SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 36 | Issue 2

1985

The Shifting Vocabulary of Antitrust--Legal Linguistics in a Period of Change

Betty Bock

Commentary

THE SHIFTING VOCABULARY OF ANTITRUST—LEGAL LINGUISTICS IN A PERIOD OF CHANGE*

*Betty Bock***

This Commentary represents a meditation on the relationship of modern antitrust law to the language in which it is phrased. The author illustrates that permissible and impermissible competitive behavior is defined using concepts inherently difficult to delimit. Unlike in other areas of the law, the language of antitrust is made up of concepts that are relative, bounded only by their implied opposite. For example, the law prohibits both too little competition through conspiracy and too much competition through predation. The ambiguous boundaries of these abstractions allow dramatic shifts in enforcement policy, as illustrated by the evolution of per se versus rule of reason analysis in the merger, price fixing, and vertical restraints areas.

INTRODUCTION

ANTITRUST, encompassing policy, law, and the interpretation of the functions and malfunctions of an enterprise system, is experiencing a series of changes. The manifestations of change vary with the actions and reactions of the complex institutions responsible for shaping the economy's competitive profile. Since the end of World War II, shifts in antitrust have tended to reflect shifts in the public's perception of the economy's health, which we now view with more caution than during the 1950's and 1960's as we find ourselves increasingly carrying out transactions in a global economy. Antitrust's evolution also reflects the increased awareness of the constraints on competitive efficiency imposed by blindly structural per se rules. And so, since the early 1970's, the courts, and since the early 1980's, the federal enforcement agencies, have begun

* The material prompting this Commentary was originally presented at a seminar held at Case Western Reserve Law School on March 20, 1985.

** Consultant, Antitrust Research, The Conference Board, and Adjunct Professor of Law, New York University School of Law. A.B., 1936, M.A., 1937, Ph.D., 1942, Bryn Mawr College.

to experiment with newly articulated standards based on efficiency and defined in terms of cost effectiveness, opportunities for innovation, and rule-of-reason flexibility with respect to competitive conduct.

As might be expected of a complex national policy in a period of changing concepts and facts, the shifts in antitrust have not been monolithic. The three-ply system of enforcement—federal, state, and private—has resulted in divergent formulations of the purposes of antitrust, as well as divergent sources of financial support for antitrust cases. At the same time, multiple systems for interpreting the meaning of the law and the validity of evidence have led to varying analyses of what antitrust is. We have, for example, the interpretations of the Antitrust Division of the Department of Justice and of the Federal Trade Commission through speeches, formal clearances, and the cases they have and have not brought. We also have the interpretations of Congress, of the courts, and of private legal and economic advisers and scholars.

It is not surprising, then, that the rich texture and complex process of substantiation and transubstantiation of the corpus of antitrust now raise fundamental questions concerning the basis of antitrust and its consequences as it evolves. We need, therefore, to consider whether or not antitrust is simply a conventional law of which violation is directly determinable. We also need to ask whether antitrust represents an objective method of preserving or modifying existing competitive institutions or whether it reflects, with lags, ongoing technological and organizational change.

I believe that antitrust consists of a language system reflecting enterprise change rather than a law controlling such change. As such, antitrust can be viewed as a code of verbal communication concerning the relationships of companies with competitors, suppliers, and customers in ever-widening circles that map the transactional matrices that, in turn, are reflected in, and are changed by, the language of the law.

I. Antitrust As a Language

Some believe that man creates language to fit the world he perceives. Others contend that language shapes man's perception of his world, that he sees the world not in fixed categories, but in whatever categories he needs at any given time to organize his perceptions of it.[1] When verbal categories are too broad for appropriate differentiation or too narrow to include more than a single item, written language becomes merely print, and spoken language, noise. Thus, antitrust law, necessarily expressed through language, can represent a serious attempt to shape and order categories of corporate conduct. Or, on the other hand, it can represent a game played with symbols with dual, and often contradictory, meanings.

Competition law seeks to translate what we want from inter-enterprise economic systems into what we will get, but the law has become entangled in the dualities of competition vocabulary. This is primarily a problem rooted in fact and in the semantics pertaining to fact. It is not, as is generally supposed, a problem with the politics of power, or in the see-saw between an "older" and "newer" economics of antitrust. If there were even three or four clear, key words in the vocabulary of antitrust we would have no such problems. Instead, we have a plurality of words, concepts, criteria and conclusions, which relate to a statute phrased in broad terms and to court and enforcement agency decisions applying to specific, and often unique, sets of facts.

How this noise has affected antitrust discourse is difficult to formulate, since the advocacy process aggravates the problems associated with the duality of the concepts. Any reading of published enforcement agency and court decisions reveals that day-to-day meanings of "antitrust" are constantly being reshaped by the debate format of the advocacy process, with opposing advocates each asserting that he is seeking to illumine the conditions for competition. The resulting allegations and counter-allegations create a curiously-patterned discordance, lacking consensus in economics, legal philosophy, or awareness of the complex interrelationships between justice and economic efficiency.

Antitrust's most fundamental unit of thought, the concept of competition, lies at the core of the problem. The definition of competition creates a paradox from which no logic compatible with the concept can permanently extricate us. Competition benefits some firms and hurts others; practices designed to increase competition by one rival tend to reduce opportunity for competition by other rivals.[2] In fact, competition law is designed to prevent both too

1. *See* R. BURLING, MAN'S MANY VOICES: LANGUAGE IN ITS CULTURAL CONTEXT (1970); G. STEINER, AFTER BABEL, ASPECTS OF LANGUAGE AND TRANSLATION (1975).

2. Even if a market grows and all sellers increase their sales, the more successful of a set of rivals will, by definition, attain some sales that less successful rivals could otherwise have attained.

little competition (through express or implied conspiracy) and too much competition (through express or implied coercion, exclusion, or predation). It follows that every strong competitive move is one toward both an increase in the initiator's and a reduction in a rival's competitive potential. This duality intensifies the advocacy process and permits broad shifts in enforcement policy as different facets of both the vocabulary and the grammar in which the paradox can be stated appear as solutions.

The language of antitrust rarely deals with this paradox as a whole, but instead normally focuses on only a single facet in the context of a specific case decision or agency guideline.[3] Consider the three linked antitrust concepts that are the most fundamental and yield the most controversy: the concept of competition itself; the concept of a market; and the concept of market power, as measured by market share and concentration ratios.

A. *The Concept of "Competition"*

The concept of competition is not a fixed one. In a classically-modeled market with many small interchangeable competitors making homogeneous products, competitive (and ultimately identical) prices based on identical costs arising out of identical systems of procurement, production, and distribution are seen as parts of a mechanism matching supply with demand in the short run, as well as attracting new supply and demand (or reducing old supply and demand) in the long run. Such pricing will, it is argued, create outputs appropriate to demand and will neither shut out, underreward, nor overreward competitors.

In the world around us, however, we find companies of different sizes and product mixes with differing costs, so that competition tends to focus on niches within which the cost-price margins of each seller can, he hopes, be maximized over time if demand expands as costs and prices fall. In such a world, a seller who picks the wrong niche, fails to control his costs, or sets prices that are too high or too low will be forced out of business. The same will be true for a seller who seeks to overcontrol or undercontrol his distribution network.

3. Any reference to paradoxes in this Commentary acknowledges the seminal work of Robert H. Bork. *See* R. Bork, The Antitrust Paradox: A Policy at War with Itself (1978).

B. *The Concept of "Markets"*

Similarly, the concept of a market, which is central to and formed by the concept of competition, is never so clear-cut as the antitrust use of the term suggests. A market can be described as an economic arena positioned in a product-geographic and time-and-price space in which a "class" of commodities or services or some combination of the two is bought and sold. But the products/services can assume different forms, be made in different ways and at different costs, and serve different uses in the same or different time periods. With this differentiation come shifts in the contours of markets. Consider today's uses of telephone lines . . . and pasta!

Moreover, as the 1982 and 1984 Merger Guidelines demonstrate, the boundaries of what may initially be thought of as a market shift with the potential for entry or exit after a given price change.[4] But, "entry" into and "exit" from a market are words representing concepts that themselves have an array of meanings. "Entry" can, for example, refer to an increase in the supply of an item offered by either existing or new sellers, some of whom may have already been selling other products or services and some of whom may be starting new businesses. "Entry" can also refer to the development of substitutes for the product, service or any of the other dimensions of the original market. "Exit" can have mirror image definitions, too.

C. *The Concept of "Market Power"*

Finally, the concept of market power used so ritualistically in the literature as a measure of a company's, or a set of companies', ability to distort competition is subject to even greater variations both in method of measurement and in interpretation of what a given measure signifies. The two most common measures are "market shares" and "concentration."[5]

---

4. U.S. Department of Justice Merger Guidelines — 1982 (June 14, 1982), *reprinted in* 2 TRADE REG. REP. (CCH) ¶¶ 4500-4505; U.S. Department of Justice Merger Guidelines — 1984 (June 14, 1984), *reprinted in* 2 TRADE REG. REP. (CCH) ¶¶ 4490-4495.

5. A market share represents the percentage of output or sales enjoyed by a particular firm in a particular industry. Concentration may represent the combined market shares of a few of the largest companies in a market. For example, the "4-firm ratio" measures the largest four firms' aggregated market shares. *See* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 56-57 (2d ed. 1980). In the automobile industry, for example, the top four companies in 1972 accounted for 99% of the industry's shipments and interplant transfers as defined by The Bureau of the Census, while in the bottled and canned soft drink sector, the top four accounted for only 14% of shipments and inter-

A market share figure normally used as a preliminary guide (in rule of reason analysis) or as virtually the only guide (in a per se analysis)[6] to the market power of an individual company is neither simple to derive nor stable over time, unless, of course, the "market" has been transfixed like a butterfly on a pin. Because market boundaries change with shifts in price, supply, demand, or other aspects of a market, the market share figure will itself shift. Therefore, the competitive meaning of the figure fluctuates with it.

While a "high" market share in a stable market can suggest a degree of market power that violates the law if it has been achieved or maintained in ways that are anticompetitive, such a figure can also have a procompetitive meaning. A high market share can, for example, be a symptom of active competition when a market is new or when it is old and dying. It can also be a symptom of active competition in a mature market if a company is forging a niche by finding a way to lower prices by lowering costs, or improving products or services, or both.

Meanwhile, a concentration index of the type normally used in the same way as a market share figure as a guide to the combined power of the major competitors in a market is nothing more than a figure signifying a collection of market shares—for example, a first-4 company concentration ratio or a Herfindahl Index.[7] Such figures are often seen as magical numbers but, in fact, are simply aggregates of market shares and suffer precisely the same ambiguities. In fact, the uncertainty is magnified, because the aggregate ratios or indices are made up of more variables than a single-firm market share figure.

What we see, then, as "competition," as a "market," and as "market power" depends on how we perceive a wide range of variables. "Competition" in markets, as well as high "market share" or

---

plant transfers. U.S. BUREAU OF CENSUS, 1972 CENSUS OF MANUFACTURERS CONCENTRATION RATIOS IN MANUFACTURING (1975). On the other hand, concentration may be measured by a profile of the relative market shares of *all* sellers in a market. For example, the Herfindahl-Hirschman Index equals the sum of the squares of the shares of each company. Thus, for a market inhabited by ten firms of equal size, the index would be 1000. *See* F.M. SCHERER, at 58-59. The Justice Department has adopted the Herfindahl-Hirschman Index as a measure of market concentration in its Horizontal Merger Guidelines. *See* U.S. Department of Justice Merger Guidelines — 1984, *reprinted in* 2 TRADE REG. REP. at ¶ 4493.01.

6. A "rule of reason" approach weighs the corresponding burdens and benefits of the trade restraint in appraising its legal status. *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982). Conversely, a "per se" rule is designed to permit quick disposal of the restraint issue by application of an inflexible rule. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

7. *See supra* note 5.

"market power," or "dominance" and "concentration," are not "things" in themselves, but rather concepts comprised of ambiguous words designed to describe changing relationships in a changing world.

II. WORDS MEAN WHAT I WANT THEM TO MEAN

" 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' "[8] Lewis Carroll, author of *Alice in Wonderland*, knew very well that we live in a world of factual complexity and linguistic ambiguity, a world on which we impose verbal patterns which help us see and think about what is going on around us. But the patterns we select, whether we are conscious of it or not, are intended to support our belief that we can influence human behavior by imputing real and clear meanings to the words we use.

In the area of competition policy, for example, we tend to use what might be called "pseudo-analytic" labels for events without clear standards of how the labels relate to facts or to each other. This tends to happen because we treat words referring to abstractions as if they applied to specific enumerable things, when, in fact, our most fundamental abstractions imply both a concept and its opposite, usually without a clearly determinable boundary between the two. "Justice" is bounded by "injustice" . . . "beauty," by "ugliness" . . . and "competition," by "failure of competition," and it is unclear at what point one becomes the other. Indeed, without such ambiguously dual attributes, it is impossible to understand the concepts. Three simple examples from antitrust are illustrative, two focusing primarily on what has come to be called a "structural" standard and the third on what has come to be called a "conduct" standard.

A. *"Oligopoly"*

An "oligopoly" market is one in which there are few sellers.[9] But any determination of whether there are few sellers depends on how we delimit the boundaries of the market. Even if we negotiate that difficulty, new ones turn up as soon as we attempt to use the oligopoly concept.

---

8. L. CARROLL, THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 269 (New Am. ed. 1960).

9. *See* E. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION, A RE-ORIENTATION OF THE THEORY OF VALUE 8, 30-55 (6th ed. 1948).

During the 1960's, for example, many economists believed that an oligopoly was automatically anticompetitive because the major companies operating in an oligopoly market would, whether consciously or unconsciously, avoid independent competitive action. They argued that each seller would fear that it would eventually lose to its rivals whatever short-term gains it might realize from individual active competition.[10]

In more recent years, other economists have challenged this belief, suggesting that companies operating in a market where they have few competitors are, in fact, initiators or survivors of competition who are producing an appropriate package at an appropriate price. If this were not so, they would not be there. Under this formulation, any rule which would proscribe fewness would support weaker firms, while eroding the capability of stronger and more competitive firms. Indeed, the widespread belief that high concentration or fewness of companies in a market always leads to conspiracy or its equivalent in passive competition cannot always be correct. Only if the interests of each of the "few" firms are the same can one believe that mere paucity of numbers will be synonymous with "conspiracy" and "market power." If the long-run goals, capital structures, products or product mixes, or costs of the companies differ, it is difficult to see how they would find it in their self-interest to charge the same prices for very long.

The dual character of any interpretation of "fewness" in a market is inherent in the fact that the concept of competition has a polarized structure. Moreover, more factors than can be easily isolated and independently studied enter into the make-up of the number of sellers competent to function at a given time in a given

10. *See, e.g., In re* Ethyl, 101 F.T.C. 425 (1983), *rev'd sub nom.* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984). The FTC held that DuPont, Ethyl, PPG Industries, and Nalco Chemical Co. had engaged in unfair competition in selling their antiknock gasoline compounds. These four defendants were the only producers in this market. Each firm had independently and unilaterally adopted at different times some or all of three business practices: (1) a delivered price (including transportation costs); (2) extra advance notice given to customers of price increases beyond the 30 days provided by contract; and (3) a "most favored nation" clause under which the seller agreed that no customer would be charged a higher price than other customers. Although the FTC agreed that defendants' adoption of these practices was noncollusive, it ruled that they collectively had the effect of substantially lessening competition by removing some of the uncertainties concerning price determination. Price parallelism, reasoned the FTC, would result. 101 F.T.C. at 428.

The Second Circuit reversed the FTC's holding, instead finding each of these three pricing policies reasonable. The court noted that governmental limits on lead concentrates in gasoline had caused the lead additive market to become inelastic, and any price competition would result in a zero sum game. 729 F.2d at 131. Needless to say, enthusiasm for price competition was low.

market.[11]

B. *"Monopolization"*

A monopoly can be defined as a firm that can determine its own prices and prevent entry of competitors.[12] A company can do this only if it has a very large share of a market with boundaries it can defend from entry. As in the case of an "oligopoly" market, whether a monopolist exists depends on how we define the boundaries of its market. Again, even if we get past that difficulty, new ones turn up as soon as we attempt to use the monopolization concept.

For example, monopoly pricing is perceived by many as the greatest of a monopolist's sins, and every monopolist is thought to be necessarily engaged in monopoly pricing. But why? From the 1940's through the 1960's, many economists believed that if a company had no, or only weak, competitors, it would by definition charge a price well above its costs and, lacking competitors to undercut such prices, would be able to amass monopoly profits. These profits, in turn, could prevent entry of competitors if used to overfinance advertising or to fund predatory (below-cost) pricing to penalize would-be competitors.

By the late 1960's, however, a different view of monopolization began to emerge. Under this theory, a monopolist who charged too high a price, or sold too inferior a product, would simply attract competitors. If, therefore, a monopolist continued to exist, it must be giving consumers the benefits of what would otherwise be competition. A corollary to this second theory is that the longer the time period in which such a monopolist sustains itself, absent government controls or other artificial barriers to entry, the more successfully it is serving the public interest.

C. *"Vertical Restraints"*

As a third example, consider what are known as vertical restraints.[13] If, for example, a manufacturer places resale require-

11. *See* Bock, *The Limits of Words and Numbers: Be Careful When Wandering at the Brink of a Precipice Without an Experienced Guide*, in BUSINESS DISCLOSURE: GOVERNMENT'S NEED TO KNOW 264 (H. Goldschmid ed. 1979).

12. *See* F.M. SCHERER, *supra* note 5, at 11.

13. *See* U.S. Department of Justice Vertical Restraint Guidelines, [special supplement] 48 ANTITRUST AND TRADE REG. REP. (BNA) No. 1199 (Jan. 24, 1985). *See generally* Note, *The Vertical Restraints Guidelines: Improvement or More Confusion?*, 36 CASE W. RES. L. REV. 150 (1985).

ments on his distributors, is he reducing or increasing his or their competitive acumen? Many commentators felt in the past that *any* restriction on an independent reseller was a restraint of trade and automatically violated Section 1 of the Sherman Act.[14]

Today, however, a strikingly different view is gaining acceptance. If a distributor has chosen its present supplier even though other choices were available, the restraint cannot be anticompetitive. Moreover, no supplier wants to reduce the combined sales of his distributors; indeed, every supplier wants to have the most effective marketing program possible. Therefore, a supplier restricting sales territories, determining the locations of distributors, or prescribing the prices at which distributors will resell is simply attempting to maximize both his and their returns and to prevent any distributor from taking a free ride on the advertising and services provided by other distributors.

III. Language Levels

Manufacturers of computer software speak of high-level and low-level languages. A high-level language requires little user knowledge of how a computer works; he simply gives instructions in normal sentence form. A low-level language, by contrast, requires the user to have a more detailed understanding of how the computer operates, since he must construct directions with a sentence structure and a vocabulary tailored to the computer hardware.

A high-level language allows greater ease in programming but confines the user to the forms of communication built into the grammar of the machine. Conversely, a low-level language requires more direct intervention in machine operations but permits greater flexibility in the range of instructions the machine can understand. Thus, the higher the level, the more formal the machine language; the lower the level, the more closely will the language be able to describe and analyze complex and changing fact situations.

This distinction between computer language levels is analogous to the distinction between per se (high-level) and rule of reason (low-level) tests for competitive behavior.[15] Per se rules are more stylized and putatively easier to use than rules of reason, while rules of reason can be adapted to particularized and changing facts with

14. The Sherman Antitrust Act of 1890, ch. 647, § 1, 26 Stat. 209 (currently codified at 15 U.S.C. § 1 (1982)).

15. *See supra* note 6.

greater flexibility but are difficult to apply in complex cases. Examination of the Supreme Court's recent antitrust decisions reveals a series of shifts between formalism and realism—between the relative certainty but awkwardness of a high-level language and the relative uncertainty but greater responsiveness to case facts of a less formalistic language. Examples in the merger and price-fixing area are instructive.

Some mergers may substantially lessen competition, others may fortify competition, and still others may lie between the extremes. Until recently, however, no serious attempt was made to establish criteria differentiating the three scenarios. Instead, the law focused on mergers that the courts could find as violating Section 7 of the Clayton Act as amended in 1950.[16] This approach resulted in a line of decisions that slowly but relentlessly adopted an increasingly high-level language.

Thus, in *Brown Shoe*,[17] its first decision under the amended law, the Court invalidated a merger that would have resulted in a market share for the combined company as low as six percent in the national shoe market and as low as five percent in some retail shoe markets. The Court did not, however, rely solely on market share figures, but also referenced other factors that it considered in reaching its decision.[18]

By 1963, the Court was moving beyond *Brown Shoe*. In *Philadelphia National Bank*,[19] it used market share and concentration tests to evaluate the probability that the merger of two commercial banks in Philadelphia might substantially lessen competition or tend toward monopoly. The Court found that such a horizontal merger, resulting in a combined share of approximately thirty-three

16. The Clayton Act Amendment of 1950, ch. 1184, 64 Stat. 1125 (currently codified at 15 U.S.C. § 18 (1982)) (amending the Clayton Act of 1914, ch. 323, § 7, 38 Stat. 730).

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

18. The additional factors included the fact that in an industry as fragmented as shoe retailing, the "control" of even a five percent market share in a given city might encourage Brown's competitors to seek similar market shares to the point where it would be difficult to dissolve combinations previously approved. Furthermore, in so fragmented an industry, the fact that even a small share of a particular market is held by a large national chain can, said the Court, adversely affect competition because the chain can insulate selected outlets from the vagaries of competition and can so manipulate styles in footwear that independents become unable to maintain competitive inventories. A third factor, in the Court's view, was the fact that the merger created a large national chain integrated with a manufacturing operation in such a way that Brown could sell through its outlets at prices below those of competing independent retailers. *Id.* at 339-46. Note that such an increase in efficiency would, under the 1984 merger guidelines, be occasion for approval rather than disapproval of a merger. *See supra* note 4.

19. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

percent of the market, might substantially lessen competition, particularly when concentration in the two largest banks in the area would have reached a level of forty-four percent.[20] The Court brushed aside the defense that customers would still have alternatives to the merged company by stating that in every case short of outright monopoly, a disgruntled customer has alternatives.[21] It also found irrelevant the justification that the merger would be of social and economic benefit to the community, holding essentially that the market share and concentration figures alone were sufficient grounds for prohibiting the merger.[22]

Moving on through the 1960's, the enforcement agencies and the courts began to take the market share and concentration standards of *Brown Shoe* and *Philadelphia National Bank* literally, invalidating acquisitions where market shares or concentration ratios were "too high" in a market affected by an acquisition. Little or no attention was paid to other facts, such as whether it would be easy for rivals to enter the market and erode an acquiring company's market share if the company were to overprice or to take advantage of customers in other ways. Moreover, little weight was given to the relativity of market boundaries and, therefore, to the possibility of shifts in market shares and concentration levels.[23]

In 1974, however, the Supreme Court tentatively began to reverse its course and to look at individual company and market circumstances. The Court found in *General Dynamics*[24] that neither past market shares nor past concentration ratios were relevant to a prediction of the competitive consequences of a merger if the conditions upon which the shares and ratios depended could be expected to change in ways that would reduce these figures. In *General Dynamics*, Material Service Corporation and its successor, General Dynamics Corporation, had acquired the stock of United Electric Coal Companies. At the time of the acquisition, Material Service's coal was produced from deep-shaft mines operated by it or its affiliate, Freeman Coal Mining Corporation. Both the acquiring and the acquired company mined coal in Illinois and in a wider set of states labeled the Eastern Interior Coal Province, with Freeman and

20. *Id.* at 364-65.

21. *Id.* at 367.

22. *Id.* at 371.

23. For an early example of this method of analysis, see Bock, *The Relativity of Economic Evidence in Merger Cases: Emerging Decisions Force the Issue*, 63 MICH. L. REV. 1355-72 (1965).

24. United States v. General Dynamics Corp., 415 U.S. 486 (1974).

United Electric together accounting for about twenty-two percent of the coal mined in Illinois and eleven percent of that mined in the Province.[25] At the time of the acquisition, United Electric had a long-term requirements contract for delivery of coal to a public utility which would ultimately exhaust the company's coal reserves. It followed, said the Court, that whatever the *past* level of the combined market shares of the two companies and their competitive effects might be, *future* adverse effects upon competition could not be assumed, since none of United Electric's reserves would ever be sold on the market.[26] This conclusion by the Supreme Court represented acceptance of a language level lower than that used in any of the Court's earlier decisions.

As the 1970's wore on into the 1980's, the Department of Justice issued two sets of merger guidelines[27] designed to update earlier guidelines issued in 1968[28]—well before the 1974 *General Dynamics* decision. Thus, in 1982, under Assistant Attorney General William F. Baxter, and again in 1984, under Assistant Attorney General J. Paul McGrath, merger guidelines were promulgated using what could only be considered a lower-level language than was used in the 1968 guidelines. New market share and concentration tests were developed, with the primary decision of whether to go forward with a merger investigation tied to what became known as the "Herfindahl Index" of concentration.[29] If this index combined with a market share figure was below a stated level, the Department would drop the case; if the figures were between two other levels, it would investigate; and if they were above specified levels, it would likely act. The Guidelines also provided additional factors to consider in determining whether a current market share or concentration figure understated or overstated a company's future competitive significance. One such factor would be a recent or ongoing change in market conditions; a second, the financial condition of the merged firm or any other firm in the relevant market; a third would be the factors that might affect the competitive importance of foreign firms; and a fourth, the ability of fringe firms with excess capacity to expand output quickly so as to easily reduce the likelihood of collusion.

25. *Id.* at 496.

26. *Id.* at 486-504.

27. *See supra* note 4.

28. U.S. Department of Justice Merger Guidelines — 1968 (May 30, 1968), *reprinted in* 2 TRADE REG. REP. (CCH) ¶ 4510 (May 30, 1968).

29. *See supra* note 5.

This shift from a higher-toward a lower-level language by the Department of Justice did not, however, seriously affect the language level used in state or private merger cases. Congress, too, has not been happy with what it sees as a regression to a "lower level" mode of communication on enterprise matters properly dealt with by the "higher level" modes of the 1960's.[30]

Another problem in language levels is presented whenever it is necessary to determine whether one is confronting a form of price fixing which will be held to be a per se violation of Section 1 of the Sherman Act.[31] Ever since *Socony-Vacuum*,[32] price fixing has been a per se violation of Section 1, but the evidence sufficient to prove or disprove the existence of price fixing has been controversial. This is not surprising, since, given a homogeneous product and other conditions of "perfect competition," prices would always be identical. If no other facts were taken into account, no one could tell the difference between perfect conspiracy and perfect competition. Nevertheless, the courts tended to find that where prices were, in fact, the same, a violation of Section 1 of the Sherman Act had occurred, and no justification for such pricing was permissible.

This was the rule until 1978 when the Supreme Court held in *BMI*[33] that blanket licensing of musical compositions, which required licensees to pay fees established by BMI, was not a form of price fixing that was per se illegal. The Court held that although BMI established licensing rates for a multiplicity of musical works to be performed by many kinds of users, such arrangements were necessary because there was no other efficient way that performers could pay for the right to perform copyrighted music.[34] The Court, therefore, ruled that BMI's blanket licensing arrangements should be judged under a rule of reason, rather than under a per se rule,[35] and went on to hold that BMI's system was not anticompetitive because licensees could, in theory, go back to individual authors, composers, or publishers and negotiate specific licensing rates.

30. *See, e.g.*, Vertical Restraints Guidelines Resolution, H.R. Res. 303, 99th Cong., 1st Sess. (1985), *reprinted in* 49 ANTITRUST & TRADE REG. REP. (BNA) 952 (1985) and the accompanying report of the Committee on the Judiciary (Vertical Restraints Guidelines published by the Department of Justice on January 23, 1985 do not have the force of law, do not accurately state current antitrust law, and should not be considered by the courts of the United States as binding or persuasive).

31. The Sherman Antitrust Act of 1890, ch. 647, § 1, 26 Stat. 209 (currently codified at 15 U.S.C. § 1 (1982)).

32. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

33. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

34. *Id.* at 20-21.

35. *Id.* at 24.

More fundamental, however, was the Court's holding that the BMI blanket licenses increased the efficiency of the system under which musical compositions are performed, while providing a relatively simple method of collection and payment for a multiplicity of providers and performers.

Even though this decision appeared to open up price fixing cases to rule of reason or lower-level language analysis, the rule of reason appears to have been applied in a per se or higher-level way in such later cases as *Maricopa*.[36] In that case, a foundation set up by the Maricopa County Medical Society to provide the Maricopa community with a competitive alternative to existing health insurance plans was prohibited from contracting with member doctors to establish the maximum fees the doctors could claim in full payment for health services provided under specified insurance plans.[37] The agreement did not escape condemnation under the per se rule against price fixing, even though it fixed only maximum prices and left member doctors free to compete by charging lower prices.

These examples, taken together, demonstrate that the Supreme Court has tended to move from higher- to lower-level languages, and then back again, in a pattern that suggests that the per se/rule of reason spectrum approximates a sine curve. While the altitude of the peaks and valleys of the curve, and the distances between them, are not predictable, the Supreme Court appears to be trying to permit neither plaintiffs nor defendants to use economic or legal labels that carry immediate legal conclusions if the words and associated concepts do not fit the specific facts. However, it is not always possible for an observer to tell the difference.

IV. Issues in the Structure of Law and Knowledge

When we examine changes in the forms of competition, in the concepts used to delineate the competitive process, and in the laws designed to order competitive conduct, we find the fundamental conundrums of Western thought continually reified in the shifting language of antitrust. The age-old tensions between being and knowledge appear, disappear, and reappear whenever we explore the forms and outcomes of the "competition" paradigm as it shifts its avatars[38] in response to changing market facts and legal percep-

36. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982).

37. *Id.* at 336.

38. Avatar: The descent of a deity to the earth in an incarnate form; manifestation or presentation to the world as a ruling power. MERRIAM WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 150 (1971).

tions. The shifting forms of the riddles of the one and the many and of the relativity of size and time illustrate these tensions.

A. *The One and the Many*

Many antitrust problems can be solved only by determining whether one is observing an integrated whole or a collection of individuals. This is, of course, the ancient problem of the one and the many[39] and is germane whenever the application of the law varies with the perception of whether one is dealing with "one" or "more than one" entity, whether a product, a service, or a company. Tying, intracorporate conspiracy, and third-party insurer problems all present examples.

1. *Tying Arrangements*

A tying arrangement requires a buyer who wants to purchase A to also purchase B.[40] Such a requirement has for many years been illegal per se.[41] No violation occurs, however, if there is, in fact, only one item in what might appear to be a package of two or more. Furthermore, even if two items are sold together by one supplier, the Supreme Court held in *Jefferson Parish*[42] that there is no violation of law if the seller does not have market power since, in that case, buyers have alternative sources for each product or service. The majority opinion noted that every refusal to *sell* two products or services separately does not restrain competition. If

39. The problem of the one and the many has confronted man in all areas of life. "Science, philosophy, and religion alike have all been basically concerned with the resolution of but one single problem: that of the relationship between multiplicity and unity." D. GRAY, THE ONE AND THE MANY 156 (1969) (quoting philosopher Tielhard de Chardin). De Chardin tried to reconcile the two extremes in such a way that the "multiple can be unified without being destroyed." He believed that "[t]he whole purpose and meaning of the evolutionary process is to achieve increasingly higher forms of union." *Id.* at 157.

40. For a discussion of tying arrangements, see Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 MINN. L. REV. 1013 (1985).

41. *See, e.g.*, International Salt Co. v. United States, 332 U.S. 392 (1947) (unreasonable per se for defendant to require customers to use defendant's salt in defendant's salt machines); Northern Pacific R.R. v. United States, 356 U.S. 1 (1958) (illegal for defendant to sell spare land with stipulation that all products made thereon be shipped on defendant's railroad).

42. Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551 (1984). The majority implied that it would have found the tie of anesthesiological services to surgery at East Jefferson Hospital illegal per se if the hospital either sold a unique product that competitors were unable to offer or if the hospital's market share was high. But, it held that neither of these conditions existed, since approximately 70% of the patients living in Jefferson Parish go to hospitals other than East Jefferson and, with a 30% share of patients, East Jefferson's market share represented an insufficient basis for inferring market power. *Id.* at 1555, 1568.

each of the products can readily be *purchased* separately, an individual seller's decision to sell the two in a single package does not impose an unreasonable restraint on either the tying or the tied market.[43] By contrast, under an illegal tying arrangement, the seller has the power to exploit its control over a tying product and to force the buyer to purchase the tied product.

A related problem occurs when a plaintiff argues that a trademark and the product or service it covers are two, rather than one, entity and, therefore, is a tie that is illegal per se. In *Jack Walters v. Morton Building*,[44] Jack Walters, a buildings material dealer, was terminated by Morton Building, Inc., a manufacturer of prefabricated buildings. Walters then sued Morton, alleging that Morton had tied the sale of building components to the Morton trademark and that later Morton had, as part of an advertising campaign for its products, put a ceiling on the prices at which a dealer could resell Morton materials.[45] Walters nevertheless sold at prices above Morton's ceiling price just before it was terminated. Walters argued, among other things, that Morton had tied the sale of its materials to its trademark, and that this was a per se violation of the Sherman Act. Judge Posner, who wrote the decision for the Seventh Circuit, held that Morton's prefabricated farm buildings and its trademark were not two separate products and, accordingly, found that tying could not have occurred. Therefore, no per se violation of law was involved.[46]

2. *Intracorporate Conspiracy*

A conspiracy among independent competitors to fix prices, limit output, or allocate markets has long been recognized as a per se violation of law.[47] Although the rule is clear, what constitutes evidence of a conspiracy in the absence of written documents is not as clear as the simplicity of the rule suggests. In fact, over the years,

43. *Id.* at 1558.

44. Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698 (7th Cir.), *cert. denied*, 105 S. Ct. 432 (1984). In considering whether a trademark and the product it covers can be viewed as one product or as a tie, Judge Posner noted that every product can be seen as a package of its components: a pair of shoes, for example, or a belt (buckle and strap). Indeed, much of what is called manufacturing is the assembly or physical integration of components. "The problem is that there is no obvious way of deciding whether a product is a single product or an assemblage of components." *Id.* at 703.

45. *Id.* at 706.

46. *Id.* at 703-06.

47. Section 1 of the Sherman Act, 15 U.S.C. §§ 1-7 (1982), explicitly makes it illegal for two or more parties to form a "contract, combination . . . or conspiracy in restraint of trade or commerce among the several states, or with foreign nations."

varying kinds of activity have been assimilated into the concept of conspiracy whenever two or more actors were involved in an agreement which destroyed independent decision-making by one or more of them. However, there can be, by definition, no conspiracy when only a single entity is involved. This theory has led plaintiffs who wanted to charge conspiracy to try to demonstrate that an entity which superficially might be considered "one" was really "more than one."

Such arguments reached their apex in *Timken Roller Bearing*[48] and *Kiefer-Stewart*[49] in which the Supreme Court held that subsidiaries of a parent company could conspire with sister subsidiaries or their parents. But, these theories were upset by the Supreme Court late in 1984. In *Copperweld v. Independence Tube Corporation*,[50] the issue was whether Copperweld and a subsidiary had conspired against a terminated customer, or whether they were, in effect, one company exercising normal business judgment. Facing this question squarely, the Supreme Court held that a parent and a subsidiary it controls are not two separate companies and therefore could not conspire.[51]

3. *Third-Party Insurer*

A different form of the problem of the one and the many (or of normal business judgment versus conspiracy) turns up in a number of health insurance situations. In *Kartell v. Blue Shield of Massachusetts*,[52] for example, a group of doctors sued Blue Shield of Massachusetts. Blue Shield had been authorized by the state to prohibit doctors who signed up with it from billing patients for sums beyond those paid to the doctors by Blue Shield. Several Massachusetts physicians challenged this ban on "balance billing" and alleged that it was, in effect, a conspiracy between Blue Shield and other physician members of the Blue Shield group.[53] Plaintiffs charged that the conspiracy denied them the opportunity to use what they thought were the most appropriate diagnostic or treatment procedures if such methods were more expensive than the stipulated Blue Shield prices. The doctors argued that the conspiracy defrauded them of income and prevented them from using their best judgment

48. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).
49. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).
50. 104 S. Ct. 2731 (1984).
51. *Id.* at 2742.
52. 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 2040 (1985).
53. *Id.* at 923.

concerning the proper care of their patients.[54] The First Circuit deflated this argument, holding that Blue Shield pays for physician care on behalf of their insured customers. In such circumstances, there can be no conspiracy because there is only one buyer—Blue Shield of Massachusetts. Blue Shield is not a "third force" intervening in the marketplace and preventing willing buyers and sellers from striking a bargain. Rather, Blue Shield itself is the purchaser of the doctors' services.[55]

B. *The Relativity of Size and Time*

Another major set of antitrust problems is related to perceptions of size. Those concerned with ways to support and strengthen small business have long acknowledged that a "small" business cannot be easily defined. What is small for the steel or the oil industry is, of course, large for garment manufacturing. Yet, it took far longer for antitrust to acknowledge that we face the same problem with "bigness." With the continuing inflation of the 1960's and 1970's, what was an unusually large business in the 1960's has become an average-size one today. "Size" is, therefore, not a thing in itself, but is relative to markets and to their penetrability over time.[56]

Still another range of antitrust problems is related to our perceptions of time, particularly to our perception of the short and the long run. How we define a market share or entry into a market is affected by the time frame employed. The shorter the time, the less is the likelihood that new companies will enter a market or that market shares will change substantially. The longer the time span, the more probable is entry or exit and the more opportunity there is for market boundaries to shift with a concomitant change in market shares and concentration levels.[57] One of the most significant problems generated by the relativity of time frames is that of differentiating between competitive and predatory pricing.

Competition and the laws affecting it attempt to provide consumers with the best possible products at the lowest possible prices

54. *Id.* at 924.

55. *Id.* Judge Breyer analogized the situation to a father taking his son into a toy shop. The boy selects the toy he wants, and the father pays for it. Which is the buyer? Surely not the son; he merely selected the toy. The father bought and paid for it on behalf of the son and would not allow the store owner to charge the son anything extra. *Id.* at 925.

56. *See, e.g.*, Farkas & Weinberger, *The Relativity of Concentration Observations*, CONF. BOARD REP. No. 742 (1978).

57. An exception to this generalization occurs when a strong "monopolist" produces a product of such excellence and with such low prices that buyers receive the benefits of competition without the fact of competition.

while generating choices for buyers that permit them the greatest possible leeway in selecting their preferred product/price combinations.[58] Predation, by contrast, is designed to drive out, and keep out, competitors, leaving the predator in control of a market.[59] Given this distinction between competition and predation, low prices can result from either one, with the difference hinging on how far and how long prices stay below the seller's costs. The shorter the time, the lower are the costs to be taken into account; the longer the time, the higher the costs to be accommodated.[60] A supplier is, therefore, said to be engaged in predation if his prices are so far below his costs for so long a period of time that he will suffer serious losses that he can never recoup unless he can force his competitors out of business and keep them out for long enough to raise his prices and sell in sufficient volume to cover more than past losses. While this is something that traditional populist economists fear is a frequent occurrence, many modern economists feel that it cannot occur for any protracted period of time, unless the government prevents competitors from entering such a market.

The critical point for present purposes is that neither the short nor the long run is a fixed time span, but rather is determined by our perception of direct and fixed costs in specific markets. The Areeda-Turner model,[61] and all other models designed to distinguish between predatory and competitive pricing, requires an understanding of this phenomenon. According to Areeda-Turner, a price is predatory only if it lies below marginal cost: the cost of

58. It is, of course, possible to have too many alternatives, so that one cannot shop the market, but that is another problem and beyond the scope of this Commentary.

59. *See* R. POSNER, ANTITRUST 361 (1974).

60. This is so because although costs can be viewed in various ways, they are generally seen as being made up of variable (or direct) and fixed (or overhead) costs. Variable or direct costs are those incurred in order to make and sell additional units of a product or service. If the product is not made, or the service not rendered, the cost is not incurred. A special type of variable cost is marginal cost or the cost of the last unit of a product produced. *See* P. SAMUELSON, ECONOMICS 452-55 (10th ed. 1976). Fixed or overhead costs are those incurred over a longer time span: setting aside funds in anticipation of the purchase of an expensive machine or for the building of a plant, expanding to increase a plant's capacity, paying the salary of managers, or carrying on research and development work designed to keep a product from becoming obsolete. *Id.* at 467. Such costs are incurred regardless of how many units of the product/service are manufactured or sold.

Note, however, that although these definitions of cost appear to be relatively clear, they are not. For what period of time must we observe a set of costs to call them overhead costs; and for what period must we observe a production function to call the associated costs variable costs? In fact, in the very long run, all costs approach variable costs.

61. *See* P. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 194-96 (3d ed. 1981).

producing one more increment of output.[62] However, since marginal cost is difficult to isolate, variable cost, or the total non-fixed cost divided by the total output, is used as a surrogate.[63] The Areeda-Turner rule states, therefore, that a price below average variable cost is predatory.[64] But, of course, what constitutes a variable cost depends on the time period considered.[65]

V. FINAL NOTE

Why antitrust can better be considered as a language reflecting enterprise change rather than a law controlling such change is bound up with the problems of verbal specification and generalization concerning competition in the future tense. This Commentary does not present a comprehensive theory of the reasons for this situation. However, three such reasons are the unmapped gaps between on-going enterprise realities and what we know about them, the pace of technological and rhetorical change, and the shifting duality of meanings implicit in the central concepts of competition.

The language aspects of antitrust are central to today's controversies concerning the legal aspects. The rhythm of executive action, statutory amendment, court decisions, economic analysis, and the trial process itself ensures continuing shifts in the language in which we try to express how and why differing industry structures and practices affect competition in differing time-and-place-frames.

Indeed, antitrust as a language—made up as it is of words and concepts representing classifications of corporate behavior and competitive consequences—presents a densely packed field of formulations of the most fundamental metaphysical problems known to Western thought: the ambiguity of a symbol and that to which it refers, and the confusion between class and individual. These problems are endemic to our forms of communication concerning competition and the logic systems generated by this language. They are the problems that appear whenever words do not refer to some-

62. *Id.*

63. *Id.*

64. *Id.*

65. *Cf.* F. FISHER, J. MCGOWAN & J. GREENWOOD, FOLDED, SPINDLED, AND MUTILATED: ECONOMIC ANALYSIS AND U.S. v. IBM (1983). The authors argue that a company, be it small or large, one among many similar companies or a dominant company, should be free to lower its prices or redesign its products and still be considered as engaged in competition rather than predation, so long as it is earning a profit. Pricing becomes predatory, they contend, only when prices are fixed so low that the seller will steadily lose money and can recoup only if he can be certain that in some later time period he can raise his prices without fear of entry by competitors who would take his market away.

thing concrete, like "the wall," or "the boy running," or "the man, woman, and child." When we talk about "competition" or "concentration" or "market power" or "predatory pricing," we are not only considering classifications of activities and imputed consequences, we are using concepts that contain their own opposites: competition that destroys competition, concentration that promotes entry and deconcentration, and market power, sometimes unfairly achieved but often developed and supported by well-designed ventures in new markets, steadfastness in declining markets, or simply wisdom, efficiency, and responsiveness to buyers in normal markets.

The more fully such conceptual duality holds true for these and other labels for varying forms of enterprise behavior, the greater will be the uncertainty of those who enforce and those who must operate businesses under the law. But, the more blind we are to dualities and the more we seek to eliminate the ambiguities by creating simple rules, the less well will the rules fit the rich variety of conduct to which they are applied.

The question arises whether similar examination of other laws would lead us through the same mazes. The answer is . . . not necessarily. While all law contains the problems inherent in the difference between words and events and between individuals and the classes to which they can be assigned, other laws do not, as a rule, focus on so ambiguous and multi-faceted a concept as competition—a process that continually destroys as it renews itself. For this reason, chaos is never far from the edges of the laws on competition. We expect each competitor to outdo his competitors, but the ultimate survival of such a rule in a changing world requires either social toleration of serious business losses or an infinitely expanding transactional universe.