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THE LANGUAGE OF LAW AND THE LANGUAGE OF BUSINESS

Spencer Weber Waller

"[D]iscourse is institutional doing and the language it entails."¹

INTRODUCTION

Antitrust since its inception has relied heavily on economic discourse and price theory in particular in recent times. There have been fierce debates on what types of economics are the most useful and whether other values inform antitrust law and policy, but economics has reigned supreme, especially during the modern era.

This is quite peculiar in the following sense. Antitrust is a body of law that regulates business behavior, but antitrust has adopted a language both different, and at odds with, the language of the very people being regulated. Even worse, antitrust has chosen a unique discourse that is self-denying as to one of the very essences of antitrust enforcement. Price theory is inherently suspicious of the claim that market power is achievable. In contrast, business leaders are trained beginning in undergraduate and graduate business programs and throughout their careers that the very opposite is true: that market power is achievable and various business and management theories provide a sound analytical basis for achieving such power in the real world.

¹ Professor and Director of the Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. Of Counsel, Kaye Scholer LLP, New York City. A substantial portion of the work on this article took place while I was a member of the faculty of Brooklyn Law School. I thank all my former colleagues for their friendship and support over the past decade; Ms. Eileen Josephson of the Kaye Scholer Law firm and Ms. Whitney Bagnall of the Columbia Law School library for their assistance in gaining access to the papers of Professor Milton Handler; Howard Bergman, Jim Fanto, Bert Foer, David Gerber, Ted Janger, Michael Jacobs, Leo Raskind, and Larry Solan for their helpful comments; Wose Tura Ebba and Camellia Noriega for their research assistance; and workshops at DePaul University College of Law, Loyola University Chicago School of Law, University of Wisconsin Law School, and Fordham University School of Law which generated many helpful suggestions and critiques. I gratefully acknowledge the financial support of both Brooklyn Law School and Loyola University Chicago School of Law through summer research stipends.

This article is both a history and genealogy of the discourse used in the discipline of antitrust law. My thesis is that antitrust adopted economics as its primary discourse as part of the creation of a separate discipline of antitrust, separate from a general field of business law or corporate and securities law. The split began in the 1920s and came to full fruition in the 1950s. Without suggesting that this was a conscious or deliberate choice, antitrust evolved into a new specialty field with its own players, its own professional organizations, its own status games and hierarchies, and most importantly, its own language. Economics became that language as part of a process of separation from the general business bar which remained tied to the language of business, a language that was increasingly discredited socially and professionally during the Great Depression, the key period when antitrust became its own field.

The premises and methodology of this article derive in substantial part from the writings of Michel Foucault, particularly in his work of uncovering the archeology and genealogy of the growth of power through the creation of scientific and professional disciplines and specialized discourses. While the teachings of Foucault have been extensively applied in legal scholarship, they rarely have been utilized for the analysis of the growth and development of antitrust law and policy.  

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2 See Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings 83 (Colin Gordon ed., 1980) [hereinafter Foucault, Power/Knowledge] (“What [genealogy] really does is to entertain the claims to attention of local, discontinuous, disqualifying knowledges against the claims of a unitary body of theory which would filter, hierarchise and order them in the name of some true knowledge . . . .”). For more on Foucault’s views on discourse, truth, and power see Michel Foucault, The Archaeology of Knowledge and the Discourse of Language (Alan Sheridan trans., 1972) [hereinafter Foucault, Archaeology]; Foucault, Power/Knowledge, supra, at 82-87, 117, 126-33, 233; sources cited infra note 4.

3 See infra notes 6-40 and accompanying text.

4 The principal scholar to have done so is Rudolph Peritz whose work helped inspire this project. See Rudolph J.R. Peritz, Competition Policy in America, 1888-1992: History, Rhetoric, Law (1996). Readers interested in an introduction to the work of Michel Foucault will benefit from Michel Foucault, The Foucault Reader (Paul Rabinow ed., 1984) and Hunt & Wickham, supra note 1. More serious readers interested in Foucault’s principal texts should consult Foucault, Archaeology, supra note 2; Michel Foucault, The Birth of the Clinic: An Archaeology of Medical Perception (Alan Sheridan trans., 1973); Michel Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans., 1977); Michel Foucault, 3 The History of Sexuality: The Care of the Self (Robert Hurley trans., 1986); Michel Foucault, 1 The History of Sexuality: An Introduction (Robert Hurley trans., 1978); Michel Foucault, 2 The History of Sexuality: The Use of Pleasure (Robert Hurley trans., 1985); Michel Foucault, Madness and Civilization: A History of Insanity in the Age of Reason (Richard Howard trans., 1965); Michel Foucault, The Order of Things: An Archaeology of the Human Sciences (Vintage Books 1994) (1966); Foucault, Power/Knowledge, supra note 2.
My paper is also a plea for a more inclusive discourse for modern antitrust. Business people are versed from the first days of business school in the language and techniques of strategic planning and brand management. They strive for and often achieve significant lasting market power. As the Chicago school style of law and economics loses its vise grip on the discipline of antitrust, lawyers, judges, and policy makers need to be conversant with all facets of business theory and discourse, not just undergraduate level economic theory. In short, the decision makers we regulate take this stuff seriously, so should we.

I. THE BIRTH OF A DISCIPLINE

Each society has its regime of truth, its "general politics" of truth: that is, the type of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements; the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; and the status of those who are charged with saying what counts as true.5

When the Sherman Act was passed in 1890,6 there was no specialized antitrust discipline or a specialized antitrust branch of the practicing bar or legal academy. The formal markers of the specialized discourse of a true antitrust discipline did not appear until the 1920s and early 1930s. By then, the Sherman Act had been supplemented by three additional antitrust statutes7 and the courts

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5 Foucault, Power/Knowledge, supra note 2, at 131. See also Richard Whitley, The Intellectual and Social Organization of the Sciences 30 (1984) (stating that reputational communities in the sciences "organize themselves as distinct collectives within their own communication system and evaluation criteria"); Robert Dingwall, Introduction, in The Sociology of the Professions: Lawyers, Doctors, and Others 5 (Robert Dingwall & Phillip Lewis eds., 1983) (pointing out that "[professions] set the very terms of thinking about problems which fall in their domain").

6 While the Sherman Act was the first federal antitrust statute, there were prior state antitrust laws going back as far as 1880. See generally James May, Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918, 135 U. Pa. L. Rev. 495 (1987) (examining the early history of early antitrust jurisprudence). There was also an 1889 federal antitrust law enacted in Canada. See An Act for the Preservation and Suppression of Combinations Formed in Restraint of Trade, ch. 41, S.C. (1889) (Can.).

had decided dozens of antitrust cases. The Federal Trade Commission ("FTC") had been created in 1914 and the Antitrust Division of the United States Department of Justice ("DOJ") in 1933.8

Until the 1920s, antitrust was not even taught as a separate subject in American law schools. To the extent it was taught at all, it represented a small piece of such courses as Contracts, Corporations, or Business Planning.9

The first recognizable course in antitrust law appears to have been offered at Columbia in 1923 by Professor Herman Oliphant. Professor Oliphant's Trade Regulation course included both the substance and procedure of what modern students would recognize as antitrust law, but also materials on trademarks and the common law of unfair competition, topics more typically covered today in intellectual property courses. While Professor Oliphant had a published casebook for this course, there is no evidence that this book was used by anyone other than Professor Oliphant's own Columbia students.10 The first modern casebook that was ultimately intended and used for a broader audience did not appear until 1937.11 Both of the principal peer-edited antitrust journals began publication in 1952.12

Law firms were similarly slow in recognizing antitrust as a separate discipline. Few, if any, major law firms had separate antitrust departments until the early 1950s.13 The American Bar Asso-

antitrust issues in international trade and have little contemporary significance.

8 See generally Symposium, In Commemoration of the 60th Anniversary of the Establishment of the Antitrust Division, 39 ANTITRUST BULL. 813 (1994) (offering several perspectives on the value of the Antitrust Division).

9 See e.g., ARTHUR C. CAPORN, SELECTED CASES ILLUSTRATING THE LAW OF CONTRACTS 291-352 (3d ed. 1920); MICHAEL E. ROWE, CASES ON CONTRACT 162-179 (1927); EDWARD H. WARREN, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PRIVATE CORPORATIONS 514-97 (1928).

10 HERMAN OLIPHANT, CASES ON TRADE REGULATION (1923). By 1930, a professor at Harvard Law School had developed a casebook for his students. JAMES ANGEL MCLAUGHLIN, CASES ON THE FEDERAL ANTI-TRUST LAWS OF THE UNITED STATES (1933).


13 For example, Kaye Scholer Fierman Hays & Handler was one of the earliest firms to have a separate department for antitrust litigation thanks primarily to the associates recruited by Milton Handler to handle the clients he attracted when he joined the firm as a partner in the early 1950s. See MILTON HANDLER, AN ORAL HISTORY 350-51 (1992). For more on the role
ciation ("ABA") did not even have a separate Antitrust Section until 1952, with an attempt the prior year to organize a separate section for antitrust having failed. Prior to 1952, antitrust lawyers were limited to participation in a committee that was part of the Corporations Banking and Business Section.\(^1\) Similarly, the first blue ribbon committee of the Attorney General to study the antitrust laws was convened in 1955\(^1\) and the Association of the Bar of the City of New York began its annual antitrust lecture in 1958.\(^1\)

Two individuals stand out in the early period in defining antitrust as a separate discipline. They are Milton Handler and Thurman Arnold, who each helped define the discipline of antitrust as academics, practitioners, and government policymakers. While many other individuals contributed to the growth of antitrust as its own field, these two individuals were leaders in different ways during the formative era from the 1920s to the 1950s when antitrust came into its own.

Professor Handler attended Columbia Law School in the mid-1920s and was a protégé of Herman Oliphant, although Handler never actually took the Trade Regulation course as a student. His interest in antitrust stemmed from his 1926-27 clerkship with Justice Harlan Stone on the United States Supreme Court when Justice Stone assigned Handler the task of helping draft the seminal United States v. Trenton Potteries Co.\(^7\) antitrust opinion. After the end of his clerkship, Handler was asked to teach the Trade Regulation course at Columbia during the summer of 1927 and joined the Columbia law faculty full-time that fall. He taught the course regularly after that with the support of Oliphant who gave up the course in favor of his protégé.

Handler's contribution to the rise of antitrust as an academic discipline began shortly thereafter. His early scholarship dealt with both antitrust and closely related trade regulation topics.\(^8\) He

\(^1\) Phone interview with Ms. Amy Peoples, Staff Director, Antitrust Section, American Bar Association (Mar. 9, 2000) (memorandum on file with author). That section of the ABA is now called the Business Law Section.

\(^2\) REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS (1955).

\(^3\) These annual lectures have been collected in annotated form in the three-volume work, MILTON HANDLER, ANTITRUST IN TRANSITION (1991).

\(^4\) See Milton Handler, The Anti-Trust Laws and the Public Interest, 18 A.B.A. J. 635
organized the first academic symposium on the antitrust laws at Columbia in 1932, resulting in both the publication of a special symposium volume\textsuperscript{19} as well as an issue of the Columbia Law Review.\textsuperscript{20}

Following service in the New Deal in Washington, D.C. and on a consulting basis from New York,\textsuperscript{21} as well as difficult family health problems,\textsuperscript{22} Handler published the first modern antitrust casebook in 1937.\textsuperscript{23} That casebook is still in print in its fourth edition, is widely used throughout American law schools, and has such distinguished contemporary co-authors including the former general counsel of the Securities Exchange Commission who is also a noted antitrust authority at Columbia Law School, the current chairman of the FTC, and a sitting Seventh Circuit judge, who formerly taught antitrust at the University of Chicago Law School.\textsuperscript{24}

The Handler casebook helped define the discipline of antitrust as more than mere legal doctrine. Handler included economic and historical material,\textsuperscript{25} although he has no formal training in either field in an effort to show how the organization of business in its then contemporary form had come about. This eclecticism contin-

\textsuperscript{19} Milton Handler, \textit{The Federal Antitrust Laws: A Symposium} (1932).
\textsuperscript{20} 32 COLUM. L. REV. 173, 173-289 (1932).
\textsuperscript{21} Handler was the principal drafter for the legislation that created the Federal and Drug Administration and served as the first general counsel for the National Labor Relations Board. See \textit{Handler, supra} note 13, at 129-86. His only government service in the antitrust area came subsequently as the principal drafter of Monograph No. 38 for the Temporary National Economic Commission. See \textit{infra} note 28 and accompanying text.
\textsuperscript{22} Handler's wife had a difficult childbirth during this era and was shortly thereafter diagnosed with multiple sclerosis. See \textit{Handler, supra} note 13, at 196-201.
\textsuperscript{23} \textit{Handler, supra} note 11.
\textsuperscript{24} Milton Handler, \textit{Trade Regulation: Cases and Materials} (4th ed. 1997).
\textsuperscript{25} See, e.g., \textit{Handler, supra} note 11, at 22-101, 274-385, 496-502 (discussing the early stages of industrial development, and the legal and economic aspects of the Sherman Antitrust Act).
ued in subsequent editions of the casebook, which also included excerpts from government reports on antitrust law and industrial organization economics materials.\textsuperscript{26} In a 1997 letter to Judge Richard Posner, Handler described his goals for the casebook as follows:

In my casebook I departed from the established approach. I personally was puzzled about how the modern business system came into existence because it was the current business system to which antitrust applied. I did an elaborate historical study, which I included in my casebook. Since antitrust dealt with competition, I thought it was important to have an analysis of that concept. I included Walter Hamilton's article on the nature of competition from the McMillan Encyclopedia of Social Sciences. In this way, I got the students to know how the modern business system came about; why competition was essential for its proper functioning and what was meant by competition.

In subsequent editions, I put in a vast amount of economic readings . . . .\textsuperscript{27}

Handler's influence on both the teaching, practice, and enforcement policy of antitrust continued to grow through his work in drafting \textit{Monograph No. 38}\textsuperscript{28} of the Temporary National Economic Commission which became one of the defining documents for establishing federal antitrust policy in the post-New Deal era. Handler also served on the 1955 Attorney General's Committee to Review the Antitrust Laws,\textsuperscript{29} in prominent positions in both the Association of the Bar of the City of New York Trade Regulation Committee as well as the ABA Antitrust Section, and delivered the annual New York City Bar antitrust lecture, now known as the Handler lecture, while continuing to write numerous influential articles in the field.\textsuperscript{30}

\textsuperscript{26} See Handler, \textit{supra} note 24, at 1-2, 221-24, 484-98, 867-73, 942-65, 1005-14, 1038-41.


\textsuperscript{28} MILTON HANDLER, \textit{TEMPORARY NATIONAL ECONOMIC COMMISSION, MONOGRAPH 38, 76TH CONG., A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS} (Senate Comm. Print 1941).

\textsuperscript{29} See Report, \textit{supra} note 15.

\textsuperscript{30} See Handler, \textit{supra} note 16. Recent studies have found Handler to be among the top
In addition to his academic workload, Handler became increasingly interested in the practice of antitrust law. In 1951, he began an association with the law firm eventually known as Kaye Scholer Fierman Hays & Handler, shortly thereafter becoming a name partner, and continued a full-time affiliation with the firm from his retirement from the Columbia faculty in 1970 until his death in 1998 at the age of 95. While in practice he participated in a substantial part of the landmark antitrust litigation of his time including numerous cases before the United States Supreme Court, while continuing to write, lecture, and carry on voluminous correspondence on antitrust and other subjects with the legal and political luminaries of his era.

The inspiring accomplishments of Professor Handler are matched by those of Thurman Arnold who contributed to the growth of a separate discipline of antitrust, like Handler, first as an academic and later in government and private practice. Following an initial legal and political career in his native Wyoming, Arnold came east to pursue an academic career first as Dean of the West Virginia University School of Law and later as a member of the faculty of Yale Law School. Arnold was part of the smaller branch of the Legal Realist movement that focused on governmental regulation of business activity rather than the operation of so-called private law fields such as contracts and torts.

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31 See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (holding that Otter Tail Power Co. was liable for its refusal to deal with municipal power systems in order to prevent or destroy their position in the market); FTC v. Texaco, Inc., 393 U.S. 223 (1968) (holding that Texaco engaged in unfair competition by inducing its dealers to purchase brands of tires, batteries, and accessories for which it received sales commissions); United States v. Cont'l Can Company, 375 U.S. 893 (1963) (holding that the U.S. proved a prima facie case of anticompetitive effect under the Clayton Act after Continental Can, the second largest producer of metal containers, acquired the third largest producer of glass containers); Am. Tobacco Co. v. United States, 328 U.S. 781 (1946) (affirming convictions under the Sherman Act against the American Tobacco Co. because its behavior showed both the power and the intent to monopolize).

32 These materials are available for perusal in the Milton Handler Rare Book and Reading Room and in the Handler collection of papers at Columbia Law School library.


34 For a discussion of the realist members of the Yale Law School faculty with similar interests in government regulation, see id. at 67-68. See also LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960 (1986) (focusing on the impact of legal realism upon legal education at
Arnold's seminal academic works are *The Symbols of Governments*, in which Arnold ridiculed the antitrust laws as empty symbolic vehicles designed to assuage popular fears of bigness and power without actually constraining the behavior of the modern business corporation. This body of work did not deter President Roosevelt in 1938 from appointing Arnold as the head of the Antitrust Division, nor Arnold from accepting the position.

As head of the Antitrust Division, Arnold presided over an unprecedented expansion of the staff, budget, prestige, and influence of the Antitrust Division from a backwater of the New Deal to one of the most prominent features of the Roosevelt post-New Deal agenda. In so doing, Arnold introduced economics and economists into the structure of the Division and forced the lawyers "to think of antitrust enforcement in objective, systematic, economic terms." Arnold helped create a well-funded Antitrust Division of both lawyers and economists that continues to this day to enjoy a reputation as politically neutral, but expert, law enforcers, with broad bipartisan support for its mission of criminal and civil antitrust enforcement.

In 1943, Arnold was appointed as a judge for the United States Court of Appeals for the District of Columbia. After slightly more than two years, Arnold left the bench to make his next lasting contribution to the development of antitrust as a discipline. In 1945, Arnold formed the law firm now known as Arnold & Porter with his friends and fellow New Dealers Paul Porter and Abe Fortas. Together they helped build not only one of the great antitrust

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36 *THURMAN ARNOLD, THE FOLKLORE OF CAPITALISM* (1937). Arnold's later work was more a response to critics of his administration as head of the Antitrust Division rather than a continuation of his earlier academic work on the subject. *See THURMAN ARNOLD, THE BOTTLENECKS OF BUSINESS* (1940).
39 For a brief discussion of Arnold's experiences on the bench that conveys his unhappiness in that role, see ARNOLD, *supra* note 33, at 156-59.
firms, but one of the great Washington, D.C. law firms, designed
to represent parties in disputes over the meaning of government
regulation, but also to influence that regulation from its incep-
tion.40

These are just a few of the events and people that shaped the
story that began in the 1920s and ended by the middle of the 1950s
in which antitrust separated itself from the great undifferentiated
mass of corporate and business law and found itself as a separate
and well-defined discipline with specialized courses, publications,
career paths in both the public and private sector, and a separate
discourse that both unified those within the discipline and ex-
cluded or co-opted those outside it.

II. THE BIRTH OF A LEGAL/ECONOMIC DISCOURSE FOR ANTITRUST

The [antitrust] community consists of present and
former policymakers from the FTC, the Antitrust Di-
vision and other government agencies, prominent
members of the antitrust bar, and industrial organiza-
tional economists. Through their ongoing intellectual
interaction they structure the way in which policy and
administration are understood, problems analyzed,
and solutions constructed.41

This section examines how and why antitrust adopted the dis-
course that it did—that of economics as its primary analytical tool
over the last sixty years. While there have been raging debates
over what brand of economics constitutes the appropriate dis-
course, and the legal consequences of which tools are used, there
has been relatively little attention paid to competing business dis-
courses which have operated at the margins of antitrust since its
inception.

A. The Textual Era

It is frequently noted that the Sherman Act was passed the
same year that Alfred Marshall published his seminal textbook on
neoclassical economics.42 Marshall’s work was not a factor in the
cursory debate about the final version of the Sherman Act nor the

40 See id. at 188-95, 204 (describing the rise of the law firm Arnold, Fortas & Porter).
41 EISNER, supra note 30, at 34.
42 ALFRED MARSHALL, PRINCIPLES OF ECONOMICS: AN INTRODUCTORY VOLUME (1890).
more extensive debate on the prior version of the bill.\textsuperscript{43} What actually motivated the members of Congress that enacted the Sherman Act has created one of the great academic cottage industries with distinguished commentators taking a wide range of positions.\textsuperscript{44} As Herbert Hovenkamp notes:

When the Sherman Act was first passed in 1890, most (but not all) economists condemned it as at best irrelevant to the problem of the trusts and at worst as harmful to the economy because the statute would prohibit firms from combining to take advantage of economies of scale made possible by recent technological development. During this period, roughly 1890-1930, American economists developed a set of theories that found consumer benefits in concentration and large firms probably to a greater extent than did any economic model until the rise of the Chicago School.\textsuperscript{45}

Regardless of which position one takes regarding this unsolvable question of legislative intent shrouded in history, there is no evidence that the courts or the enforcers looked outside the language of the law to resolve the textual ambiguities of the broad formulations adopted by Congress in sections 1 and 2 of the Sherman Act in prohibiting “every contract, combination . . . or conspiracy” in “restraint of trade or commerce”, or in prohibiting

\textsuperscript{43} See 1 EARL M. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 7-23 (1978) (discussing the legislative history surrounding the subsequently amended Senate version of the bill that later became the Sherman Act); PERITZ, supra note 4, at 13-26.

\textsuperscript{44} There are at least six different positions commonly asserted as to the motivating spirit and purpose of the Sherman Act. See Spencer Weber Waller, Market Talk: Competition Policy in America, 22 LAW & SOC. INQUIRY 435, 456-38 (1997) (book review). For a jurisprudential and rhetorical analysis of the debates leading up to the enactment of Sherman Act, see PERITZ, supra note 4, at 9-26.

\textsuperscript{45} Herbert Hovenkamp, Antitrust Policy After Chicago, 84 MICH. L. REV. 213, 220 (1985) (footnotes omitted). See also William E. Kovacic & Carl Shapiro, Antitrust Policy: A Century of Economic and Legal Thinking, 14 J. ECON. PERSP., Winter 2000, at 43, 44 (stating that “most economists scorned the Sherman Act” and that it was not thought of as being a useful method of controlling abusive business conduct). It is doubly ironic that Hovenkamp suggests the existence of a nineteenth century Chicago school with similar views to its successor in the 1960s and beyond, and that one of the few economists supporting antitrust enforcement in the early part of the nineteenth century was Herbert Simons, a faculty member at the University of Chicago. See CHICAGO CONFERENCE ON TRUSTS 5 (1900) (collecting speeches, debates, and resolutions of delegates attending an 1899 conference on trusts and trade combinations, sponsored by the Civic Federation of Chicago); Kovacic & Shapiro, supra, at 49 (“Simons in particular assailed the statist assumptions of New Deal planning experiments such as NIRA and advocated robust antitrust enforcement . . . “).
those who “monopolize or attempt to monopolize or conspire with any other person to monopolize.” Early Supreme Court cases focused on either the constitutionality of the Act or the meaning of interstate commerce, or engaged in a bitter interpretative struggle over the relationship of the Sherman Act to the prior common law of restraint of trade and the need to adopt or avoid a “rule of reason.”

The debate over the need for a rule of reason was resolved doctrinally in the 1911 Standard Oil Co. v. United States decision, which held that the Sherman Act prohibited only those agreements that unreasonably restricted competition. The Court then moved on to amplify the meaning of the rule of reason and struggle with the question of whether there were categories of agreements, which were so inevitably anticompetitive that they could be deemed per se unreasonable. Cases like Trenton Potteries suggested that certain categories of price fixing were indeed per se violations of the antitrust laws. Cases like the Supreme Court’s Appalachian Coals v. United States suggested to the contrary, but were read as aberrations of the Great Depression. It was not until 1940 that the Supreme Court appeared to have resolved

46 See, e.g., Swift & Co. v. United States, 196 U.S. 375 (1905) (finding that the defendants’ conduct was commerce among the states as contemplated in the Sherman Act); N. Sec. Co. v. United States, 193 U.S. 197 (1904) (affirming and holding that the Sherman Act is a valid exercise of Congressional authority); Hopkins v. United States, 171 U.S. 578 (1898) (holding that a combination of commission merchants at stock yards is not subject to the Sherman Act since their business is not interstate commerce); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding that manufacturing alone is not encompassed by the Sherman Act’s definition of interstate commerce).

47 See, e.g., N. Sec. Co., 193 U.S. at 410 (Holmes, J. dissenting) (“A partnership is not a contract or combination in restraint of trade between the partners unless the well known words are to be given a new meaning invented for the purposes of this act.”); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (affirming then Circuit Judge William Howard Taft’s more famous opinion at 85 F. 271 (6th Cir. 1898)) (detailing the history the common law doctrine of restraint of trade); United States v. Joint Traffic Ass’n, 171 U.S. 505 (1898) (holding that the defendant violated the Sherman Act by creating an association of competing trunk line systems that established and maintained rates and fares); United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290 (1897) (holding that all combinations in restraint of trade or commerce are prohibited, whether in the form of trust or in any other form).

48 221 U.S. 1, 60-68 (1911).

49 See Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (holding that legality depends on whether the restraint imposed merely regulates or promotes competition, or whether it may suppress or destroy competition).

50 See United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) (stating that “[a]greements . . . may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed”).

51 288 U.S. 344, 360 (1933) (holding that joint sales agreement not per se unlawful).
this issue in *United States v. Socony-Vacuum Oil Co.* in holding that all price fixing agreements were per se violations of the antitrust laws.

During this textual era neither economic theory nor business theory played a dominant role in the Supreme Court's resolution of the issues of the day, but each occasionally entered the picture. After *Standard Oil*, the business community turned to a variety of business theories that offered business leaders a seeming opportunity to stay one step ahead of the evolving antitrust law and enforcement policy. Some were attempts to circumvent rules against price-fixing through the open exchange between competitors of sensitive competitive information about present and future prices, sales, and customers. The more brazen schemes were stricken down, while more competitively neutral information exchanges were approved and lent judicial approval to the growing trade as-

52 310 U.S. 150 (1940). The category of agreements constituting per se agreements has grown and contracted over the years. Forty years afterwards, the Supreme Court began to question the wisdom of treating all agreements relating to price as per se unreasonable and began to analyze certain agreements between competitors related to price under the full rule of reason or variously formulated middle standards. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (analyzing the refusal of a federation of dentists to supply dental x-rays to insurance companies for use in benefits determinations under the rule of reason); *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (adopting the rule of reason rather than a per se rule when analyzing an NCAA plan limiting the total amount of televised intercollegiate football games); *Broad. Music Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979) (reversing a 2nd Circuit decision that utilized the per se rule to invalidate licenses, and remanding the case for an assessment under the rule of reason); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (explaining that whether a practice is analyzed under the per se rule or the rule of reason, "the purpose of the analysis is to form a judgment about the competitive significance of the restraint"). The Court continues to struggle with whether to view the relationship between per se and full rule of reason cases as dichotomous choices or a sliding scale and how to select the proper standard in a particular case. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 770-71 (1999) (holding that the decision between a "quick-look" analysis and the rule of reason is to be determined by the obviousness of the anticompetitive effects). *See generally* Stephen Calkins, *California Dental Association: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495, 531-33 (2000) (analyzing the Court's decision and characterizing the opinion as a setback for the "quick-look" movement).

53 For example, the Supreme Court first cited an economist in 1925 in *United Maple Flooring Manufacturing Association v. United States*, 268 U.S. 563, 583 n.1 (1925) (pointing readers to economists' analyses of the "Competitive System" in "Marshall's Readings on Industrial Society," referring to Hobson's "The Evolution of Modern Capitalism," and to Irving Fischer's "Elementary Principles of Economics"). *See Kovacic & Shapiro, supra* note 45, at 47 ("Maple Flooring holds special interest for economists today because it featured the Supreme Court's first citation to an economist's work in an antitrust decision . . . .").

54 *See ARTHUR EDDY, THE NEW COMPETITION* 123-56 (1915) (sanctioning the use of "Open-Price Associations" to avoid antitrust violations).

55 *See Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 410-11 (1921) (referring to the "Open Competition Plan" between hardwood manufacturers as "skillfully devised to evade the law").
sociation movement of the times. If anything, business theory was used by corporate America to either justify its behavior when challenged or to support the de facto repeal of antitrust when government-business cooperation was needed during World War I and the Great Depression.

During this same era, both economic as well as business discourse exerted competing influences on the antitrust legislative agenda of the early part of the twentieth century, but neither provided much analytical heft to either plaintiffs or defendants in the cases that followed. While the 1914 Clayton Act contained language directing courts to focus on the likely effects on “competition,” economic theory of the times provided little help to the courts in making this determination.

In contrast, the 1914 Federal Trade Commission Act sought to create a new administrative body expert in the ways of business to determine and separate out “unfair methods of competition” from normal business behavior. Contemporary business theory did not provide the tools to undertake this task and a combination of bureaucratic inactivity and hostility from the courts left the FTC a secondary player in antitrust enforcement during this era.

B. The Rise of Economic Discourse

Two factors led to the subsequent rise of economic discourse as the predominant discourse of antitrust. The first was the utter discrediting of business thinking in the wake of the Great Depression. The Great Depression was the critical event for virtually everyone alive during this period. Apart from the devastating material effects on the lives and fortunes of millions, the Great Depression also was the preeminent intellectual influence on a generation of intellectuals and public policy makers who rejected the old tools which had failed the nation and embraced and sought

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56 See Maple Flooring Mfg. Ass’n v. United States, 268 U.S. 563, 582 (1925) (upholding a trade association plan that exchanged price and consumer information).
57 See ALAN BRINKLEY, THE END OF REFORM, NEW DEAL LIBERALISM IN RECESSION AND WAR 120-23 (1995) (documenting the difficulties encountered by New Dealers in enforcing the antitrust laws); EISNER, supra note 30, at 64.
58 For example, one of the many periods of relative inactivity occurred in the late 1920s and early 1930s under the chairmanship of William Humphrey who wanted to align the FTC more closely with the needs of the business community. See EISNER, supra note 30, at 65. President Roosevelt’s efforts to fire Humphrey in order to promote a more activist commission resulted in the constitutional landmark case of Humphrey’s Executor v. United States, 295 U.S. 602 (1935). The many ups and downs in the activity and status of the FTC are discussed in EISNER, supra note 30, at 59-75, 150-83, 210-25.
new tools and a new role for government to undo the carnage that had been wrought. As Thurman Arnold, among many others, noted: "The public discovered that 'sound' business thinking had been mostly superstition."

To fill this void, economic theory and discourse developed that allowed a more vigorous role for government in economic matters and a new vitality for antitrust, where prior to that time mainstream economic theory had little to offer a serious antitrust enforcer. Around the time that John Maynard Keynes was supplying the macroeconomic tools for governments to adjust budgets, taxes, and spending to deal with the Great Depression, two other prominent English economists were supplying the microeconomic tools to reinvigorate antitrust theory and enforcement.

Edward Chamberlin's theory of monopolistic competition, and to a lesser extent Joan Robinson's theory of imperfect competition, provided a viable alternative to the neoclassical theories that had unproductively focused on either perfect competition or true monopoly as the only attributes of markets. The work of Chamberlin and Robinson became the inspiration for a generation of industrial organization economists who created a paradigm based on structure-conduct-performance ("SCP") that dominated antitrust enforcement for next generation.

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60 Arnold, supra note 33, at 38. In contrast, the corporate bar remains more closely connected to, and conversant with, the business literature, particularly in the corporate finance area. See Peter Huang & Michael S. Knoll, Corporate Finance, Corporate Law and Finance Theory, 74 S. CAL. L. REV. 175 (2000).
61 Even as late as 1938, Thurman Arnold felt that there was very little support among economists for the proposition that antitrust enforcement was an important economic policy. See Arnold, supra note 33, at 113 ("I believed that my principal function was to convince American businessmen that the Sherman Act represented something more than a pious platitude; second, that its enforcement was an important economic policy. But there was very little support among economists for the latter notion."). See also Herbert Hovenkamp, The Antitrust Movement and the Rise of Industrial Organization, 68 TEX. L. REV. 105, 145 (1989) (stating that many "economists who accepted the classical theory of competition" did not support antitrust enforcement because they believed "trusts could have only beneficial consequences, not harmful ones"); Louis Kaplow, Antitrust, Law & Economics and the Courts, 50 LAW & CONTEMP. PROBS., Autumn 1987, at 187, 187 (discussing Supreme Court antitrust opinions adopting an economic analytical framework).
64 Joan Robinson, The Economics of Imperfect Competition (1933).
The SCP paradigm held that "concentrated industrial structures promote anticompetitive forms of conduct which affect the performance of the economy."\(^6\) From this premise flowed several highly generalized conclusions:

- Concentrated industrial structures create an inflationary bias;
- Large firms in concentrated industries may be relatively inefficient;
- High levels of concentration place limits on technological innovation;
- High levels of concentration promoted product differentiation and reduced price competition;
- High levels of concentration exacerbated maldistribution of wealth through transfers from consumers to producers.\(^6\)

The principal texts of the SCP paradigm include: JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES (1956) [hereinafter BAIN, BARRIERS]; JOE S. BAIN, INDUSTRIAL ORGANIZATION (2d ed. 1968) [hereinafter BAIN, INDUSTRIAL ORGANIZATION]; CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY (1959); CARL KAYSEN, UNITED STATES V. UNITED SHOE MACHINERY CORPORATION: AN ECONOMIC ANALYSIS OF AN ANTI-TRUST CASE (1956); EDWARD S. MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM (1957); REPORT, supra note 15; J.M. Clark, Toward a Concept of Workable Competition, 30 AM. ECON. REV. 241 (1940). See also Frederick Rowe, The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics, 72 GEO. L.J. 1511 (1984) (describing SCP paradigm and critiquing fusion of law and economics as providing false promise of certainty as model for interpretation of business behavior).

For one of the purest application of the SCP paradigm in government antitrust enforcement policy, see the 1968 Merger Guidelines issued by the Antitrust Division during the tenure of Donald Turner as Assistant Attorney General. DEP'T OF JUSTICE, MERGER GUIDELINES (1968) reprinted in Merger Guidelines (1968), 4 Trade Reg. Rep. (CCH) ¶ 13,101, at 20,521 (Mar. 18, 1998). See also EISNER, supra note 30, at 129 (establishing market concentration thresholds derived from the SCP paradigm to determine the legality of a horizontal merger).

Like the types of economic discourses that both preceded and followed the SCP paradigm, this discourse lost much of its influence but did not disappear when it was replaced as the dominant discourse of the discipline. Current prominent advocates of this form of industrial organization economics include G. William Shepherd and F. Michael Scherer. See F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 5 (2d ed. 1980) (noting that the field of industrial organization analyzes the relationships involving a causal flow from market structure to conduct and performance); WILLIAM G. SHEPHERD, PUBLIC POLICIES TOWARD BUSINESS 24-25 (7th ed. 1985) (describing industry structure, behavior and performance in an analysis of competition and market power).

\(^{66}\) EISNER, supra note 30, at 101. See also BAIN, INDUSTRIAL ORGANIZATION, supra note 65, at 120 (noting that "as sellers are progressively fewer in number, it becomes progressively easier for them to arrive at and sustain express and tacit agreements to pursue joint profit-maximizing price and output policies").

\(^{67}\) EISNER, supra note 30, at 101-03 (noting that structure and conduct analysis leads to the above-mentioned performance-related generalizations).
The SCP approach came closest to reintroducing certain aspects of business discourse back into antitrust enforcement. Joe Bain's notion of entry barriers and the need for highly empirical industry and firm studies was a gateway to this discourse if either lawyers or economists been interested in pursuing this path. While this type of discourse is no longer dominant in the antitrust world, it remains a staple of the strategic planning exercises through which business managers today seek to achieve sustainable competitive advantage.

Neither the economists nor the lawyers dominating antitrust discourse were inclined to proceed in this direction. The economists studied these topics in technical industrial organization jargon and the lawyers and courts used these tools as a justification for the spread of per se rules which prohibited an increasing number of collaborative and distribution practices based on increasingly specious economic assumptions or equally dubious inferences from limited statistical or market data.

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68 See BAIN, BARRIERS, supra note 65, at 3-4 (finding that conditions of market entry may be an important determinant of market behavior based on a study of twenty manufacturing industries).

69 See infra notes 123-58 and accompanying text. Studying modern business texts often provides an eerie sense of deja vu in recreating the discourse of key aspects of the SCP tradition. See e.g., DAVID A. AAKER, STRATEGIC MARKET MANAGEMENT 78-97 (5th ed. 1998) [hereinafter AAKER, STRATEGIC MARKET MANAGEMENT] (analyzing market profitability by the intensity of competition among actual competitors, the threat of potential competition, and bargaining strengths of consumers and suppliers); DAVID J. COLLIS & CYNTHIA A. MONTGOMERY, CORPORATE STRATEGY: RESOURCES AND THE SCOPE OF THE FIRM 25-47 (1997) (strategy as means of achieving sustainable economic rents); ROBERT M. GRANT, CONTEMPORARY STRATEGY ANALYSIS 54, 62 (2d ed. 1995) (describing barriers to entry when conducting a market analysis); MICHAEL E. PORTER, COMPETITIVE ADVANTAGE xvi (1985) (detailing the means by which a firm can put generic strategies into practice in order to gain a competitive advantage over competitors); MICHAEL E. PORTER, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS 7-17 (1980) (describing how new market participants should analyze their strengths and weaknesses to create or overcome barriers to entry); MICHAEL E. PORTER, ON COMPETITION 56-73 (1998) (emphasizing the importance of "fit" between product, distribution, and marketing strategy as part of an overall strategy for sustainable competitive advantage).

70 In addition to strictly enforcing the previously established per se prohibitions against horizontal price fixing and minimum resale price maintenance, courts in the dominant era of the structure-conduct-performance paradigm established new per se prohibitions against tying in Northern Pacific Ry. v. United States, 356 U.S. 1 (1958), group boycotts in Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), maximum resale price maintenance in Albrecht v. Herald Co., 390 U.S. 145 (1968), and vertical territorial restrictions in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). In addition, Clayton Act provisions regarding exclusive dealing were interpreted broadly in Standard Oil Co. v. United States (Standard Stations), 337 U.S. 293 (1949), and the Celler-Kefauver amendments to the antimerger provisions of the Clayton Act were interpreted to bar any quantitatively significant mergers in markets with increasing concentration in United States v. Von's Grocery Co., 384 U.S. 270 (1966).
The intellectual sterility of this approach, changes in the economy, and a growing sense that the only unifying theme in antitrust enforcement was that the government (or plaintiff) always won, led to two different counter-revolutions. One group of critics led by Milton Handler and Betty Bock, an economist, argued for the need for more empirical and case-by-case analysis before condemning particular practices or deciding individual cases. The other more dominant wing was the theoretical revolution of the Chicago school, which relied on the teaching of economic theory, rather than business theory, to achieve results quite congenial to the business community.

C. The Discourse Flips: The Rise of the Law and Economics Movement

The rise of the Chicago school of antitrust analysis and its tenets has been frequently discussed. All accounts point to the critical role of Aaron Director who, as a teacher at the University of Chicago, but not a scholar, formulated the principal ideas of the movement by examining the principal questions of antitrust

71 See Von's Grocery Co., 384 U.S. at 301 (Stewart, J., dissenting) ("The sole consistency that I can find is that in litigation under § 7, the Government always wins.").

72 See BETTY BOCK, MERGERS AND MARKETS: AN ECONOMIC ANALYSIS OF THE CASE LAW (2d ed. 1962) (1960) (noting the absence of concrete data available in a study of mergers and acquisitions); MILTON HANDLER, ANTITRUST IN PERSPECTIVE (1957) (arguing against per se rules of analysis and for a rule of reason approach where all the relevant data are weighed); Milton Handler, Where Do We Go from Here - An Overview, in ANTITRUST IN TRANSITION (1991) (advocating an approach applied on a case-by-case basis in light of special and peculiar facts of each industry, market conditions, and the regulatory goals in each market); Betty Bock, An Economist Appraises Vertical Restraints, 30 ANTITRUST BULL. 117 (1985) (advocating for a uniform theory for vertical restraints analysis); Betty Bock, The Relativity of Economic Evidence in Merger Cases: Emerging Decisions Force the Issue, 63 MICH. L. REV. 1355 (1965) (noting that economic experts in antitrust cases must develop economic facts and criteria that will be acceptable legal evidence); Betty Bock, The Shifting Vocabulary of Antitrust—Legal Linguistics in a Period of Change, 36 CASE W. RES. L. REV. 326 (1985) (describing the relativity of antitrust concepts which can result in dramatic shifts in enforcement policy). See also William E. Kovacic, Creating Competition Policy: Betty Bock and the Development of Antitrust Institutions, 66 ANTITRUST L.J. 231, 235-36 (1997) (describing Bock’s contribution to antitrust economics, noting her disapproval of structural tests and bright-line rules that fail to measure efficiency, consumer-responsiveness, technology, and the firm’s life-cycle).

73 The history of the movement is summarized in Richard A. Posner, The Chicago School of Antitrust, 127 U. PA. L. REV. 925 (1979). See also Frank H. Easterbrook, Is There a Ratchet in Antitrust Law?, 60 TEX. L. REV. 705, 707-08 (1982) (describing the Chicago school leaders’ use of economic theory to debunk assumptions about predatory conduct, vertical arrangements and restricted distribution). For a less sympathetic account which also attributes a greater influence to the ideas of Ronald Coase see PERITZ, supra note 4, at 236-45, 258-62 (noting that Coase’s article, The Theory of Social Cost, greatly influenced the Chicago School’s antitrust policies, which include the promotion of liberty of contract and limited government intervention in the market).
through the lens of price theory. Director’s largely unpublished ideas were elaborated on by key students and colleagues such as Ward Bowman, John McGee, Robert Bork, and Lester Telser. Subsequent scholars such as George Stigler and Richard Posner further elaborated ideas flowing from analyses of specific antitrust issues so that the common elements of a school could be discerned.

The basic assumptions of the Chicago school are: “(1) the best policy tool currently available for maximizing economic efficiency in the real world is the neoclassical price theory model; and (2) the pursuit of economic efficiency should be the exclusive goal of antitrust enforcement policy.” Its key tenets can be summarized as:

- Economic efficiency, the pursuit of which should be the exclusive goal of the antitrust laws, consists of two relevant parts: allocative efficiency and productive efficiency... A properly defined antitrust policy will attempt to maximize net efficiency gains.

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74 See Posner, supra note 73, at 928 (“I believe Director’s conclusions resulted simply from viewing antitrust policy through the lens of price theory.”). But see Fleming, supra note 65 (pre-Chicago school critique of antitrust by business journalist condemning contemporary antitrust policy as to hard competition, price discrimination, monopolization, vertical integration, and distributional practices).

75 But see Aaron Director & Edward H. Levi, Law and the Future: Trade Regulation, 51 Nw. U. L. Rev. 281, 282 (1956) (arguing that general economic principles do not justify the application of antitrust laws to many of the situations in which the laws were currently being applied).

76 See Robert H. Bork, The Antitrust Paradox 145 (1978) (describing Professor Director’s hypothesis that monopolists would rather merge than use predatory conduct which later expanded to debunk the theory that Standard Oil’s conduct was predatory); John S. McGee, In Defense of Industrial Concentration 152-37 (1971) (questioning studies attempting to correlate industrial concentration with inefficient market performance and the ability of antitrust laws to promote efficiency and cooperation); Robert Bork, Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception, 22 U. Chi. L. Rev. 157, 194, 196 n.129 (1954) (citing Professor Director’s theory of tying as a counting device for price discrimination); Ward Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L.J. 19, 19-20 (1957) (elaborating on Professor Director’s theories that product tying could be either an evasion of price regulation or a counting device for price discrimination); John S. McGee, Predatory Price Cutting: The Standard Oil Case, 1 J.L. & Econ. 137, 138 n.2 (1958) (crediting Professor Director for encouraging the author’s study of Standard Oil Co. and predatory pricing); Lester Telser, Why Should Manufacturers Want Fair Trade?, 3 J.L. & Econ. 86, 86 (1960) (crediting Professor Director for a study on manufacturer support for resale price maintenance).

77 See George Stigler, The Organization of Industry (1968) (collecting his seminal articles challenging then conventional industrial organizational theory).

78 See Richard A. Posner, Antitrust Law: An Economic Perspective 4 (1976) (arguing that antitrust law and remedies should correspond to economic theory and should be used neither where competition is less efficient than monopoly nor where the object is to achieve non-efficiency-related goals, such as protection of small businesses).
• Most markets are competitive even if they contain a relatively small number of sellers.
• Monopoly, when it exists, tends to be self-correcting.
• "Natural" barriers to entry are more imagined than real.
• Economies of scale are far more pervasive than economists once believed.
• Business firms are profit maximizers.
• Antitrust enforcement should be designed in such a way as to penalize conduct precisely to the point that it is inefficient, but to tolerate or encourage it when it is efficient. The decision to make the neoclassical market efficiency model the exclusive guide for antitrust policy is nonpolitical.

As Richard Posner has noted even more succinctly: "By 1969, then, an orthodox Chicago position (well represented in the writings of Robert Bork) had crystallized: only explicit price fixing and very large horizontal mergers (mergers to monopoly) were worthy of serious concern."

The influence of the Chicago version of the law and economics movement grew, and even gained converts from prominent adherents to the old paradigm, despite cogent criticism from both within the economics profession and from those who disagreed with either the assumptions or values espoused by the Chicago

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80 See EISNER, supra note 30, at 103-07.
81 Posner, supra note 73, at 933.
82 Key Chicago school figures such as William Baxter and George Stigler had at one time taken positions more aligned with the older SCP paradigm. In addition, key SCP adherents such as Donald Turner and Leonard Weiss muted or modified their positions on key issues to accommodate the growing influence of the Chicago school. See EISNER, supra note 30, at 109-10 & n.40, 126; Posner, supra note 73, at 944 (arguing for convergence of so-called Harvard and Chicago schools of analysis).
83 See, e.g., Richard S. Markovits, A Basic Structure for Microeconomic Policy Analysis in our Worse-Than-Second-Best World: A Proposal and Critique Approach to the Study of Law and Economics, 1975 WIs. L. REV. 950, 953 (criticizing the Chicago school's emphasis on allocative efficiency at the expense of income redistribution goals); Richard S. Markovits, A Constructive Critique of the Traditional Definition and Use of the Concept of "The Effect of a Choice on Allocative Efficiency": Why the Kaldor-Hicks Test, the Coase Theorem, and Virtually All Law & Economics Welfare Arguments are Wrong, 1993 U. ILL. L. REV. 485, 485 (criticizing the economists' definition of a choice on allocative efficiency as tending to preserve the status quo); Richard S. Markovits, Some Preliminary Notes on the American Antitrust Laws' Economic Tests of Legality, 27 STAN. L. REV. 841, 844-50 (1975) (arguing that antitrust economic tests, including the actual price/actual marginal cost of product test, are ambiguous, arbitrary, or non-comprehensive); Richard S. Markovits, Economists and Self-Deception: A Critique of Law & Economics Scholarship and Scholars (unpublished manuscript on file with author). See generally Hovenkamp, supra note 45, at 255-60 (approving of Chicago school analysis, but noting that the neoclassical efficiency model cannot predict the consequences of real world behavior).
school. It reached its high point in terms of antitrust enforcement policy during the Reagan administration with the appointment of prominent Chicago school scholars and followers as heads of both the Antitrust Division and the FTC as well as the appointment of many leaders of the Chicago school to the federal appellate courts. The Chicago school became the orthodoxy being spread in numerous courts, law schools, and ongoing symposia.

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84 See, e.g., Eleanor M. Fox, The Battle for the Soul of Antitrust, 75 CAL. L. REV. 917, 918 (1987) [hereinafter Fox, Battle] (highlighting the benefits of the “New Coalition” school of antitrust analysis, advocated by Professor Sullivan, which takes into account real world evidence and history over the Chicago school approach); Eleanor M. Fox, Consumers Beware Chicago, 84 MICH. L. REV. 1714, 1718 (1986) [hereinafter Fox, Beware Chicago] (arguing that the Chicago school’s worldview would defeat antitrust law altogether); Eleanor M. Fox, The Modernization of Antitrust: A New Equilibrium, 66 CORNELL L. REV. 1140, 1140 (1981) [hereinafter Fox, New Equilibrium] (redefining the antitrust goal of efficiency to mean protecting consumer interests through competition and encouraging “smallness for its own sake”); Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 65, 69-70 (1982) (opining that Congress passed the antitrust laws to advance the goal of wealth redistribution by preventing unfair acquisition of consumer wealth by firms with market power); Robert Pitofsky, In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing, 71 GEO. L.J. 1487, 1488 (1983) (arguing that the Supreme Court’s per se rule towards vertical price-fixing arrangements is justified because minimum vertical price-fixing leads to higher resale prices); Robert Pitofsky, The Political Content of Antitrust, 127 U. PA. L. REV. 1051, 1051 (1979) (arguing that antitrust analysis should include relevant political concerns, including a desire to enhance individual and business freedom by discouraging concentration of power and a concern whether economic theory alone will reduce concentration); Lawrence A. Sullivan, Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?, 125 U. PA. L. REV. 1214, 1214 (1979) (arguing that economic theory has limited application and that antitrust legal scholarship should incorporate the teachings of other disciplines, including history, philosophy, and the social sciences).

85 William Baxter was a prominent law and economics antitrust scholar at Stanford Law School and a vigorous advocate of the Chicago school prior to his appointment, although he was a convert from the earlier dominant Structure-Conduct-Performance paradigm. See supra note 82.

86 James Miller was an economist sympathetic to Chicago school economics. He received his Ph.D from the University of Virginia, and prior to his appointment as chairman of the FTC had served in prominent economic policy positions under the Ford administration and had been a resident scholar at the American Enterprise Institute. He was the first economist to serve on the Commission itself and the first non-lawyer in thirty years. See EISNER, supra note 30, at 213 (discussing James Miller’s goal to fully integrate law and economics into antitrust policy during his tenure as chairman of the FTC).

87 These appointments included Richard Posner and Frank Easterbrook to the Seventh Circuit, Ralph Winter to the Second Circuit, and Robert Bork and Douglas Ginsburg to the D.C. Circuit. Both Bork and Ginsburg were subsequently unsuccessfully nominated for the United States Supreme Court as well.

88 For example, Henry Manne, the former dean of the George Mason University Law School, organized an ongoing series of law and economics symposia to train law professors, judges, and policy makers in this discourse. See Symposium, The Legacy of Henry G. Manne: Pioneer in Law and Economics and Innovator in Legal Education, 50 CASE W. RES. L. REV. 203-466 (1999) (celebrating the whole of Henry Manne’s contribution to scholarship and to education). See also Kovacic & Shapiro, supra note 45, at 38 (noting institutional entrenchment of law and economics movement in law schools, the judiciary, and government agencies).
Much of the impact of this flip in the discourse would not have occurred but for institutional changes in the organization of both the Antitrust Division and the FTC that occurred prior to the Reagan Administration. During the period roughly from 1960 to 1980 for the Antitrust Division, and from 1970 to 1980 at the FTC, the influence of economists within these organizations was greatly enhanced. As Professor Marc Eisner and others have discussed, both agencies dramatically upgraded the resources and prestige associated with the role of economists.\textsuperscript{89} The particular economic theories associated with the Chicago school could thus take root so thoroughly and quickly within the agencies because economic theory and economists already had established an institutional presence and had been integrated into the policy process.\textsuperscript{90}

\textbf{D. Post-Chicago: It's Still the Economics that Matters}

Despite the dominance of the Chicago school model, particularly on the enforcement decisions of the Reagan administration, undercurrents of other discourses still remained in the mix. Regardless of the eclecticism of these voices, and the growing strength of the post-Chicago movements, the debate remained whether, and what types of, economics should be used without much thought as to what business theory could add to the mix.\textsuperscript{91} The dominant discourse to emerge to contest the Chicago school paradigm has been dubbed the post-Chicago school. Beginning in the mid-1980s, a group of lawyers and economists began to advocate what they considered a new brand of analysis, which was economic in nature but more empirical, less static, less reductivist, and more sympathetic to enforcement actions by both government and private plaintiffs.\textsuperscript{92}

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\item \textit{During this period there is no known equivalent effort espousing either an alternative economic, or non-economic, view of antitrust.}
\item \textit{See Eisner, supra note 30, at 15-18; Weaver, supra note 37, at 130-36 (discussing upgrading of economics in Division during the leadership of Donald Turner and the resentful reaction of legal staff).}
\item \textit{See Eisner, supra note 30, at 18, 184-227 (describing the integration of economics into the structure and policy of the antitrust agencies which was partially responsible for the conservative enforcement agenda in the 1980s). For example, the FTC stopped bringing vertical restraint cases in 1979, prior to the election of President Reagan. Id. at 223.}
\item This was unfortunate, but perhaps, inevitable given the strong association between the Chicago school prescriptions, classical notions of laissez faire, and the interests of the business community.
\item The early wave of the post-Chicago scholarship relating to raising rivals costs is summarized and discussed in Hovenkamp, supra note 45, at 274-80. Later symposia both describ-}
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Prominent voices in the post-Chicago school have included Steven Salop who has pioneered on his own, and with others, the theory of raising rivals' costs that has proved influential in both the literature and agency enforcement policy in recent years. Oliver Williamson has focused on various forms of strategic behavior that the Chicago school ignored as either efficient or competitively benign. A variety of other commentators have rein-

See Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 YALE L.J. 209, 214 (1986) (suggesting a unified standard to assess exclusionary conduct, including raising rivals' costs); Thomas G. Krattenmaker et al., Monopoly Power and Market Power in Antitrust Law, 76 GEO. L.J. 241, 263-64 (1987) (arguing that the presence of either of the two types of anticompetitive economic power, raising one's own prices and raising competitors' costs, should suffice for a violation); Michael H. Riordan & Steven C. Salop, Evaluating Vertical Mergers: A Post-Chicago Approach, 63 ANTITRUST L.J. 513, 519 (1995) (noting that vertical mergers may be anticompetitive because they raise rivals' costs); Steven C. Salop, Exclusionary Vertical Restraints: Has Economics Mattered?, 83 AM. ECON. REV. 168, 168 (1992) (special issue) (describing the general acceptance of economic theory among judges, but noting that courts often restrict their engagement with the theories and as a result the legal conclusions drawn are overbroad); Steven C. Salop, The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium, 68 ANTITRUST L.J. 187, 187-88 (2000) (analyzing the Kodak decision based on the competitive effects of the conduct at issue); Steven C. Salop & David T. Scheffman, Raising Rivals' Costs, 73 AM. ECON. REV. 267, 267 (1983) (special issue) (opining that exclusionary practices, scale economies, and entry barriers may be more effective and more dangerous than predatory pricing); Steven C. Salop, Strategic Entry Deterrence, 69 AM. ECON. REV. 335, 335 (1979) (special issue) (analyzing strategic barriers to entry that result from a fundamental asymmetry between an established firm and potential entrant).

See Oliver E. Williamson, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 258-61 (1975) (analyzing vertical integration, conglomeration, dominant firms and oligopoly under a theory of organizational hierarchies); Oliver E. Williamson, Antitrust Enforcement: Where It's Been, Where It's Going, 27 ST. LOUIS U. L.J. 289, 314 (1983) (describing unresolved strategic firm behavior issues, including identifying a firm's incentives to engage in predation); Oliver E. Williamson, Credible Commitments: Using Hostages to Support Exchange, 73 AM. ECON. REV. 519, 536-37 (1983) (explaining that some non-standard contracting practices should not be assumed to produce efficiencies); Oliver E. Williamson, Predatory Pricing: A Strategic and Welfare Analysis, 87 YALE L.J. 284, 286 (1977) (describing an analytical model of strategic motivations of firms to engage in predatory pricing). Williamson is a complicated scholar to analyze in terms of a Chicago/post-Chicago dichotomy since important portions of his work support key insights of the Chicago school about the value and role of efficiency in antitrust. See Oliver E. Williamson, Assessing Contract, 1 J.L. ECON. & ORG. 177, 203 (1985) (efficiency purposes sometimes served by both restraint of trade and
vigorated antitrust economics with a renewed focus on the application of game theory to analyze when certain predatory practices are both rational and likely to injure competition.  Jonathan Baker, Timothy Bresnahan, Daniel Rubinfeld, and others have introduced a new empiricism which has focused on the unilateral effects of mergers and acquisitions and hold forth the possibility of the routine use of viable empirical tools to directly find and measure market power without the need for the old surrogates of defining shares of a relevant market.

At the same time, a group of eclectic voices have focused on non-economic concerns that also achieved greater prominence in the post-Chicago space. These voices include overlapping mem-

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bers of a modern populist wing, a post-modern wing closely related to the critical legal studies movement, a group of new his-

97 See Peter C. Carstensen, The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the "Rule of Reason" in the Restraint of Trade Analysis, 15 RES. L. & ECON. 1, 1-2 (1992) (arguing that the restraints of trade in Chicago Board of Trade were reasonable because "they controlled risks of opportunistic behavior and so were ancillary to a joint, productive venture" between the Board and traders); Peter C. Carstensen, How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing?, 74 IOWA L. REV. 1175, 1217 (1989) [hereinafter Carstensen, Examining History] (arguing that only "complex and specific history of industries" should be used to assess the economic impact of antitrust enforcement); Peter C. Carstensen, Public Policy Toward Bank Mergers: The Case for Concern, 49 OHIO ST. L.J. 1397, 1399 (1989) (opining that interstate bank mergers threaten increased consumer costs); Peter C. Carstensen, Restricting the Power to Promote Competition in Banking: A Foolish Consistency Among the Circuits, 1983 DUKE L.J. 580, 581 (arguing that the Fifth, Eighth and Ninth Circuits' requirement that regulators prove that a merger's anticompetitive effects would make the combination unlawful is too strict); Peter C. Carstensen, A Time to Return to Competition Goals in Banking Policy and Antitrust Enforcement: A Memorandum to the Antitrust Division, 41 ANTITRUST BULL. 489, 492 (1996) (arguing that DOJ should resume rigorous scrutiny of horizontal bank mergers); Fox, Battle, supra note 84, at 918 (advocating for the "New Coalition" in antitrust analysis); Fox, Beware Chicago, supra note 84, at 1718 (criticizing the Chicago school's narrow principals); Eleanor M. Fox, Monopoly and Competition: Tilting the Law Towards a More Competitive Economy, 37 WASH. & LEE L. REV. 49, 51-52 (1980) (describing the recommendations of the National Commission for the Review of the Antitrust Laws); Fox, New Equilibrium, supra note 84, at 1140 (describing antitrust goals of consumer and small business protection); Eleanor M. Fox, The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window, 61 N.Y.U. L. REV. 554, 554 (1986) (arguing that judges and scholars should be aware of the ideological bias in the modern uses of law and economics); Robert H. Lande, Proving the Obvious: The Antitrust Laws were Passed to Protect Consumers (Not Just to Increase Efficiency), 50 HASTINGS L.J. 959, 961 (1999) (arguing from author's article, Wealth Transfers, that Congress' primary intent in passing the antitrust laws was to protect "consumers from paying more as a result of anticompetitive activity"); Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 65 (1982) [hereinafter Lande, Wealth Transfers], reprinted in Wealth Transfers, 50 HASTINGS L.J. 871 (1999); Rudolph J.R. Peritz, Some Realism About Economic Power in a Time of Sectoral Change, 66 ANTITRUST L.J. 247, 252 (1997) (arguing that a company's size and its effects should be analyzed to derive market power).

98 See PERITZ, supra note 4, at 8 (stating that competition policy and arguments are "contestable social and political choices" not resulting from historical, economic or logical necessity); Arthur D. Austin, Antitrust Deconstructed, 22 STETSON L. REV. 1101, 1102-03 (1993) (noting that antitrust has "been deconstructing itself since 1890," and using a deconstructionist device juxtaposing privileged and marginal commentary from the antitrust scholarly community with quotes from major antitrust cases); Arthur D. Austin, Antitrust Reaction to the Merger Wave: The Revolution vs. the Counterrevolution, 66 N.C. L. REV. 931, 959-62 (1988) (arguing that Chicago school economics, the growth of information technology and globalization will render the antimerger doctrine of section 7 of the Clayton Act obsolete); Gary Minda, Antitrust at Century's End, 48 SMU L. REV. 1759, 1781 (1995) (arguing that antitrust's continuing relevance depends on its reinvention for post-industrial world markets); Gary Minda, The Common Law, Labor and Antitrust, 11 INDUS. REL. L.J. 461, 461 (1989) (noting the modern trend toward lax enforcement of antitrust laws and stringent enforcement of labor laws to the detriment of organized labor); Gary Minda, Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine, 41 HASTINGS L.J. 905, 1028 (1990) (arguing that the Noerr-Pennington doctrine allows business interests to "use political expression as a predatory strategy for capturing the benefits of regulation"); Gary Minda, The Law and Metaphor of Boycott, 41 BUFF. L. REV. 807, 812 (1993) (describing "boycott" as a "judicial trope to condemn . . . expressive activity of different groups"); Rudolph J.R. Peritz, A Counter-
toricists, and a group of comparative scholars focused on international and foreign competition systems and the lessons to be learned for the United States. A number of scholars can be clas-
sified in more than one of these groups, illustrating the inclusive nature of the post-Chicago space.

The correctness and utility of these new tools and approaches remain hotly contested. Administrations change, courts remain filled with appointees from prior administrations, and advocates of the Chicago school and older theories continue to press their case. If anything, the intense professional debate about the right type of economics to apply to antitrust issues has tightened the grip of some form of economics as the dominant language of antitrust and made it even more difficult to broaden the language of the discipline and the communities of expertise. What is interesting is that even in the post-Chicago space, business discourse remains marginalized as a myriad of new economic views take cen-


101 See, e.g., Ronald A. Cass & Keith N. Hylton, Antitrust Intent, 74 S. CAL. L. REV. 657 (2000) (proposing that the specific intent standard is required where the cost of false convictions is high relative to those of false acquittals); Andy C.M. Chen & Keith N. Hylton, Procompetitive Theories of Vertical Control, 50 HASTINGS L.J. 573, 577 (1999) (surveying the procompetitive justifications for vertical arrangements to assist the courts under a rule of reason analysis); Malcom B. Coate & A.E. Rodriguez, Pitfalls in Merger Analysis: The Dirty Dozen, 30 N.M. L. REV. 227, 227 (2000) (applying Chicago school analysis to use and misuse of Merger Guidelines); Michael S. Jacobs, An Essay on the Normative Foundations of Antitrust Economics, 74 N.C. L. REV. 219, 219 (1995) (arguing that antitrust policy should focus on the acceptance or rejection of normative, political assumptions and not on the inadequacy of economic data); Michael S. Jacobs, The New Sophistication in Antitrust, 79 MINN. L. REV. 1, 2-3 (1994) (opining that the court’s acceptance of the “sophistication doctrine,” where some firms are thought to possess better tactical information or knowledge, undercuts antitrust’s economic principles); Abbott B. Lipsky, Jr. & J. Gregory Sidak, Essential Facilities, 51 STAN. L. REV. 1187, 1188-89 (1999) (explicitly applying teachings of William Baxter to criticize expansion of the essential facilities theory); Alan J. Meese, Economic Theory, Trader Freedom, and Consumer Welfare: State Oil Co v. Khan and the Continuing Incoherence of Antitrust Doctrine, 84 CORNELL L. REV. 763, 765 (1999) (analyzing the Supreme Court’s recent decision in which it applied advances in economic theory to conclude that maximum resale price maintenance may benefit consumers).
ter stage and vie for predominance.

E. Business Discourse in a Minor Key

Business discourse was marginalized in the antitrust community early on because much of it was devoted to the very overthrow or outright evasion of the core principles of antitrust. For example, around 1914 Arthur Eddy and others pioneered the open competition movement in an attempt to implement otherwise plainly unlawful price-fixing agreements by having businesses exchange and discuss the most minute details of their past, present, and future prices and production so the same market outcomes could be achieved without any formal agreements.102 Later examples of business discourse were used to justify either the repeal or non-enforcement of antitrust, in times of war, economic emergency, or crises of confidence. A typical example of business theory attacking antitrust came in the early 1940s. James Burnham wrote a minor best-seller entitled The Managerial Revolution103 in which he argued that business elites should control the production and distribution of goods acting in concert. Burnham advocated an elite technocratic business community planning and conducting a "rational" economy rather than relying on a disorderly competitive system.104

A later form of business discourse antithetical to the goals of antitrust enforcement came in the 1980s in which a rhetoric of "competitiveness" was used to advocate the restriction or repeal of antitrust statutes or their enforcement. Some of the most prominent public advocates of this position included Malcolm Baldrige and Robert Mosbacher while they served as Secretary of Commerce in the Reagan and Bush Administration.105

102 EDDY, supra note 54. See generally PERITZ, supra note 4, at 102 (ascribing the Supreme Court's growing tolerance for exchange of business information formerly thought to lead to price-fixing to Eddy's theories of cooperative competition).

103 JAMES BURNHAM, THE MANAGERIAL REVOLUTION (1941).

104 See id. at 71-138 (theorizing that business managers acting in concert will control the production and distribution of goods in the rapidly transforming society through their control of state institutions). See also Concentration or Confusion, FORTUNE, Jan. 1943, at 104, 104 (describing war production plan for concentration of industry); L.S. Horner, Volume Without Profit Menaces Business, FORBES, Mar. 15, 1928. at 15, 15 (arguing that price cutting is destructive); H.A. Toulmin, Jr., Is Price Cutting Legal?, FORBES, Nov. 15, 1929, at 40, 44 (arguing that price-cutting is restraint of trade); W. A. Vincent, Shall We Legislate Our Profits?, NATION'S BUS., Apr. 1929, at 123, 126 (arguing that price competition is unethical); E.T. Weir, Does Price Cutting Pay?, FORBES, Feb. 15, 1933, at 7, 7 (arguing that price-cutting involves "destruction . . . of proper earnings for labor and for stockholders").

105 Correspondence from Malcolm Baldrige to Senator John Heinz, Export Trading Com-
In addition to being an implacable foe of the goals of antitrust, most business discourse simply was speaking in another language that neither plaintiffs, defendants, judges, policymakers, nor commentators spoke if they were part of the discipline of antitrust. If the business theorists were saying anything useful, no one in the antitrust world was listening.

To illustrate anecdotally the extent to which business theory has been discounted by the courts, consider a recent non-fiction book, which discusses the lives of the great business thinkers of the twentieth century, in the author’s words “the capitalist philosophers.” Of the thirteen figures discussed, not one has ever been cited or discussed in a published antitrust decision.

There are many interlocking reasons why business discourse has always taken a back seat to economic discourse in the formulation and enforcement of antitrust policy. Historically the modern business school and the accompanying academic business research and discourse is a post-World War II phenomenon, arising after antitrust had already established itself as its own legal discipline and after the antitrust profession already had claimed economics as its special language. Even then, academic business theory was a “fragmented adhocracy” in which there was no accepted hierarchy of what parts of business discourse held the most relevance or which theories in the various sub-specialties had uncontested acceptance. Against this background, there was no single business discourse that an antitrust outsider could readily identify and mas-

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107 See WHITLEY, supra note 5, at xxxi.

108 Id. at xxxii.
ter in an effort to unseat the dominant economic language in antitrust. Much business literature was further highly descriptive, atheoretical, and prone to short-lived fads. In contrast to economics, business theory frequently appeared unscientific, less academic, and less prestigious.109

At the most fundamental level, business discourse simply has never been the language of the community of expertise, the discipline of antitrust.110 The community of expertise has been a blend of lawyers and economists each taking turns dominating the discourse and helping steer to preeminence different legal and economic schools of thought. Business leaders and theorists have never been the players in this community which consists of the present and former officials at the antitrust agencies, a handful of similar staff from Capital Hill, the leaders of the private bar as represented by the leaders of the ABA Section on Antitrust Law,111 and a smaller group of law professors and industrial organization economists.112 Formal business training is relatively rare in this group and access to, and interest in, the cutting edge of business discourse also is rare.113

Business theory requires a different mode of learning as exemplified by the different modes of learning embodied in the case method of business school and the case method of law school.114


110 See EISNER, supra note 30, at 16-18 (discussing professionalism of antitrust enforcement around language and discourse of industrial organization economics); id. at 91-98 (discussing the general theory of communities of expertise and effect on policy process). See generally FOUCAULT, supra note 2, at 92-108 (discussing the nature of discourse in shaping accepted notions of truth).

111 For a discussion of the role of ABA Antitrust Section in shaping the discourse and profession, see Waller, supra note 38, at 1445-46.

112 See EISNER, supra note 30, at 92-99 (describing the groups comprising the antitrust community).

113 The only place in the antitrust community where business people served in prominent positions was the FTC, which has had commissioners with business backgrounds from time to time throughout its history. More often than not, these appointments have coincided with periods of lesser enforcement and lower prestige for the FTC. See William E. Kovacic, The Quality of Appointments and the Capability of the Federal Trade Commission, 49 ADMIN. L. REV. 915, 917 (1997) (discussing the FTC's appointments record, selection criteria, and the impact of appointments on agency performance).

114 For an example of the lengthier, more complex and empirical type of case materials studied in business school, see, e.g., DAVID ARNOLD, THE HANDBOOK OF BRAND MANAGEMENT passim (1992) (discussing effective branding strategies through case study successes); COLLIS & MONTGOMERY, supra note 69 (containing a total of eight business case
Most business discourse poses the additional hurdle of being another voluminous body of literature to digest over and above the demands of legal research and client needs. Much of this work also tends to be more descriptive, less theoretical, and less suited to constructing a single model for analyzing all aspects. Even for the enterprising lawyer willing to tackle this literature, the nature of the discipline and community of expertise would tend to filter out as irrelevant, if not untrue, business discourse which conflicted with the prevailing norms of the discipline of antitrust, whether that be the earlier SCP paradigm, the Chicago school, or the more recent post-Chicago thinking.115

During the ascendancy of the Chicago school, business theory and discourse were particularly devalued. What corporate defendants and their agents actually thought or intended was devalued as either factually or legally irrelevant.116 Documents authored by lower level employees were ignored as mere locker room talk or unauthorized comments by persons not truly speaking for the corporation.117 The significance of even such talk and writings by the true leaders of the corporation was typically dismissed as the es-
sense of hard competition and precisely the type of ruthless attitudes that made markets competitive. As Judge Easterbrook noted in the 1989 A.A. Poultry Farms case:

[f]irms "intend" to do all the business they can, to crush their rivals if they can . . . Rivalry is harsh, and consumers gain the most when firms slash costs to the bone and pare price down to cost, all in pursuit of more business. Few firms price unaware of what they are doing; price reductions are carried out in pursuit of sales, at others' expense. Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it. You cannot be a sensible business executive without understanding the link among prices, your firm's success and other firms' distress. If courts use the vigorous, nasty pursuit of sales as evidence of forbidden "intent," they run the risk of penalizing the motive forces of competition.118

Nowhere was the skepticism more evident than in the restriction of liability for predatory pricing. Rather than being viewed as a plausible business tactic to eliminate or discipline weaker rivals, the rationality and very existence of predatory pricing was challenged on both a theoretical and empirical level.119 Predatory pricing, to the extent it existed, was recharacterized as either procompetitive hard competition, a misguided tactic which could not injure equally efficient rivals, or a short term gift to consumers that could not hurt competition except in the most unusual of circumstances where the predation was both successful and the dominant firm was able to subsequently recoup losses and extract monopoly rents.120 This skepticism was quickly echoed in the courts, which

118 A.A. Poultry, 881 F.2d at 1401-02. See also ANTITRUST LAW DEVELOPMENTS, supra note 116, at 294-96 (collecting cases on the role of intent in predatory pricing cases). But see William S. Comanor & E.H. Frech III, Predatory Pricing and the Meaning of Intent, 38 ANTITRUST BULL. 293 (1993) (arguing for a valid but reformulated role for intent in predatory pricing cases in response to the Rose Acre case). For a general critique of the role of intent in section 2 cases, see Herbert Hovenkamp, The Monopolization Offense, 61 OHIO ST. L.J. 1035, 1038-41 (2000) (stating that the subjective desire to hurt your competition is consistent with lawful competition in most circumstances).

119 Id.

dismissed predatory pricing claims even when prices were proved to be below some relevant measure of cost and the defendants clearly intended to harm their rivals.121

In the wake of the Chicago school onslaught, intent evidence in all areas of antitrust analysis has been devalued, and with it any interest in how business decision makers form their policies. So much so that a recent Ninth Circuit decision rejected most intent evidence as "no value" and a "fruitless inquiry" in all rule of reason cases.122

The Chicago school adherents on the bench and in the agencies during and following the Reagan administration were equally dismissive of a wide variety of strategies that the businesses apparently intended to use to avoid the constraints of aggressive price competition. Regardless of how the corporations viewed their own actions, mergers and vertical restraints were upheld as plausibly procompetitive, efficiency enhancing, output expanding, or necessary to prevent free riding.

Business executives, particularly those who found themselves as actual or potential antitrust defendants, were the only group who had both the interest in, and the mastery of, business theory to challenge the dismissal of their discourse by the Chicago school. But they had little cause for complaint. There was little incentive to battle the prevailing economic norms of antitrust enforcement when the results under the Chicago school analysis, which even if incomplete from a business perspective, were so congenial to business interests.

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121 See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) (holding that Brown & Williamson's alleged pricing scheme was not likely to result in oligopolistic price coordination and sustaining supra-competitive pricing in the relevant cigarette market); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) (holding that Monfort's loss of profits caused by petitioner's lowered prices after its merger with another large beef packer did not constitute antitrust injury); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (holding that the court of appeals erred by failing to consider the absence of a plausible motive for petitioners to engage in predatory pricing); A.A. Poultry, 881 F.2d at 1396 (affirming a judgment n.o.v. for defendant because the jury verdict that defendant anticompetitively under-priced surplus product and injured commercial rivals was not supported by the trial record); MCI Communications Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983) (holding that the jury's award of antitrust damages for predatory pricing was improper because of the use of an improper cost standard and insufficiency of the evidence).

122 California Dental Ass'n v. FTC, 224 F.3d 942, 948 (9th Cir. 2000) (citing 7 PHILLIP E. AREEDA, ANTITRUST LAW § 1506 (1986)).
III. TAKING MODERN BUSINESS DISCOURSE SERIOUSLY

“There remains nothing, therefore, where an absolute superiority is not attainable, but to produce a relative one at the decisive point, by making skillful use of what we have.”

Modern business discourse is replete with numerous lucid discussions of the managerial techniques necessary to successfully achieve durable market power and how good managers can achieve these goals and long-term supra-competitive returns. There is the possibility that the Orthodox Chicago school rejoinder is in fact right and such beliefs, no doubt sincere, are precisely the type of behavior that makes competitive markets possible and negates the very results being sought by aggressive managers.

The prevalence of such theories and the actual behavior of managers and businesses toward these goals do, however, call into question the assumption underlying the Chicago school, and much of price theory itself, namely the rationality of economic actors. Taking the famous Groucho Marx line seriously: “Who are you going to believe, me or your own eyes?” this in turn suggests that the real story of the struggle for market power is a plausible one. Otherwise why would businesses so persistently apply these kinds of techniques? If economic actors are indeed rational, then

123 CARL VON CLAUSEWITZ, ON WAR 197 (J.J. Graham trans., 1966) (1832).

124 See, e.g., Larry Light, Advertising and the Law of Dominance, J. ADVERTISING RES., Aug.–Sept. 1990, at 49 (discussing strategic factors managers can implement in order to become a profitable “market dominant business”). See also supra sources in note 69.

125 See, e.g., Frank H. Easterbrook, Allocating Antitrust Decisionmaking Tasks, 76 GEO. L.J. 305, 307 (1987) (“[M]arkets both undercut successful monopolists and deter putative ones without the help of judges.”); Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1-5 (1984) (explaining the inhospitality tradition of antitrust, in which courts view business practices with suspicion, and arguing that this tradition leads to the condemnation of too many beneficial practices); Frank H. Easterbrook, Monopolization: Past, Present, and Future, 61 ANTITRUST L.J. 99, 102-03 (1992) (“Firms want (intend) to grow; they love to crush their rivals; indeed, these desires are the wellsprings of rivalry and the source of enormous benefit for consumers . . . . the same elements of greed appear whether the entrepreneur wants to please customers or stifle rivals.”); Hovenkamp, supra note 118, at 1039-40 (“[I]n most circumstances involving monopoly, the ‘intent’ to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively.”). Cf. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984) where the Supreme Court noted:

It is not enough that a single firm appears to “restrain trade” unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster.

such goals must be plausible, or least under certain circumstances, or rational managers would have abandoned them for other techniques to further their own interests at the expense of the corporation, or for a simpler life as a price-taker in competitive commodity-type markets.

There is a common language of business, which revolves around the conscious pursuit and exploitation of market power. This language is taught consistently at the top business schools and is the common curriculum and vocabulary of the business leaders and their advisers with this background just as torts, contracts, property, civil property, criminal law, and constitutional law form and shape the common vocabulary of those of us with legal training.

Managers learn techniques related to the acquisition and maintenance of durable market power from virtually their first day in business school. A survey of the traditionally highly ranked schools offering a Masters in Business Administration ("MBA") or its equivalent shows an extraordinarily consistent pattern of first year required courses. While course titles and labels frequently are different the contents are not. Quantitative skills such as accounting, statistics, financial analysis, and economic theory are a consistent part of the package as are courses best described as organizational behavior and design. More relevant to antitrust

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127 The indoctrination in the language of business in all likelihood begins even earlier in both undergraduate business programs and the common two year work experience in the business sector which is either the formal or informal apprenticeship to many MBA programs.

128 The author reviewed the first year curriculum of schools ranked in the top twenty by either Business Week or U.S. News and World Report for 1999 solely for the purpose of determining which required courses are consistently offered at the vast majority of graduate business programs. The top twenty schools from Business Week were, in rank order, University of Pennsylvania, Northwestern University, University of Chicago, University of Michigan, Harvard, Columbia, Duke, Cornell, Stanford, Dartmouth, University of Virginia, UCLA, NYU, Carnegie Mellon, MIT, UC Berkeley, Washington University, University of Texas, UNC, and Yale. See Business Week On-Line, B-School Rankings & Profiles 99 Update, Dec. 1999, at (last visited Oct. 25, 2001). The top twenty according to U.S. News and World Report for 1999 were, in rank order, Harvard, Stanford, University of Pennsylvania, MIT, Northwestern, Columbia, University of Chicago, Duke, University of Michigan, UC Berkeley, Dartmouth, UCLA, University of Virginia, NYU, Cornell, University of Texas, UNC, Carnegie Mellon and Indiana University. See U.S. NEWS & WORLD REP., April 10, 2000, at 68. The only practical difference for this study was that Indiana University appears in the U.S. News top twenty and Washington University appears in the Business Week top twenty. Otherwise all other schools appear on both lists although differently ranked for the most part.

129 For the most part, these required courses are introductory or intermediate micro- and macroeconomic theory courses. While the macroeconomic curriculum would have little application to antitrust principles, the inclusion of microeconomics does bear the possibility of serious cognitive dissonance in learning both the self-defeating nature of market power and at the same time the tools to achieve lasting market power.
purposes are the consistent inclusion of courses dealing with competitive strategy and marketing, both of which are premised on the ability of a well-managed firm to obtain lasting market power.

A. Strategic Planning

"Strategy is the great Work of the organization. In Situations of life or death, it is the Tao of survival or extinction. Its study cannot be neglected."

The most common technique by which managers seek (and claim to achieve) that which the Chicago school claims is impossible is through a process of strategic planning. The current preeminent theorist of strategic planning is Michael Porter, a professor at the Harvard Business School. Porter's work is particularly significant because he was trained as an industrial organization economist but has chosen over the past twenty years to speak directly to a business audience in its own discourse and not his own. As Porter has noted:

The study of competition, in its full richness, has preoccupied me for two decades. While trained as an economist and steeped in the discipline of economic reasoning, I have sought to capture the complexity of what actually happens in companies and industries in a way that both advances theory and brings that theory to life for practitioners.

130 Competitive strategy courses are part of the first year curriculum at Penn, Northwestern, Michigan, Harvard, Columbia, Stanford, Virginia, UCLA, NYU, MIT, Washington University, UNC, and Yale. At Duke, this is a required course in the second year. Competitive Strategy is an elective at UC Berkeley and Texas. It is impossible to determine from publicly available material whether or not such material is part of the required first year at Chicago, Cornell, Dartmouth, Carnegie Mellon and Indiana.

131 Marketing courses are part of the required curriculum at each of these schools except for the following: At the University of Chicago marketing is part of a group of six courses from which the students must select four during their first year; at Carnegie Mellon it is part of a group of 3 courses from which the students must select one during their first year; it is an elective at MIT; and it is impossible to determine from the publicly available materials whether or not marketing is a required first year course at Cornell.


134 MICHAEL E. PORTER, ON COMPETITION 1-2 (1998). In contrast, a variety of prominent
Porter's classic work *Competitive Strategy* begins with the proposition that "every firm competing in an industry has a competitive strategy, whether explicit or implicit." In Porter's words: "This book presents a comprehensive framework of analytical techniques to help a firm analyze its industry as a whole and predict the industry's future evolution, to understand its competitors and its own position, and to translate this analysis into a competitive strategy for a particular business."

Porter offers a widely adopted five-factor framework for determining the appropriate strategy for achieving competitive advantage. As set forth in the diagram below, Porter identifies the rivalry among existing firms, as well as the threat of new entrants, the threat of substitute products or services, the bargaining power of buyers, and the bargaining power of suppliers as the principal factors determining the state of competition and profitability. The goal of competitive strategy for Porter is for a firm "to find a position in an industry where it can best defend itself against these competitive forces or to influence them in its favor." Firms do this by positioning themselves so that existing capabilities best defend against the current array of competitive forces, influence the balance of forces though strategic moves, and/or anticipate shifts in the factors underlying the forces and respond to them.

How firms do this illustrates how far business theorists like Porter have moved away from the key assumptions of price theorists and the orthodox thinking in Chicago school law and economics antitrust analysis. Porter argues that entry and mobility barriers

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legal and economic scholars have addressed business strategy, but have done so through the lens of post-Chicago economics. See Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2249 (2000) ("Modern theory is critically needed because proof of predatory pricing under recent Supreme Court decisions requires a showing that the alleged predation is economically rational, which is precisely what the newer theory demonstrates."); Shapiro, *supra* note 95, at 125 ("My aim here is to provide one participant's view of what industrial organization economists have learned from the recent theoretical research and where the field of industrial organization should go during the 1990s.").


137 *Id.* at xiv.

138 *Id.* at 4.

139 *Id.* at 29-31.
are important and sets out a series of road maps as to how to achieve such barriers to diminish the intensity of existing rivalries, the likelihood of new entry, and the pressures exerted by customers and suppliers.\textsuperscript{140} Price competition is not a preferred strategy because it is not a long-term strategy that can be pursued without imitation and industry-wide damage to profitability.\textsuperscript{141}

\begin{align*}
\text{Threat of} \\
\text{New Entrants} \\
\text{Bargaining} \\
\text{Power of} \\
\text{Suppliers} \\
\text{The Industry} \\
\text{Jockeying for Position} \\
\text{Among Current} \\
\text{Competition} \\
\text{Bargaining} \\
\text{Power of} \\
\text{Customers} \\
\text{Threat of Substitute} \\
\text{Products or Services}\textsuperscript{142}
\end{align*}

In \textit{Competitive Strategy}, and his later book, \textit{Competitive Advantage}, Porter identifies three basic sources of long-term advantage for a firm competing in any given market.\textsuperscript{143} First, he discusses long-run competitive advantage stemming from becoming a unique low cost provider of a good or service.\textsuperscript{144} Second, he identifies similar competitive advantage flowing from selling a differentiated product or service and charging a higher price than the

\textsuperscript{140} \textit{See id.} at 110-55 (developing a strategy toward buyers and suppliers and explaining the differences in the performance of firms in the same industry).

\textsuperscript{141} \textit{See PORTER, COMPETITIVE ADVANTAGE, supra} note 135, at 20-22 (arguing that a strategy based solely on cost can "lead all firms in an industry to pursue the same type of competitive advantage in the same way—with predictably disastrous results"); \textit{id.} at 97 ("The strategic value of cost advantage hinges on sustainability."); \textit{PORTER, COMPETITIVE STRATEGY, supra} note 135, at 17 ("Some forms of competition, notably price competition, are highly unstable and quite likely to leave the entire industry worse off from the standpoint of profitability.")

\textsuperscript{142} \textit{PORTER, ON COMPETITION, supra} note 135, at 22; \textit{PORTER, COMPETITIVE STRATEGY, supra} note 135, at 4.

\textsuperscript{143} \textit{PORTER, COMPETITIVE ADVANTAGE, supra} note 135, at 11-16; \textit{PORTER, COMPETITIVE STRATEGY, supra} note 135, at 34-46. Porter cautions that a producer must watch out for things such as a lack of strategic choice, being caught in the middle, and repeatedly changing between strategies, all of which are likely to lead to very poor performance and a position of competitive disadvantage. \textit{See PORTER, COMPETITIVE ADVANTAGE, supra} note 135, at 16 ("A firm that engages in each generic strategy but fails to achieve any of them is 'stuck in the middle.' It possesses no competitive advantage.")

\textsuperscript{144} \textit{PORTER, COMPETITIVE STRATEGY, supra} note 135, at 41-44 (claiming that a failure to develop one of the three generic strategies leaves a firm in a poor strategic position).

\textsuperscript{14} \textit{See PORTER, COMPETITIVE ADVANTAGE, supra} note 135, at 12-14, 62-118; \textit{PORTER, COMPETITIVE STRATEGY, supra} note 135, at 35-37.
competition. Finally, he offers what he calls focus as the final generic strategy, "select[ing] a segment or groups of segments in the industry and tailor[ing] its strategy to service[e] them to the exclusion of others."146

Differentiation is the preferred strategy since it leads to the greatest likelihood that a sustainable competitive advantage can be generated, and avoid the transitory gains and long-term losses associated with price competition.147 Successful differentiation is sustainable through the creation of various types of entry barriers, mobility barriers, and switching costs, which combine to prevent easy duplication by competitors or substitution by buyers.148 Seeking competitive advantage through being the low-cost provider can be problematic, unless there are special circumstances that permit the firm to achieve a significant lasting advantage that cannot be duplicated by existing or potential competitors and not challengeable through general price competition.149

Porter's preference for differentiation as a strategy to achieve sustainable comparative advantage and the accompanying price premium is perhaps best illustrated in his discussion of "good" competitors versus "bad" competitors.150 Good competitors can reinforce desirable industry characteristics and, under the right circumstances, act as barriers to entry and mobility preserving the comparative advantage of leading firms.151 In contrast, bad competitors will undermine existing industry structure, seek to obtain market share through price competition, and contribute to the

145 See PORTER, COMPETITIVE ADVANTAGE, supra note 135, at 14, 120-63; PORTER, COMPETITIVE STRATEGY, supra note 135, at 37-38.
146 PORTER, COMPETITIVE ADVANTAGE, supra note 135, at 15. As Porter acknowledges, a focus strategy is really a combination of the first two strategies in terms of serving a narrow market target. See PORTER, COMPETITIVE STRATEGY, supra note 135, at 38-39 ("Even though the focus strategy does not achieve low cost or differentiation from the perspective of the market as a whole, it does achieve one or both of these positions vis-à-vis its narrow market target.").
147 See PORTER, COMPETITIVE ADVANTAGE, supra note 135, at 7 (discussing the growth of generic cigarettes and the undermining of industry differentiation strategy); id. at 120 (discussing the superiority of differentiation as strategy); id. at 121 (discussing the possibility of differentiating even a commodity product where prior competition was based on price); id. at 311 (discussing how redefining competition away from price can deter substitution).
148 See id. at 158-59, 311 (discussing the reconfiguration of a value chain in order to achieve the positive results of differentiation).
149 See PORTER, COMPETITIVE ADVANTAGE, supra note 135, at 13 (discussing competing away gains from being a low cost producer through price competition); PORTER, COMPETITIVE STRATEGY, supra note 135, at 36-37, 45-46 (discussing the pros and cons of a low-cost position and how to achieve one).
150 PORTER, COMPETITIVE ADVANTAGE, supra note 135, at 201-28.
151 See id. at 208 ("A good competitor can reinforce desirable aspects of industry structure or promote structural change that improves the attractiveness of the industry.").
commodification of the industry.152

Porter lays out a veritable roadmap of how to build and increase entry barriers, mobility barriers, and switching costs to maintain competitive advantage in the face of a strategic challenge from another firm.153 In his catalogue of strategies for raising structural barriers, decreasing expected retaliation, and lowering the inducement for attack, he continues to emphasize differentiation, and downplay price competition, as the most effective strategy for obtaining a sustainable competitive advantage. He tellingly states: "Any fool can cut the price, goes the old maxim, and a firm often hurts itself more than the challenger in defending in this way."154

David Aaker also argues that sustainable competitive advantages are crucial to long-term success and available based on organizational assets and competencies.155 Aaker agrees with Porter's three sources of sustainable competitive advantage, but also adds preemptive moves and synergy as additional sources of sustainable competitive advantage.156

Most, but not all, business professors agree in general terms with the thrust of Porter and Aaker's work.157 Many offer different advice for the formulation and implementation of strategic planning, but share a broad consensus on the achievability of long-term competitive advantage for a successfully run business.158 All re-

152 See id. at 214, 217 (discussing the entry of oil companies into the chemical and fertilizer business and the destruction of differentiation through price competition).
153 See id. at 482-512 (outlining a defensive strategy for firms to implement in order to protect themselves from competitor attacks).
154 Id. at 501.
155 AAKER, STRATEGIC MARKET MANAGEMENT, supra note 69, at 141-202.
156 See id. at 7 (claiming that three strategies "are frequently strategically important and are not easily covered by the umbrella of differentiation and low cost—namely, focus, preemptive moves, and synergy").
157 See, e.g., ROBERT M. GRANT, CONTEMPORARY STRATEGY ANALYSIS supra note 69, at 41, 80-84, 173-228 (2d ed. 1995) (adopting Porter's analysis, but offering a limited critique of the model's failure to account for dynamic competition and contribution of game theory). But see HENRY MINTZBERG, THE RISE AND FALL OF STRATEGIC PLANNING (1994) (discussing the fallacy in believing in the ability to plan for the future based on the trends of the past and the state of the present).
fute the explicit premise that markets are inherently competitive and that firms are merely price takers, regardless of the strategies they employ.

B. Marketing and Brand Management

Professor Gregory T. Gundlach, a business professor with both law and business degrees, has written how marketing complements and extends both the Chicago and the pre- and post-Chicago economic schools. As Gundlach has noted: “Marketing differs, however, from an economic perspective mainly through the level of analysis at which it studies exchange. Marketing focuses on the individual behavior of participants versus how such individuals might behave in the aggregate.” Most marketing studies assume that both sunk costs and imperfect information are present to a significant degree and focuses on the needs and wants of different segments of consumers each with varying needs and degrees of rationality. It fundamentally examines the process of exchange from the point of view of economics as well as sociology, psychology, anthropology, and biology. Unlike the Chicago school, marketing as a discipline views market power and barriers to entry as omnipresent. It is thus highly empirical and individualistic in analyzing the operation of a particular market.

Brand management is similarly devoted to a study of the techniques that managers can use to differentiate their products and charge higher prices or obtain other competitive advantages over the unbranded, or less successfully branded, competing products. Selling a commodity type product is an anathema, because


160 Gundlach, Choice, supra note 159, at 528.

161 See Gundlach, Marketing, supra note 159, at 44 (“Under the post-Chicago school, some of the assumptions underlying perfectly competitive markets are relaxed to take into account various market imperfections and other forces that alter market outcomes.”).

162 See, e.g., id. at 40 (describing antitrust as an interdisciplinary field involving “wider application of theories from other disciplines to antitrust policy development” and employing “additional empirical methodologies in antitrust adjudication”).

163 See, e.g., id. at 42-43 (discussing marketing’s extension of the post-Chicago perspective because both consider non-price benefits).

price competition is the only available strategy for such products and the ability to obtain a sustainable competitive advantage nearly impossible.\textsuperscript{165}

For example, Gillette was anxious to exit, or de-emphasize, the market for disposable razors, despite having a dominant position, since it viewed this segment as strictly a commodity market involving competition based only on price. They devised a new branded higher-quality higher-margin razor, the Sensor, to instead compete on the basis of quality, brand name, and customer loyalty.\textsuperscript{166}

The greatest possible marketing triumph is turning a commod-

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\textsuperscript{165} See \textsc{David A. Aaker}, \textit{Managing Brand Equity}, 8, 11 (1991) [hereinafter \textsc{Aaker}, \textit{Managing Brand Equity}]; \textsc{Grant}, \textit{supra} note 157, at 208 (discussing the superiority of differentiation over cost advantage as a strategy); \textsc{Kevin Lane Keller}, \textit{Strategic Brand Management: Building, Measuring, and Managing Brand Equity}, 4, 9 (1998) (discussing how product differentiation is the goal of brand management that has the non-price advantages of successful branding including: brand loyalty, barriers to entry, and the creation of transferable legal property).

Product differentiation is an important entry barrier and limit to price competition. It is also discussed extensively in the strategic planning literature. See, \textit{e.g.}, \textsc{Porter, Competitive Strategy}, \textit{supra} note 135, at 9 ("Differentiation creates a barrier to entry by forcing entrants to spend heavily to overcome existing customer loyalties.").

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\textsuperscript{166} See \textsc{Vishwanath & Mark}, \textit{Supra} note 165, at 169, 176 ("Gillette successfully made consumers 'trade up' to a new spending level—and a new set of performance expectations."); \textsc{Richard E.S. Boulton et al.}, \textit{Managing Risk in an Uncertain World}, \textit{Upside}, June, 2000, at 269, 274-76 (praising Gillette's strategy as a proper means to manage risk).
ity type product into a true brand. One example is Perrier’s ability to turn essentially fungible natural spring water into a branded beverage with customer loyalty and a substantial price premium over the costs of the ingredients. \(^\text{167}\) Other examples of commodity products that have been successfully branded allowing both substantial product differentiation and premium pricing include Perdue chickens, Chiquita bananas, and Nutrasweet which has acquired and maintained high brand loyalty and brand equity \(^\text{168}\) with a once-patented sugar substitute which has long since entered the public domain. \(^\text{169}\)

Branding is nearly everything to the modern manager. The brand may be the most valuable asset of a company. \(^\text{170}\) In the case of many high tech and dot-com companies the brand may well be the only present valuable asset of the firm. \(^\text{171}\) Recent books in the popular business press have extended this analysis in applying brand management to people and not just products. \(^\text{172}\) The success of such instantly recognizable personal brands as Oprah, Sting, and

\(^{167}\) See De Chernatony & McDonald, supra note 164, at 10. Conversely, the authors bemoan the fate of the British “fruit-squash drink” which moved in the opposite direction from having a number of strong brands competing on non-price terms to a commodity market dominated by price competition and private label goods. \(\text{Id.}\)

\(^{168}\) See infra notes 176-77 and accompanying text for a discussion of the concept of brand equity.

\(^{169}\) See Aaker, Managing Brand Equity, supra note 165, at 20. See also Biddle, supra note 165 (describing successful branding of the otherwise commodity product of feathers for down products).


\(^{171}\) See, e.g., Kurt Badenhausen, Brandwagon, Forbes, June 12, 2000, at 60 (reporting results of over 100,000 surveys of which brands are on upswing or downswing and stating that “[i]n the postindustrial age intangibles are everything”); Magazines: Branding in the Information Age, N.Y. Times, Oct. 16, 2000, in Advertising Supp.; Floyd Norris, Seeking Ways to Value Intangible Assets, N.Y. Times, May 22, 2001, at C2 (noting that investors need information about the value of intangible assets, such as brand names); Al Ries & Laura Ries, The Hazards of Corporate Vanity, Upside, June 2000, at 252 (discussing eleven so-called immutable laws of internet branding).

\(^{172}\) See Steedman Graham, Build Your Own Life Brand! A Powerful Strategy to Maximize Your Potential and Enhance Your Value for Ultimate Achievement (2001) (describing how to create unique personal images, or “brands,” to help enhance lives); Tom Peters, Reinventing Work: The Brand You 50 or: Fifty Ways to Transform Yourself from an “Employee” Into a Brand That Shouts Distinction, Commitment, and Passion! (1999) (describing ways to improve personal image). See also De Chernatony & McDonald, supra note 164, at 9-10 (noting that branding applies to products, people, places, and companies).
Martha (Stewart) and the value of the businesses bearing their names suggests this is less far-fetched than may seem at first glance.\(^{173}\) The ubiquity of brands has spread to the non-profit world as well in which the association of celebrities with charitable fund raising in the medical research field has been referred to as the "branding" of diseases.\(^{174}\) At a more grandiose level, the historian Daniel Boorstin has observed that brands serve the function that fraternal, religious and service organizations used to serve to help define who people are and help them communicate that definition to others.\(^{175}\)

The business community uses the term "brand equity" to describe the marketing effects uniquely attributable to the brand or, in other terms, the value added versus having no brand associated with the product or service.\(^{176}\) As David Aaker has stated in slightly different terms: "[I]t is a set of assets, such as name awareness, loyal customers, perceived quality, and associations ... that are linked to the brand (its name and symbol) and add (or sub-

\(^{173}\) See Richard Sandomir, *Russell Redux: A Private Man Bursts Back into the Public Eye*, N.Y. TIMES, June 14, 2000, at D3 (discussing renewed marketing effort of ex-Boston Celtic basketball great Bill Russell in terms of revival of Russell "brand"); Gary M. Stern, *Brand Yourself, AM. WAY*, Oct. 1, 2000, at 126 (stating that "as business intensifies and competition heats up, individuals ... are using the power of personal branding to make themselves stand out"); Gary Trudeau, *Doonesbury*, CHI. TRIB., Nov. 3, 2000, § 5, at 6 (featuring fictional third party presidential candidate Uncle Duke stating, "I didn't even have a last name, much less a fancy branded one like Gore or Bush").


\(^{176}\) See AAKER, MANAGING BRAND EQUITY, supra note 165, at 15-16 (defining brand equity as "a set of brand assets and liabilities linked to a brand, its name and symbol, that add to or subtract from the value provided by a product or service to a firm and/or to that firm's customers"); ARNOLD, supra note 114, at 5-6 (noting that companies are increasingly viewing brand equity as a tangible asset); DE CHERNATONY & MCDONALD, supra note 164, at 396-97 (defining brand equity as "the differential attributes underpinning a brand which give increased value to the firm's balance sheet"); KELLER, supra note 164, at xvii (stating that "brand equity represents the added value endowed to a product as a result of past investments in the marketing activity for a brand"); John A. Quelch & David Harding, *Brands Versus Private Labels: Fighting to Win*, in HARVARD BUSINESS REVIEW ON BRAND MANAGEMENT 23, 39 (5th ed. 1999) (defining brand equity as "the added value that a brand name gives to the underlying product"). Cf. KELVIN LANCASTER, CONSUMER DEMAND: A NEW APPROACH (1971) (developing concept of hedonic price analysis in order to estimate price advantage that differentiation strategy will support). For a discussion of the differing ways to value brands and balance sheet treatment of brand equity, see AAKER, MANAGING BRAND EQUITY, supra note 165, at 21-30; ARNOLD, supra note 114, at 211-26; DE CHERNATONY & MCDONALD, supra note 164, at 413-18.
tract) value to the product or service being offered."\(^{177}\)

Branding is viewed as a source of a price premium or at least the ability to make a successfully branded item less price sensitive than its competitors.\(^{178}\) The concept of brand equity as a price premium is illustrated as simply as Intel’s periodic surveys to determine how much discount would a potential customer require before being willing to accept a personal computer without “Intel Inside.”\(^{179}\)

This segment of business discourse shares much with the SCP paradigm in identifying branding and product differentiation as a source of durable market power,\(^{180}\) an insight sharply contested by the Chicago school.\(^{181}\) More generally, brand management conveys a point of view nearly one hundred eighty degrees opposite of any version of industrial organization economics about how firms acquire and maintain a dominant market position. As two business commentators recently noted:

- The issue in branding . . . always boils down to the same thing: product vs. perception.

- Managers believe it’s only necessary to deliver a better product or service to win. But brands like Coca-Cola, Hertz, Budweiser and Goodyear are strong not because they have the best product or service (although they might have), but because they are market leaders that dominate their categories.

\(^{177}\) AAKER, MANAGING BRAND EQUITY, supra note 165, at 4.

\(^{178}\) DE CHERNATONY & MCDONALD, supra note 164, at 408. See also Saul Hansell, AOL Raising Monthly Rate 9%; A Rival May Follow Suit, N.Y. TIMES, May 23, 2001, at C12 (noting that AOL is able to raise its price without adding new features because people recognize AOL as a “premium brand”).

\(^{179}\) DE CHERNATONY & MCDONALD, supra note 164, at 408.

\(^{180}\) See AAKER, MANAGING BRAND EQUITY, supra note 165, at 275 (noting that “the brand name and what it means combine to become the pivotal sustainable competitive advantage that firms have”); AAKER, STRATEGIC MARKET MANAGEMENT, supra note 69, at 172 (“Another way to differentiate is to build strong brands, to create brand equity. A strategy based on strong brands is likely to be sustainable because it creates competitive barriers.”); ARNOLD, supra note 114, at 1 (noting that a strong brand can deliver sustainable comparative advantage); Erich Joachimsthaler & David A. Aaker, Building Brands Without Mass Media, in HARVARD BUSINESS REVIEW ON BRAND MANAGEMENT 1, 20-21 (5th ed. 1999) (citing in-house media capability as a source of sustainable competitive advantage representing a significant barrier to competition).

\(^{181}\) See, e.g., Posner, supra note 73, at 930-31 (arguing that rational consumers will pay for advertising only if it reduces the overall cost of the product).
• Which scenario seems more likely, A or B?

➢ Scenario A: A company creates a better product or service and consequently achieves market leadership.

➢ Scenario B: A company achieves market leadership (usually by being first in a new category) and then achieves the perception of having the better product or service.

• Logic suggests Scenario A, but history is overwhelmingly on the side of Scenario B. Leadership first, perception second.\textsuperscript{182}

This scenario turns most conventional antitrust thinking on its head yet opens an observer to strong new insights for antitrust analysis as discussed below.

IV. AN ENRICHED ANTITRUST DISCOURSE

Business theory represents a rare chance to expand the community of expertise and for the discourse of antitrust to take into account the discourse of the actual decision makers whose conduct is being analyzed for antitrust purposes. Little of this work has been integrated into antitrust doctrine or discourse. Few if any decisions discuss either strategic planning or marketing in any substantive way in assessing antitrust liability.\textsuperscript{183}

Business theory has only occasionally been part of antitrust discourse once the litigation process has begun. Notions of strategic planning were underlying much of the private antitrust litigation against IBM in the 1970s in connection with its decision to make certain of its systems incompatible with the peripheral devices manufactured by competitors, but these theories were rarely successful as antitrust litigation strategies.\textsuperscript{184} Similarly brand

\textsuperscript{182} Ries & Ries, supra note 171, at 256.

\textsuperscript{183} For example, the only citation to the work of Michael Porter in an antitrust decision occurs in United States Football League v. NFL, 842 F.2d 1335, 1349 (2d Cir. 1988) (discussing a presentation by Professor Porter to the NFL as part of the factual background of the case).

\textsuperscript{184} See California Computer Prods., Inc. v. IBM, 613 F.2d 727 (9th Cir. 1979) (affirming directed verdict in favor of IBM because IBM’s technological innovations entitled it to maintain the dominant position in the market it created through business acumen); In re IBM Peripheral EDP Devices Antitrust Litig., 481 F. Supp. 965, 1022 (N.D. Cal. 1979) (holding that “the action IBM took . . . did not unreasonably restrict competition, and thus, did not violate the law”), aff’d
management and marketing were part of the underlying theories of liabilities in the Supreme Court's decision in *FTC v. Proctor & Gamble Co.*,\(^{185}\) which prohibited the conglomerate acquisition of Purex bleach on the grounds that Purex's dominance of its market would be entrenched by the addition of P&G's marketing muscle and advertising budget. However, these decisions and the handful of others exploring these concepts do so within the paradigm of industrial organization economics rather than directly engaging the business theory concepts on their own terms.

While it is dangerous to try to prove a negative, the number of cases that even mention strategic planning or brand management as concepts is few and far between. A LEXIS search in September 1999 found no antitrust cases discussing even mentioning "brand management." A tiny handful of cases mentioned strategic planning, but in no case did the actual decision turn on any aspect of the discussion of this concept.\(^{186}\)

A handful of commentators and government enforcers have begun to coalesce around these ideas in the hopes of constructing a richer discourse as part of the post-Chicago movement. Ironically, it is a different line of Porter's work dealing with international competition that has received the most attention. Porter's *The Competitive Advantage of Nations*\(^{187}\) is widely known and discussed in the antitrust community. In that work, Porter argues that the nations whose firms are most successful in global competition are from countries with robust competition policies.\(^{188}\) This argu-

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\(^{188}\) See PORTER, supra note 187.
ment has been widely disseminated and praised by both the head of the Antitrust Division and the FTC during the Clinton administration and is the current rejoinder to the 1980s "competitiveness" critique of antitrust law.

While as yet ignored in the case law, Porter's work on strategic planning is increasingly discussed in the law reviews. For example, Charles Weller, an antitrust partner with a prominent national law firm, has argued in several fora that the work of Michael Porter forms the basis for a workable and vibrant antitrust policy for both the United States and the European Union. Most

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190 See, e.g., Walter Adams & James W. Brock, Antitrust, Ideology, and the Arabesques of Economic Theory, 66 U. COLO. L. REV. 257, 281 (1995) ("Hence, as the traditionalists see it, a vigorous antitrust policy at home is the most effective way for a nation to promote world-class performance in markets abroad. They thus agree with Michael Porter's recent findings . . . "); Harry S. Gerla, Restoring Rivalry as a Central Concept in Antitrust Law, 75 NEB. L. REV. 209, 234 (1996) ("Professor Porter's research lends powerful support to the idea that antitrust laws ought to be used to promote rivalry. The promotion of domestic rivalry is vital to the competitive success of a nation's industries, and therefore to the economic well-being of that nation."); Mark R. Patterson, The Market Power Requirement in Antitrust Rule of Reason Cases: A Rhetorical History, 37 SAN DIEGO L. REV. 1, 41 (2000) ("In Porter's view, 'good' competitors play by the 'rules of [the game],' allowing all to profit.") (quoting PORTER, supra note 187, at 213).

191 See, e.g., Steven R. Salbu & Richard A. Brahm, Strategic Considerations in Designing Joint Venture Contracts, 1992 COLUM. BUS. L. REV. 253, 304 (describing "Porter's model of competitive forces" as "a catalog of bargaining power derived from various configurations of interdependence"); Jonathan L. Diesenhau, Comment, Competitor Standing to Challenge a Merger of Rivals: The Applicability of Strategic Behavior Analysis, 75 CAL. L. REV. 2057, 2088 (1987) (discussing Porter's suggestion "that a firm can enhance performance through strategic moves designed to lessen the intensity of the five competitive forces: (1) threats of entry; (2) rivalry; (3) pressure from substitute goods; (4) bargaining power of buyers; and (5) bargaining power of sellers").

recently, the American Bar Association Antitrust Section Task Force on Fundamental Theory invited Michael Porter to speak to the task force to assist it in analyzing the current assumptions underlying antitrust law and policy.\textsuperscript{193}

Brand management and marketing more broadly also are beginning to enjoy a revival as a source of wisdom for antitrust analysis. In addition to the work of Professor Gundlach already discussed,\textsuperscript{194} FTC Commissioner Thomas Leary has begun to consider the effects of marketing as a discipline on antitrust analysis.\textsuperscript{195}

The limited use of business discourse in antitrust enforcement so far has occurred largely outside the litigation process. Since 1976, most mergers and acquisitions of any significance are subject to premerger notification and a waiting period before closing while the agencies determine the competitive significance of the transaction.\textsuperscript{196} One of the principal categories of information which must be filed with the initial pre-merger notification are the so-called 4C documents which consist of: "all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets . . .".\textsuperscript{197}

\textsc{Antitrust Rep.}, Mar. 2000, at 2, 3 (suggesting that "Michael Porter's 'Five Forces' multi-dimensional analysis of competition itself" coupled with "four Supreme Court developments . . . provide a timely new approach for antitrust for the knowledge and joint venture economy of today and tomorrow"); Charles D. Weller, A "New" Rule of Reason from Justice Brandeis' "Concentric Circles" and Other Changes in Law, 44 ANTIrrusT BuLL 881, 948 (1999) (arguing that "Michael Porter's new tools for analyzing competition itself" help "to update antitrust joint venture law to the times, and craft a 'new' rule of reason")\textsuperscript{198}. See Notes on Remarks of Professor Michael Porter Before the ABA Section of Antitrust Law Task Force on Fundamental Theory (Jan. 11, 2001) [hereinafter Porter Remarks] (memorandum on file with author). This is a significant development given the centrality of the ABA Antitrust Section and particularly its leadership in the formulation of antitrust discourse. See Weller, supra note 38, at 1445-46 ("The antitrust world, to a large extent, is driven by the American Bar Association Antitrust Law Section . . . and the antitrust partners of the large law firms which dominate the Section and handle the vast majority of large anti trust matters. The ABA Antitrust Section provides the most direct opportunities to demonstrate that you are a member, and major player, in the antitrust club.").\textsuperscript{199} See supra notes 159-63 and accompanying text.

\textsuperscript{194} See Thomas B. Leary, The Significance of Variety in Antitrust Analysis, 68 ANTIrrusT L.J. 1007, 1007 (2001) (explaining that "business can prosper to the extent they can transform their offerings from the sale of relatively simple goods and services to the sale of experiences").


\textsuperscript{196} Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions, FTC Form C-4, 4(c) (revised 07/01) (instructions to item 4(c)), available at
These documents are the starting point for discussions and negotiations between private parties and the government enforcers as to whether a transaction will be challenged and what restructuring of the transaction will be sufficient to prevent a challenge.\footnote{198} The discussion between private antitrust counsel and the government is further guided by the current version of the Antitrust Division and FTC \textit{Horizontal Merger Guidelines}, which embody many of the principles of Porter's work.\footnote{199} In another example of greater sensitivity to business discourse, the \textit{Antitrust Guidelines Collaborations Among Competitors} jointly issued by both the FTC and the DOJ call for an examination of the business purpose underlying any joint venture being analyzed under the rule of reason.\footnote{200}

These developments will affect who actually testifies in antitrust litigation and participates in conversations with the government at the investigatory stage. As would be expected, the case law discusses almost exclusively the admissibility and persuasiveness of economists serving as expert witnesses. These witnesses are virtually exclusively drawn from academic economists, the present and former government antitrust agency economists, and the group of professional economic consulting firms working in the major cities throughout the United States. The handful of business school experts serving as expert witnesses in antitrust matters are themselves almost entirely professional economists rather than business theorists.\footnote{201} Most attorneys are simply nerv-

\footnote{198 See generally Irving Scher, \textit{ANTITRUST ADVISER} § 3.52 (4th ed. 1995) ("The documents submitted under [4(c)] . . . in many cases are the best early source of information for the investigating agencies about the relationship of the business of the merging companies and the possible competitive consequences of the transaction.").}


\footnote{200 FED. TRADE COMM'N, U.S. DEP'T OF JUSTICE, \textit{ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS} § 3.31 (2000) ("In examining the nature of the relevant agreement, the Agencies take into account inferences about business purposes for the agreement that can be drawn from the objective facts. The Agencies also consider evidence of the subjective intent of the participants to the extent that it sheds light on competitive effects.").}

\footnote{201 For example, both of the principal economists in the government antitrust case against Microsoft were prominent economists, although one currently serves on a business school faculty. Richard Schmalensee who testified for Microsoft was an economist and the dean of the Sloan School of Business of MIT. The government's expert, Franklin Fischer, taught economics at MIT and had served as the principal expert for IBM in its successful defense against government monopolization charges over a thirteen year period from 1969-1982. \textit{See generally FRANKLIN M. FISCHER ET AL., FOLDED, SPINDLED AND MUTILATED: ECONOMIC ANALYSIS AND UNITED STATES v. IBM 351} (1983) (explaining that expert witnesses in large antitrust cases...})
ous about departing from the accepted discourse and proffering expert testimony of a different type except as window dressing.\textsuperscript{202}

It appears that the tide is changing, albeit slowly. Traditional antitrust economic testimony is coming under increasing scrutiny following the Supreme Court's \textit{Daubert} line of decisions.\textsuperscript{203} In addition, innovative litigants have found that an expert steeped in business theory can be convincing in telling a consistent and persuasive story that will convince a judge or jury of one side's theory of the case.

For example, in \textit{Conwood Co., v. United States Tobacco Co.},\textsuperscript{204} the plaintiff, a small producer of smokeless tobacco, relied on expert testimony from Gregory Gundlach, as already noted, a marketing professor from the University of Notre Dame, who holds both a law degree and an MBA.\textsuperscript{205} Professor Gundlach's marketing expertise formed the basis for his testimony as well as his continuing research on how the process of exchange can help illuminate issues of antitrust law and policy.\textsuperscript{206} This expert testimony has proved quite effective to date constituting a key component in the jury verdict in Conway's favor that exceeds $1 billion

\textsuperscript{202} \textit{See supra} notes 159-63 and accompanying text.

\textsuperscript{203} \textit{See supra} note 159 and accompanying text.
The Supreme Court has opened the window to all forms of business discourse in the Aspen Skiing Co. v. Aspen Highlands Skiing Corp., but the lower courts have only rarely to date followed through on the invitation. Prior to Aspen, the black letter law was that even an admitted monopolist could not be guilty of a section 2 violation unless it could be shown that its market share resulted from something other than "a superior product, business acumen, or historical accident." Starting with Aspen, the Court subtly shifted the focus to whether the defendant had a valid business justification for its conduct. As more recent lower court decisions have noted, the proffered business justification is the most important issue in such cases. If the conduct has no rational business purpose other than its adverse effects on competitors, there is an inference that it is exclusionary, and hence unlawful. The work of Michael Porter and the other business theorists discussed above is precisely the type of tools to bring content to this process and make this test something more than another in a long line of empty formulas in the monopolization area.

An additional salutary effect is to partially reclaim the role of intent in antitrust analysis. Sophisticated corporations expend too many resources in their strategic planning and marketing decisions not to take seriously the results of that work. Looking at the results of strategic planning exercises, brand management, and marketing studies do not necessarily lead to either plaintiff or defendant verdicts. Such evidence should be a fertile source for either plaintiffs or defendants seeking to unravel the purpose and effect of mergers, joint ventures, distribution agreements, and other economically ambiguous conduct being conducted under some form

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209 See Aspen Skiing, 472 U.S. at 608 ("Perhaps most significant, however, is the evidence relating to Ski Co. itself, for Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose.").
210 See Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1061 (8th Cir. 2000) (stating that cutting prices for the legitimate reason of increasing business "is the very essence of competition, which the antitrust laws were designed to encourage"); Steams Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 522 (5th Cir. 1999) ("The key factor courts have analyzed in order to determine whether challenged conduct is or is not competition on the merits is the proffered business justification for the act.").
211 See Aspen Skiing, 472 U.S. at 605 ("If a firm has been ‘attempting to exclude rivals on some basis other than efficiency,’ it is fair to characterize its behavior as predatory.") (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1978)).
of the rule of reason.

Business discourse gives the government decision-maker, corporate actor, judge, and jury an additional tool to analyze the most persistently perplexing questions in antitrust. Unraveling whether the defendant had a valid business purpose behind the conduct harming competitors or sought to unlawfully exclude competition may be impossible at a linguistic level for the reasons identified by the Chicago school, but it is also impossible to determine the issue without examining the decisions actually made by the key decision-makers and the information they relied upon for their decision. While the Chicago school properly has cautioned against reliance on the language used by lower level employees, a business theory lens suggests a similar caution against reliance on such evidence where it has no business significance for the defendant or transaction being analyzed, not because it is inherently worthless.

The introduction of expert testimony and other evidence on business theory may in the right case help illuminate these delicate issues for the finder of fact in precisely the manner contemplated by the Federal Rules of Evidence regarding expert testimony. The fears of the Chicago school that colorful language will be the basis for plaintiff verdicts chilling competitive zeal can be better dealt with other evidentiary and procedural tools such as motions in limine under Federal Rule of Evidence 403.

One recent example that suggests the power of unfiltered business theory and its potential use by the enforcement agencies relates to the series of FTC investigations of agreements between pharmaceutical companies regarding the sale of generic drugs to competitors whose branded competing drug was about to go off patent. In March of 2000, the FTC charged two drug makers with violating section 5 of the FTC Act by reaching agreements with generic drug makers to delay bringing competing generic drugs into the market. On that same day, the FTC also announced that it negotiated consent decrees with two other drug companies charged

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213 See supra notes 117-22 and accompanying text.
214 Accord Comanor & Frech, supra note 118, at 302-04 (non-Chicago school commentators arguing for continued role for intent in predatory pricing cases but conceding lack of usefulness in search for or reliance on so-called hot documents or stray statements).
215 Fed. R. Evid. 702 (“If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”).
216 Fed. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury . . . .”).
with similar violations. The nature of the violation was simple: by keeping a competing generic version of a branded prescription drug off the market consumers (and prescribing physicians) had been deprived of a clear choice between branded and generic medicine which had the potential to save hundreds of millions of dollars per year.\(^\text{217}\) Shortly thereafter, a district court in Michigan agreed with this analysis and held that one of these agreements constituted per se unlawful market allocation in a private consumer class action.\(^\text{218}\)

The FTC appears to be wielding business theory and business discourse as a sensitive tool to distinguish between those types of agreements that it will challenge and those it will not. The FTC recently has chosen not to charge Eli Lilly for its agreement with a drug manufacturer that manufactured a competing version of a Lilly drug about to go off patent.\(^\text{219}\) While the public record is silent as to the precise basis for the FTC’s decision not to proceed, one fact stands out. Lilly acquired rights not to produce a generic clone of its drug, but to a new substance that performed the same functions as the branded drug but without certain key side effects. Presumably the FTC did not view this agreement as the type of collusion it had previously challenged, but instead chose not to proceed following the standard antitrust joint venture or acquisi-

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\(^{217}\) See Press Release, FTC Charges Drug Manufacturers with Stifling Competition in Two Prescription Drug Markets, at http://www.ftc.gov/opa/2000/03/hoechst.htm (Mar. 16, 2000) ("The financial arrangements between the branded and generic manufacturers were designed to keep generic versions of Cardizem CD and Hytrin off the market for an extended period of time," and "have the potential to cost consumers hundreds of millions of dollars each year") (quoting Richard Parker, Director of the FTC's Bureau of Competition.). See also FTC Cites Schering-Plough for Negotiating Anticompetitive Accords with Generic Makers, 80 Antitrust & Trade Reg. Rep. (BNA) No. 2003, at 328 (Apr. 13, 2001) (detailing a similar allegation involving medication to treat low blood potassium levels); Melody Petersen, Ivax Says Bristol-Myers Deal Aims to Delay a Generic Drug, N.Y. TIMES, Aug. 16, 2000, at C6 (reporting similar allegations involving a cancer drug).

\(^{218}\) In re Cardizem CD Antitrust Litigation, MDL No. 1278 (E.D. Mich. June 6, 2000) (Order No. 13). The FTC plans to issue a large number of civil investigative demands seeking information on similar licenses more broadly throughout the pharmaceutical industry. See FTC Will Conduct Study of Generic Drug Competition, Seeks Input on Data Collection, 79 Antitrust & Trade Reg. Rep. (BNA) No. 1979, at 365 (Oct. 13, 2000) ("The commission explained that its proposed study would examine whether brand-name and generic drug manufacturers have entered into agreements or have used other strategies in an effort to delay competition from generic versions of patent-protected drugs.").

\(^{219}\) See Pamela Sauer, Waiting for the Generics Feast, CHEMICAL MARKET REP., May 15, 2000, at 25, 27 ("The Federal Trade Commission recently approved the licensing agreement that allows Eli Lilly to exclusively develop and globally commercialize (R) - fluoxetine."). But see Courts Won’t Dismiss Zenith’s § 1 Claims of Delayed Entry into the Generic Market, 80 Antitrust & Trade Reg. Rep. (BNA) No. 1991, at 48 (Jan. 19, 2001) (refusing to dismiss private antitrust suit challenging alleged conspiracy by Lilly and others to delay entry by generic competitors).
tion analysis it routinely undertakes in this and other high tech industries. Careful consideration of business purpose in the language which the parties use in the day-to-day conduct of their business can help distinguish between collusive attempts to preserve branded market power and more legitimate joint ventures where consumers stand to benefit through increased opportunities to treat their conditions without debilitating side effects.

The use of business theory and the separate discourse that it entails are what is important, not the result in a particular case. The lawfulness of the competitive consequences of business behavior in the real world must be examined in light of the business leader's commitments to these techniques and discourse if business theory is to be taken seriously and not filtered through the different and highly technical and ever-changing discourse of industrial organization economics.

One final benefit that would emerge would be to reconnect antitrust to the popular will and imagination. While the Microsoft litigation perhaps has put antitrust back in the public eye, it remains a highly technical discourse that shuts out those who have not mastered its arcane terminology. The rise of industrial economics has been one of the principal forces that transformed antitrust from a populist movement to one more typically debated in expert circles. The revival of business theory as one source of wisdom for antitrust decision-making has the potential of making antitrust part of the civic discourse for a broader circle of persons. This enlarged community of persons will help break the monopoly of the current community of experts and can study, analyze, and debate the important decisions being made as a result of their use and familiarity of business decision-making from their life experiences in modern society. Where that leads us long term is unknowable in terms of antitrust policy, but it leads in the direction of a more accountable and understandable antitrust policy as it grapples with the many forms of business behavior in an ever-changing economy.

**CONCLUSION**

Changing a discourse is a difficult and tricky business. For reasons of history, path dependence, sociology, the highly departmentalized structure of the modern law firm, institutional inertia, self-interest, and intellectual simplicity, antitrust, like most disciplines, has its own truth. Antitrust sticks almost exclusively with the now familiar language of law and economics, even as it hotly
debates which type of economics best serves the antitrust profession. It regards all other discourses with suspicion and too often dismisses new theories and paradigms as untrue or irrelevant to the discipline. It would indeed take cataclysmic events to dislodge economics from its privileged position.

Antitrust, like any other form of discourse, contains within itself the seeds of its own opposition. Every use of economics as a decision tool creates a hydraulic pressure to recognize and deal with legal issues using opposing conceptions of truth and social science. These rhetorical forces of opposition rarely become dominant but remain active at the margin of the discipline appearing from time to time both to challenge and reinforce the primacy of the predominant strain of professional discourse.

The realistic goal then is not to supplant economic discourse in antitrust, but instead to take advantage of the post-Chicago space to reintroduce business theory as a more prominent part of antitrust discourse directly, and without first filtering its message through the highly technical language of industrial organization economics, regardless of which flavor of that discipline is favored at a particular moment in time.