Scholarship & Antitrust

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NYU: Next Generation of Antitrust Scholarship

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Scholarship matters

- Scholarly influence in antitrust has led to monumental changes over the past 40 years.

1976: 40 Years Ago

- Mergers resulting in combined 5% share successfully challenged as unlawful.
- Vertical exclusive territories illegal per se.
- Minimum and maximum resale price maintenance illegal per se.
- Wholly-owned subsidiaries could conspire with their parents.
- No antitrust injury requirement.
- Market power presumed from patents, copyrights, and even trademarks.

1976: 40 Years Ago

- Weak exclusionary conduct requirement for monopolization; guilty unless monopoly power is "thrust upon" the defendant.
  - Constructing new plants actionable as monopolization.
  - Predatory pricing proven by "declining price structure."
  - Unlawful to use monopoly power in one market to gain competitive advantage in another.
  - Price squeezes unlawful.
- Proposals to make "no fault" monopolization actionable.
  - Internal DOJ recommendation to break up General Motors.
  - Massive case filed against IBM.
  - Proposed legislation.

Waking up in the future

Smoke this. We now know that tobacco is one of the best things for your health

- Antitrust has changed at least that much

So how did all the change happen?

- Aaron Director (University of Chicago) worked with and taught a number of important students and disciples – including Robert Bork, Richard Posner, Ward Bowman, John McGee, Lester Telser, Ben Klein – starting in the 1950s.
  - Director co-taught with a lawyer, usually Edward Levi; one year, it was John Paul Stevens.
  - Director's important colleagues included Ronald Coase, Harold Demsetz, and Milton Friedman (Director's brother-in-law).
- Teachings manifested in the famous *Fortune* magazine debate in 1963-1964, Bork and Bowman against Columbia's Harlan Blake and William Jones.
  - The Bork/Bowman piece was "The Crisis in Antitrust."
  - The debate papers were later formalized and published in 1965 Columbia Law Review.

The Airlie Conference

- Throughout antitrust's first 80 years, noneconomic goals were significant. But there was also a fundamental, largely unchallenged, assumption that market concentration led to noncompetitive conduct, which in turn generated poor economic results.
- Conversely, there was a concern in some quarters that aggressive antitrust enforcement was reducing U.S. competitiveness in an increasingly global economy.
- Chicago School scholars, including Henry Manne, Armen Alchian, and Harold Demsetz, rejected the "structure-conduct-performance" paradigm, and concluded that concentrated markets can yield competitive outcomes.
  - Their view was directly opposite to those of the no-fault monopolization advocates.
- The debate spurred a conference, held at Airlie House in Virginia in 1974, and sponsored by Columbia Law School.
- The upshot was a fundamental rethinking of concentration and antitrust doctrine more generally.

Scholarship in the courts

- The outpouring of scholarship made its way quickly into the courts.
  - *General Dynamics* in 1974 ended "the government always wins" in merger cases.
  - *Fortner II* in 1977 cited Kenneth Dam's critique of *Fortner I* in narrowing tying doctrine.
- Citing Phillip Areeda, a unanimous Court effectively overruled *Radiant Burners* (1961), and established the "antitrust injury" requirement in *Brunswick* (1977).
- And then, most significantly, the Supreme Court expressly overruled *Schwinn* in the *Sylvania* case (also 1977) – relying heavily on academic criticism, especially Bork and Posner.
  - *Sylvania* began the process of removing noneconomic goals and focusing only on economic theory or effects.

Scholarship in the courts

- Many express overrulings followed *Sylvania*:
  - *Copperweld* (1984) expressly overruled many intra-corporate conspiracy cases, relying on Professors Handler and Areeda, among many others.
  - *Khan* (1997) overruled *Albrecht* (1968), relying on several authors, most prominently Richard Posner, who had written the opinion below.
  - *Illinois Tool* (2006) expressly overruled numerous cases holding that market power could be presumed from the possession of a patent or copyright, citing the Areeda-Hovenkamp treatise and many other scholars.
  - *Twombly* (2007) overruled *Conley v. Gibson* (1957), relying on a variety of commentators.
  - *Leegin* (2007) overruled *Dr. Miles* (1911) and numerous other cases, relying on the ABA, Hovenkamp, Overstreet, and many others.

Scholarship in the courts

- Other cases overruled precedents sub silentio:
  - *BMI* (1979) limited *Topco* (1972), citing Lawrence Sullivan's book.
  - *Northwest Stationers* (1985) limited *Klor's* (1959), also citing Sullivan; *Discon* (1997) narrowed boycott law further, citing Areeda-Hovenkamp.
  - *Business Electronics v. Sharp* (1988), effectively overruled *Parke Davis* (1960), citing Posner.
  - *Brooke* (1993) effectively overruled *Utah Pie* (1967), citing Bork, Bowman, Posner, and others – and relied heavily on the famous 1975 Areeda & Turner article in Harvard.
    - Court required not just below-cost pricing, but recoupment as well – focusing on the longer run effect on consumers.
    - Bork argued the case for Brown & Williamson, Areeda argued for Brooke.
    - Judge Easterbrook's Chicago article on *Predatory Strategies & Counterstrategies* was a major influence on *Matsushita* (1986), which anticipated *Brooke.*
  - *linkLine* (2009) effectively overruled *Alcoa* (1945) and other price squeeze cases.
- Economic literature also informed Professor Baxter's then-controversial and now almost universally accepted HMT technique for defining markets, as set forth in the *Merger Guidelines.*

Scholarship in the courts

- Antitrust law has experienced changes unsurpassed and probably unrivaled in business law over the past 40 years, and a huge part of the change has been the result of academic insight and criticism.
- Apart from horizontal price fixing, virtually every area of the law is now different – and often the precise opposite – of what it was in 1976.
- The law has been informed, not just by Chicago and UCLA, but by substantial "post-Chicago" and "Harvard School" scholarship as well.
  - Examples include *Kodak* (1992) and *Actavis* (2013).

Much is left to be done

- Important areas of the law remain unsettled, and the room for additional scholarship is vast.
  - Horizontal mergers, where the Supreme Court has not had a case since *Citizens & Southern* in 1975.
  - Vertical mergers, where the last S. Ct. case was *Ford* in 1972.
  - Exclusive dealing, where the Court has had no case since 1961.
  - Bundling and loyalty discounts, as well as partial exclusive dealing, where the Court has never had a real case.
  - Resale price maintenance, where application of *Leegin*'s rule of reason is unclear.
  - Tying, where the last nail in the per se coffin is long overdue.
- When these issues arise, it is certain that the courts will, once again, turn to the academy for needed guidance.

Beware the case where scholarship is ignored

- Of the many doctrine-altering cases, two notably have not exhibited reliance on academic literature: *Credit Suisse v. Billing* in 2007 and *Trinko* in 2004.
- These cases upset decades of settled law on implied immunity from antitrust.
- Starting with *Georgia v. Pennsylvania Ry. Co.* in 1945, the Supreme Court had made clear that, when an other area of the law covered areas touched by antitrust, the solution was not implied immunity, which was expressly “disfavored.” Because the antitrust laws represented “a fundamental national economic policy,” immunity was regarded as implied only if necessary to make the other law work, and even then only to the minimum extent necessary.

Beware the case where scholarship is ignored

- *Trinko* and *Billing* both involved other laws – telecommunications and securities – where there was no conflict.
  - In *Trinko*, the FCC remedies were in addition to antitrust remedies and there was an express provision in the statute than antitrust was not ousted. Nevertheless, the Court concluded that application of antitrust was no longer necessary given the FCC remedies.
  - This aspect of *Trinko* was dictum since the Court found no antitrust problem anyway, but *Billing* was a square holding.
  - *Billing* revised the inquiry from "plain repugnancy," where a true conflict was required to oust antitrust, to "clear incompatibility." Under that revised standard, securities law provisions that actually *prohibited* the same conduct were found sufficient to establish "clear incompatibility" and thus oust antitrust.
  - So without any academic support, the Court denigrated what had been a "fundamental national economic policy" to one subordinate to other types of laws.

Next up?

- With the many known unresolved issues in antitrust, as well as the ones we can't even imagine today, there remains substantial room for scholarship in antitrust – and a real opportunity to continue influencing the path of the law.
- And great scholarship remains necessary to avoid imprudent detours (like *Trinko* and *Billing* in my judgment) as we move forward into the next 40 years.

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