THE NECESSARY REVIVAL OF SHERMAN ACT SECTION 2

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Section 2 of the Sherman Act has been a problem child for a long time. Judge Learned Hand put his finger on its difficulties 75 years ago, when he wrote in his famous *Alcoa* opinion that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[2] Yet only a few pages earlier, in the same opinion, Hand had also written that "[t]hroughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."[3] So which is it? Should we, in the name of letting the market go where it will, accept the results of the competitive race, no matter how dominant the winning firm may be, or should we adopt as an independent goal a more decentralized industry structure, even if it may mean higher prices?

For many years, starting roughly in the mid-1970s, anyone asking that question would have been laughed out of the room. It was Gospel that Big was not necessarily Bad; that the costs of mistaken intervention in potentially efficient business behavior far exceeded the costs of pursuing an overlooked monopoly or cartel (i.e. that Type 1 errors were more serious than Type 2 errors); and that the *summum bonum* for competition law was consumer welfare, defined as the best quality achievable for the lowest price. No one expressed this philosophy better than the late Justice Antonin Scalia, who wrote this in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, with respect to the exclusionary practice of refusing to deal:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing — a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.[4]

During the heyday of this era, neither the federal government nor private enforcers focused their efforts on Section 2 enforcement. Merger policy reflected much the same philosophy: whereas during the 1960s the government and the Supreme Court worried in the *Von's Grocery* case

2 *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

3 *Id.* at 429.

4 540 U.S. at 407–08 (quotation marks omitted).

about a merger between the #3 and #6 grocery chain in Los Angeles (accounting together for 7.5 percent of the entire market),[5] by 1990 a merger between two firms that collectively had 76 percent of the relevant market for certain drill bits was permitted, in *United States v. Baker Hughes Inc.*[6] The few exceptions to this pattern simply proved the rule: the great AT&T case of the late 1970s was resolved by the Modified Final Judgment on January 8, 1982[7]; on the same day the government dropped its case against IBM[8]; and, while the Antitrust Division had some success in the 1990s with its case against Microsoft,[9] it was unable to obtain the same kind of broad-ranging structural relief that it did in AT&T.[10] In the end, the *Microsoft* case fizzled out.[11] People argued that antitrust was just not able to cope with the Internet Era; markets moved too fast; the technical aspects of the industries were well beyond the capabilities of generalist federal judges; and competition itself would take care of any remaining problems.

Other jurisdictions — in particular, the European Union and the countries that follow its model for competition law — were never convinced that single-firm behavior could safely be left alone, nor were they so pessimistic about the ability of government to address concentrations of market power. For example, while the U.S. Federal Trade Commission investigated Google in the early 2010's and came to the conclusion that Google had not engaged in "search bias,"[12] the Competition Directorate of the European Commission was taking a more aggressive approach.[13] It announced a narrow case in April 2015,[14] and in late June 2017 the Commission found that Google had abused its dominant position in the comparative shopping service market in Europe. It fined Google €2.42 billion ($2.7 billion). That case was quickly followed by an action in 2018 that targeted Google's Android mobile operating system; that one ended with a fine of €4.34 billion ($5 billion). And that was not the end: in March 2019 the EC launched an investigation based on Google's alleged dominance in the online advertising market. The advertising case was resolved with a fine of €1.49 billion ($1.69 billion); by way of justification, the Commission stressed Google's exclusive contracts and later premium payments with website owners.

The U.S. Department of Justice, on behalf of the United States, re-entered the fray in October 2020, when it announced the filing of a suit against Google asserting that Google was unlawfully maintaining its monopoly in search engines by cutting off rivals from critical distribution channels. It is worth reiterating, however, that the Department and the FTC rarely bring cases under section 2 of the Sherman Act. Notably, if one checks the Antitrust Division's website, which allows the user to filter by the type of case that was filed, monopolization does not even come up as a choice. Instead, the list includes "price-fixing, horizontal; bid rigging; horizontal merger; customer, territorial or market allocation – horizontal; and other restraint of trade."[15]

The essence of the Division's theory in the Google case is that Google's search engine is what we used to call an "essential facility," and that in the case of a monopolist with the kind of market power Google exercises, the deliberate exclusion of rivals from that essential facility amounts to an anticompetitive practice. There was a time, once again best illustrated by *Trinko*, that the essential facilities doctrine had been given the Last Rites. It was derided by one and all as devoid of content, impossible to apply in practice, and, to the extent it reflected economic reality at all, superfluous as compared to the standard doctrine on refusals to deal. But perhaps we were too quick to throw it away. In a talk entitled "Disinterring the Essential Facilities Doctrine" that I gave at the University of Colorado Law School a few years ago, I suggested that we might have mistaken the *factual* rarity of monopoly cases presenting genuine essential facility concerns with the *legal* coherence of that concept.

5 See *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

6 908 F.2d 981 (D.C. Cir. 1990) (Thomas, J.).

7 *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983).

8 This decision was discussed by Edward T. Pound, in "Why Baxter Dropped the I.B.M. Suit," New York Times, Jan. 9, 1982, at https://www.nytimes.com/1982/01/09/business/why-baxter-dropped-the-ibm-suit.html.

9 See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

10 The Court of Appeals rejected the district court's order requiring Microsoft to engage in both conduct modification and structural reorganization, see 97 F. Supp. 2d 59 (D.D.C. 2000), vacated, 253 F.3d 34, *supra.*

11 Granted, there were some remedial measures that were imposed with the goal of undoing the effects of the exclusionary practices in which Microsoft had engaged. See *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004). But they were modest compared with the government's original aspirations for the case.

12 In the Matter of Google, Inc., Statement of the FTC Regarding Google's Search Practices, Jan. 3, 2013, FTC File No. 111-0163.

13 See e.g. Statement of VP Almunia on the Google Antitrust Investigation, Speech/12/372 (2012).

14 Commission Sends Statement of Objections to Google on Comparison Shopping Service, European Commission, Fact Sheet, 2015.

15 See https://www.justice.gov/atr/antitrust-case-filings; choose "filter and sort," and scroll down.

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I was struck by the fact that in countries that did not have an economy with the same depth, competitive vigor, entrepreneurship, and strong legal traditions (including in the fields of contract, property, antitrust, and regulated industries) as the United States has enjoyed, competition authorities found the need to attack entrenched monopolies and to pry open markets that were strangled by single-firm bottlenecks.

There is now a virtual flood of books that are re-examining what antitrust law should have to say, and does have to say, about single-firm power. Matt Stoller has written a book called "Goliath: The 100-Year War Between Monopoly Power and Democracy,"[16] which harkens back to the Learned Hand quote with which this essay began. Put simply, Senator Sherman and his fellow authors of our foundational antitrust law had no trouble seeing the close link between enormous economic power and our political institutions. Zephyr Teachout's book "Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money"[17] challenges the conventional wisdom of the 1970s through the 2010's to the effect that dispersal of economic power is inherently inefficient and will, in essence, impose an unwanted tax on consumers. Tim Wu also argues for restored attention to the consequences of monopoly power, in his book "The Curse of Bigness: Antitrust in the New Gilded Age."[18] So does Jonathan Baker, who wrote (with a nod to Robert Bork's transformative book, "The Antitrust Paradox: A Policy At War With Itself"[19]) "The Antitrust Paradigm: Restoring a Competitive Economy."[20] He too turns to the field of exclusionary practices, which was under fire during the reign of the so-called Chicago School.

Recall that adherents of the Chicago School, led by such notables as Richard Posner, Robert Bork, and Frank Easterbrook, argued strongly that courts are ill-equipped to juggle both apples (economic efficiency goals) and oranges (distributional and market-access goals), and so it was best to give them simple instructions and rely on other tools to handle the latter concerns. By limiting antitrust to the simple aim of protecting "consumer welfare," understood as exclusively referring to low prices for consumers, the Chicago School argued, antitrust (and the judges and lawyers who administer the laws) can deal with lawsuits designed to prevent or break up hard-core cartels, and they can and should prevent the most egregious of mergers (maybe a three-to-two transaction, and likely a two-to-one deal unless other economic factors suggested that those numbers overstate the likely future harm to competition). Exclusionary agreements, including exclusive dealing arrangements, boycotts, predation of various types, tying arrangements, and bundled or loyalty discounts, were just too hard to sort and thus had to be left, so people argued, to the market-correction mechanism.

Part of the great re-examination of antitrust that is currently taking place calls into question the pessimistic assessment that exclusionary practices just can't be regulated in a principled way. Another part is inspired by the impact of the digital giants.[21] Competition, after all, is a dynamic process: just because today's monopolist may be providing services at prices consumers like does not assure that the long-term market for innovation and diverse approaches is best served.

Section 2 of the Sherman Act lies at the center of this debate. If, as many urge, antitrust begins once again to concern itself with the exclusionary practices monopolists use, that will reflect a return to a more complex understanding of the purposes of the antitrust laws. But no one should be surprised that the U.S. antitrust laws reflect more than one goal, nor should that fact prompt enforcers and courts to throw up their hands in dismay. Bills are passed and enacted into law every day that reflect several goals, and the goals are not always 100 percent compatible. Executive branch enforcers, private parties, and courts deal all the time with laws that have more than one aim. The result is not some kind of "anything goes" outcome. No violation of Sherman Act section 2 can be found unless the court (a) finds that the company in question has the requisite degree of market power, depending on whether the case charges an attempt to monopolize or full-blown monopolization, (b) finds that that market power was unlawfully obtained or maintained, and (c) finds that the power did not arise "as a consequence of a superior product, business acumen or historic accident."[22] The rub has been this: when does exclusionary conduct on the part of a monopolist amount to an abusive practice, and hence one that qualifies under step (b), and when is it just old-fashioned hard competition, and thus something that falls under step (c)?

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16 Published 2020.

17 Published 2020.

18 Published 2018.

19 Published 1971 (amusingly, it comes up on Amazon as published in 1791).

20 Published 2019.

21 In addition to the books mentioned above, see Francesco Ducci, Natural Monopolies in Digital Platform Markets (2020).

22 *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

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For decades, courts have answered those questions by reference to the antitrust basics: How much market power does the defendant firm have? Can the exclusionary practice be explained by a legitimate business concern, such as the protection of intellectual property, or cost in unbundling aspects of the firm's own product or service, or a genuine quality control or other reputational issue? The answers to those (and similar) questions should reveal whether the practice is one that any firm would use, or if it is designed solely to push a competitor out of the market and cement the monopolist's control. Other aspects of the potential case of monopolization can also be evaluated. Does the firm quietly go around buying up all potentially competing technology? Is the firm taking advantage of path-dependence, making sure that it had a head start and putting roadblocks in the way of potential competition?

At the most general level (with a nod to the much-maligned case of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[23]), the question is whether the alleged monopolist's behavior is explicable only because it will ensure the profits that come from lessened competition, not for any other business purpose. Recall that in *Aspen Skiing*, the Ski Company was so eager to destroy Highlands's business that it ultimately refused to accept cash vouchers from Highlands customers. (It finally agreed to take travelers cheques, but the harm had already been done by that time.) Walking away from cash is not something that a normal firm would do; the competing inference, that the Ski Company was trying to monopolize this destination ski resort, was a compelling one.

Size matters, at least when it leads not just to the power to raise prices and reduce output, but also to the muscle to push other competitors out of the market. The Supreme Court remarked in *Brown Shoe Co. v. United States* that "the antitrust laws were passed for the protection of *competition*, not *competitors*."[24] It has repeated that mantra frequently.[25] But there is a flip side: it is impossible to *have* competition without competitors. That means, logically, that an antitrust law that focuses exclusively on competition in the abstract — those cartels and monopolies that create a dead-weight loss triangle when they price at marginal cost and sell the correspondingly reduced quantities — will miss an important part of the point of the legislation. Exclusionary practices may be difficult to analyze in close cases, but the job must be done.

The people who enacted the antitrust laws knew this. Not until the 1970s was this even a controversial proposition. Classic lists of *per se* illegal offenses included exclusionary practices such as tying arrangements and group boycotts.[26] It now appears that the U.S. economy — and to some degree the world economy — once again is confronting single-firm behavior that calls for antitrust intervention. Section 2 of the Sherman Act is there for the taking; it is time to remember our history, to dust off the cobwebs, and to get to work.

23 472 U.S. 585 (1985).

24 370 U.S. 294, 320 (1962).

25 See e.g. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993).

26 See *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958).

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