Coca-Cola had the first product and it had chosen the approach to distribution that was heavily favored by independent economic developments. PepsiCo was claiming literally that many of Coca-Cola's restaurant customers preferred to offer PepsiCo rather than Coca-Cola, but could not figure out a way to get PepsiCo fountain syrup delivered because all the best distributors were tied up. It was not a plausible case, and the courts recognized that.

D. *The Granitz-Klein Analysis of United States v. Standard Oil Co.*<sup>74</sup>

The *Journal of Law & Economics* article written by Elizabeth Granitz and Ben Klein regarding *Standard Oil Co. v. United States*<sup>75</sup> bears careful reading. The Standard Oil Company played a key role in the evolution of American conceptions of monopoly, competition, and the limits of acceptable business conduct. The evolution of Standard Oil and its business practices were critically important to the enactment and interpretation of the Sherman Act, and the case against Standard Oil was a broad pillar upon which judicial interpretation of U.S. antitrust law was based. The rule of reason—the first classic mode for competitive analysis under the Sherman Act—originated in that case. For all these reasons it might well be regarded as shocking that the entire Standard Oil competitive conundrum was not well understood until 1996—more than a hundred years following passage of the Sherman Act and eighty-five years after the Supreme Court opinion and judgment that began one of the largest acts of divestiture and deconcentration in history.

Most antitrust lawyers hear the story of how John McGee's seminal article<sup>76</sup> debunked the theory that Standard Oil's conduct can be understood as an exercise—actually a long series of exercises—in predation. Granitz and Klein persuasively argue that the operation was actually a cooperative cartelizing venture between the railroads serving the petroleum-producing regions of the eastern United States and Rockefeller. Rockefeller undertook the role of manager for the railroad cartel, ensuring that the traffic gener-

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<sup>74</sup> Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 J.L. & ECON. 1 (1996).

<sup>75</sup> 221 U.S. 1 (1911).

<sup>76</sup> John McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958).

ated by his petroleum industry activities was distributed among the railroads in a manner calculated to ensure effective policing of market share allocations determined by the railroad cartel. What Rockefeller got in return, according to the study, is cooperation from the railroads in putting his competitors at a disadvantage by the manipulation of transportation rates. The central evil cannot be understood as the sole product of the monopolizing tendencies of the giant Rockefeller Trust, cutting prices to drive out smaller competitors with less stamina; it was the combination of the dominant firm and the railroad cartel, hunting in the same pack.

#### CONCLUSION

I have cited and described several competitive analyses that are models of clarity and sound assessment. It is difficult to distill and describe the common characteristics of these analyses that make them so appealing. These cases (and the Granitz and Klein article) are lucid, coherent, and persuasive. They exhibit certain consistent qualities that bear emulation by courts and agencies called upon to decide “real” antitrust cases—cases that are not missing a brick and therefore require true substantive competition analysis.

Each analysis approached the industry, the parties, and the practices in question by starting from the broad industry context. None of the courts were distracted by the details of the specific legal formulations that govern consideration of particular competitive practices. The search for economic substance was paramount: each focused on the competitive realities of the industry involved. In each case, particular basic facts about the nature of the market and the evolution of the impugned practice were brought out so that their relationship to the competitive characteristics of the industry was clearly understood. In each case, patience in reasoning through the economic logic of the practice at issue resulted in a competition analysis that did not seem particularly difficult or, in the end, controversial.

As described in the Introduction, the lessons of these examples seem compelling: competition analysis must start with a basic appreciation of the fundamental economic characteristics of the activities being examined. The decision-maker must approach the analysis with a flexible understanding of the antitrust rules. By searching for economic substance, each analysis was led to examine and understand unique characteristics of the industry that readily provided the link between the character of the impugned practices and the nature of competition in the given context. These are very simple rules, easy to apply for those who can recognize the paramount role of economic substance in antitrust decision-making. Application of this basic approach would go far to bridge the asserted gap between the need for simple, administrable rules on one hand and the need to take account of particular economic circumstances of specific industries and practices on the other. The objectives of administrative simplicity and predictable guidance are not

so incompatible after all: sound competition analysis will optimize the criteria for antitrust decision-making.