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AN ICONOCLASTIC ATTACK ON THE ANTITRUST COMMUNITY: A REVIEW OF EDWIN S. ROCKEFELLER'S *THE ANTITRUST RELIGION*

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I. INTRODUCTION

The central thesis of Ed Rockefeller's entertaining and provocative book, *The Antitrust Religion*, is that the U.S. antitrust laws do not establish "a rule of law."[1] Rather, what exists is a "religion," premised on "a mystical collection of persistent beliefs,"[2] designed to fill "emotional needs"[3] to do "social justice."[4] It is a "moral" "crusade,"[5] chasing what Rockefeller asserts are "imaginary evils"[6] because of "an irrational fear of corporate consolidation."[7] Rockefeller equates antitrust to a "ceremonial process" akin to throwing a goat off a cliff.[8]

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[1] EDWIN S. ROCKEFELLER, THE ANTITRUST RELIGION 1 (2007).

[2] *Id.* at 20.

[3] *Id.* at 101.

[4] *Id.* at 46.

[5] *Id.* at 42.

[6] *Id.* at 13.

[7] *Id.* at 8.

[8] *Id.* at 38. In Greek and early Judaic practice, the sacrifice of a goat was used to remove guilt from the community. *See Leviticus* 16:7–10. The sins of the community

Rockefeller, a one time Federal Trade Commission official, has had a long career as a corporate counselor. For over fifty years, he has chaired the BNA *Antitrust and Trade Regulation Report*'s Advisory Board, leading a lively quarterly discussion of the latest antitrust law developments by prominent practitioners. From that perspective, Rockefeller says that the real beneficiaries of the "Antitrust Religion" are the "Antitrust Community," which he derides as mostly antitrust defense lawyers who "profit[] handsomely from antitrust."[9] Many have taken a turn as Department of Justice or FTC enforcers. That enables them to claim "access to and insight into the minds of" the current crop of FTC and DOJ prosecutors, who "mak[e] subjective decisions," which Rockefeller criticizes as standardless.[10]

According to Rockefeller, the Antitrust Community mystifies corporate and other clients through the use of "cult"-like, "sinister-sounding," and "self-righteous" "misleading metaphors" from the "antitrust vocabulary," preventing the exercise or creation of "market power" or "dominance," and creating instead an "oligopoly," resulting in predatory pricing/tying/buying in favor of "economic efficiency" and "consumer welfare."[11] These "doctrinal verbalizations," Rockefeller opines, can readily justify any individual's "subjective judgments," with no real accountability.[12] That is because, as Rockefeller observes, the core antitrust "articles of faith" are largely not "a matter of factual proof," resting as they do on unchallengeable "circular assumptions."[13]

But whereas religious beliefs in "the Apostle's creed," "the virgin birth," and "the power of prayer" "may do some good and [do] no harm to non-believers," Rockefeller argues that antitrust "carries a potential for mischief," as it provides "no rational basis for normative

were placed on the head of a goat, called the goat of Azazel, which was "sent away into the wildness to Azazel." *See Leviticus* 16:10. Some medieval Jewish scholars claimed "Azazel" was the name of a steep cliff near Mt. Sinai. YAACOV DOVID SHULMAN, RASHI: THE STORY OF RABBI SHLOMO YITZCHAKI (1993).

[9] ROCKEFELLER, *supra* note 1, at 102.

[10] *Id.* at 17.

[11] *Id.* at 10–11, 22–23, 102.

[12] *Id.* at 51, 12, 24.

[13] *Id.* at 40, 43–45, 99.

rules."[14] He points out that antitrust has been called a "hoax" that allows "lengthy, expensive, fruitless search[es] for a villain."[15] He says this antitrust "witchcraft" has done more harm than good.[16] Rockefeller closes his book with the recommendation that everyone should be educated about these "antitrust facts of life" which, once acknowledged, Rockefeller intimates could result in the "repeal" of the antitrust laws.[17]

Rockefeller's premise is essentially correct; antitrust *is* a religious-like movement. It has been since the passage of the Sherman Act back in 1890, which occurred in response to calls for a populist revolt against the perception that Standard Oil and other industry "trusts" were abusing their substantial economic and political power, hence the term "anti*trust*." But antitrust is not a rigidly dogmatic, Catholic- or Islamic-like "religion," demanding strict adherence to specific sets of beliefs and prescribed conducts, regardless of any "new learning." Rather, the antitrust laws are more akin to the evolving principles of spirituality, promoting "good," "reasonable," and "responsible" conduct to the serenity of society in general and the individuals involved.

The spiritual movements and the major religions purport to reflect the wisdom of some Higher Power, a "god" or "gods." All purport to promote "good" over "evil." All are subjectively interpreted by "believers" purporting to clarify the "word," be it from the Bible, the Koran, or the Sherman Act. All have been used to rationalize wrongs. But surely Rockefeller would not contend that the principles of spirituality or any of the religions have done more harm than good for society and individuals in general. Or that any of the major religions should be abolished. Can their respective benefits and detriments to society be empirically proven and compared to one another? Probably not, but it is nonetheless true that they have been, on balance, a beneficial force.

So too has been antitrust. The body of laws against illegal monopolization (anti-"Standard Oiling/Microsofting"), unreasonable restraints of trade (like price fixing and group boycotts), and mergers

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[14] *Id.* at 45.
[15] *Id.* at 85, 99.
[16] *Id.* at 40.
[17] *Id.* at 40, 99–103.

or acquisitions that are likely to lead to monopolies or substantially lessen competition (by facilitating price fixing or monopolistic abuses) have benefited American consumers. That is said from my perspective as an antitrust trial lawyer with nearly forty years in the trenches, fighting for and counseling the very business people whom, Rockefeller asserts, are subjected to a game of "roulette," with their commercial conduct—both historical and prospective—at the mercy of the "subjective" "whims" of regulatory and judicial decision makers and self-serving antitrust practitioners.[18] These individuals are all free to indulge their personal judgments about what is "right," "reasonable," or "fair" "competitive conduct."

Certainly, over the years (but less and less of late), there have been mistaken applications of the antitrust laws. A particular outlier was the "shared monopoly" case brought by the FTC back in the 1970's against the major breakfast cereal producers. Rockefeller focuses on the stupidity of that case as an example of the antitrust laws' "potential for mischief." [19] But Rockefeller himself—successfully—helped to defend that case, albeit after a long and expensive ten-year fight for his client Kellogg, proving (contrary to Rockefeller's core complaint) that the system of checks and balances in our overall legal system works.

The reality is that competition does "bring out the best" in business as in athletics. It fosters greater innovation—the most powerful engine for societal progress, as Schumpeter long ago explained.[20] Competitive rivalry also promotes better quality and

[18] *Id.* at 46, 55.

[19] *Id.* at 19, 32, 34 (discussing *In re* Kellogg Co., 99 F.T.C. 8 (1982)) A recent confirmation that the workings of the judicial system can be self-correcting is the Supreme Court's reversal of the Ninth Circuit Court of Appeal's decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,* 549 U.S. 312 (2007). Oddly, Rockefeller focuses upon the lower court decision to say that the case—involving allegations of "predatory buying," by paying too high a price for lumber to "raise rivals' costs" and foreclose access to a needed input—"illustrates vividly the impossibility of distinguishing legitimate competition from unlawful attempts to monopolize . . . ." ROCKEFELLER, *supra* note 1, at 62. But the Supreme Court's ready application of recent anti-monopolization jurisprudence to reverse the lower court underscored the bright lines that have developed, logically, in this and other areas of antitrust. *See* Tefft W. Smith, Colin R. Kass & Scott Abeles, *Competition is Good Again*, LEGAL TIMES, Mar. 19, 2007, at 34.

[20] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY 81 (Allen & Unwin 4th ed. 1954) (1942).

service and results in lower relative prices. It also—and importantly—motivates the individuals involved in the competitive process to focus on doing "better than," rather than concocting strategies to harm (or conspiring in secret with), business rivals. That "positive vs. negative" mindset is more satisfying for the individual business people involved and more beneficial to their companies, consumers, and society in general.[21]

If the U.S. antitrust laws were as counter-productive as Rockefeller asserts, why over the past decade have so many other nations (many of which stagnated under the state monopolies of communism) embraced the United States' culture of competition, as fostered by the U.S. antitrust laws? Now nearly all major countries have enacted their own comparable statutes and are increasingly enforcing those "competition" laws against their own corporate citizens.[22] Rockefeller suggests this phenomenon is the product of proselytizing by the Antitrust Community to "spread[] the gospel" for their own further enrichment.[23] I say, no, it is the natural spread of a good idea, through the process of attraction, based on the successes of the U.S. economy in the 1980's and 90's relative to the rest of the world.

Many of Rockefeller's criticisms—like those of the religious scholars who questioned the credibility of the Immaculate Conception—are legitimate. But they do not support Rockefeller's implicit call for reduced antitrust enforcement. The gap between the criticism and the conclusion is demonstrated by an analysis of what Rockefeller calls the four flawed articles of "antitrust faith": "(1) a belief in the legend of Standard Oil, (2) fear of corporate

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[21] RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 229 (1999).

[22] *See also* KY P. EWING JR., COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA'S EXPERIENCE (2d ed. 2006); International Competition Network, http://www.internationalcompetitionnetwork.org/ (describing the organization's goals of building consensus and convergence in antitrust laws); *see generally* Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs, Reviews of Competition Policy Frameworks, *available at* http://www.oecd.org/infobycountry/0,3380,en_2649_40381607_1_1_1_1_1,00.html.

[23] ROCKEFELLER, *supra* note 1,, at 25.

consolidation, (3) a belief in the magic of 'market power,'" and (4) a faith that government can protect us from those evils."[24]

II. THE STANDARD OIL TRUST AS "EVIL": A MYTH?

Rockefeller correctly notes that the doctrinal foundation of the Antitrust Religion is what he calls the "myth" that the Standard Oil Trust, formed in 1881 by (ironically) Rockefeller's namesake, John D. (no relation), was "evil."[25] Rockefeller (the author) tries to debunk the "gospel" that Standard Oil engaged in "predatory pricing," "coerce[ing]" mergers with smaller competitors, and "restrict[ing] production to drive up prices"—all to the detriment of American consumers—at the end of the nineteenth and beginning of the twentieth centuries.[26]

The legislative history of the 1890 Sherman Act does reflect that it was a Congressional reaction to the economic and perceived political power of the Standard Oil Trust. As the principal driver of the statute, Republican Senator John Sherman of Ohio, said: "The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than . . . the concentration of capital into vast combinations [like the Standard Oil Trust]. . . . Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life."[27]

By 1890, the Standard Oil Trust had gained control of over 80% of the nation's oil refinery capacity and had spawned many more industry "trusts" (really stock holding companies for coordinating competing companies' activities), formed by J.P. Morgan and other industrial and Wall Street "Robber Barons."[28] These aggregations of economic power sought to capitalize on the economies of scale and scope that the then-emerging national U.S. economy and the industrialization of business allowed.[29]

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[24] *Id.* at 5.
[25] *Id.* at 47–50.
[26] *Id.*
[27] 21 CONG. REC. 2460 (1890) (statement of Sen. Sherman).
[28] ROCKEFELLER, *supra* note 1, at 49.
[29] JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY 58–71 (2003).

The Sherman Act, as enacted, reflected a compromise between the populist John Sherman and Republican Senator Nelson Aldrich of Rhode Island, the then-leading legislative friend of the Wall Streeters and industrialists. The statute passed by a vote of 240–0 in the House, and 52–1 in the Senate. The Act was kept purposely vague due to the then—and continuing—split in opinion as to whether the "concentration of capital" will more often result in "price fixing" (to the detriment of the public), as Senator Sherman predicted, or "lessen the cost of production and reduce the price of the necessities of life," as Senator Aldrich predicted.[30]

The goal of the Sherman Act was to prohibit "bad" corporate conduct but not deter the "good," hence the vague and undefined language of the Sherman Act:

"Every contract, combination in the form of *trust* or otherwise, or conspiracy, in restraint of trade . . . is hereby declared to be illegal."[31]

"Every person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty of a felony . . . ."[32]

Rockefeller focuses on writings arguing that the Standard Oil Trust was not "evil" at all. He points to evidence that, as of 1890, "oil industry prices were declining"[33] and cites D.T. Armentano's *Myths of Antitrust* for the proposition that "at the peak of Standard's supposed dominance . . . 'the costs and prices for refined oil reached their lowest levels in the history of the petroleum industry.'"[34] Rockefeller cites others who assert that there was no evidence at the trial (initiated by Teddy "the Trust Buster" Roosevelt and his Department of Justice and resulting in the 1911 break-up of Standard Oil for illegal monopolization) that the Trust had "restrict[ed] production to drive up prices."[35] Rockefeller notes that the empirical evidence is that "real crude oil prices were falling before

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[30] 21 CONG. REC. 2654–55 (1890). Rockefeller points to the "basic conflict inherent in the human desire for both efficiency and fairness—goals that are often incompatible." ROCKEFELLER, *supra* note 1, at 11.

[31] 15 U.S.C. § 1 (2006) (emphasis added).

[32] 15 U.S.C. § 2 (2006).

[33] ROCKEFELLER, *supra* note 1, at 49.

[34] *Id.* at 49.

[35] *Id.* at 49 (citing THOMAS J. DILORENZO, HOW CAPITALISM SAVED AMERICA 135 (2004)).

Standard Oil was brought to trial and rose after the breakup."[36] Rockefeller cites a study concluding that the *Standard Oil* trial record did not reflect any "'predatory price discrimination to drive out competing refiners.'"[37] Rather, the evidence is that Standard Oil "secured its market position in petroleum primarily through internal efficiency."[38] "'[I]t kept its costs low and was able to sell more and more refined products, usually at a lower and lower price, in the open marketplace.'"[39]

There is no question that John D. Rockefeller and the Standard Oil Trust did some "good" things and may not have been "evil" (notably, no one was sent to jail for the felony of monopolization found there). But that does not answer the question of whether the nation and the consuming public would have been better off without the breakup of Standard Oil. Would there have been as much exploration and production, expansion of refining and marketing facilities, innovation in oil and gas exploration and production, petroleum and petrochemical refining, gasoline marketing, or lower prices for petroleum products if the Standard Oil Trust had been allowed to continue unchecked by the antitrust laws and the corresponding oversight by the DOJ and the FTC?

While Rockefeller points to economic and academic literature concluding that there is "no evidence" that "antitrust policy improves consumer welfare" and there is some literature claiming antitrust policy has "harmed" consumer welfare,[40] other economists have cited evidence that that the antitrust laws have benefited consumers.[41] None of them claim to have definitively proven either proposition. So, continuing with Rockefeller's religious analogies, it

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[36] *Id.* at 49. *But compare* PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 449 (5th ed. 1997); ELEANOR M. FOX & LAWRENCE A. SULLIVAN, CASES AND MATERIALS ON ANTITRUST 208 (1989).

[37] ROCKEFELLER, *supra* note 1, at 50 (citing John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 168 (1958)).

[38] ROCKEFELLER, *supra* note 1, at 50 (quoting D.T. ARMENTANO, THE MYTHS OF ANTITRUST, 24, 25, 43 (1972)).

[39] *Id.* at 50 (quoting D.T. ARMENTANO, THE MYTHS OF ANTITRUST, 24, 25, 43 (1972)).

[40] *Id.* at 12.

[41] *Id.* at 49 (citing DILORENZO, supra note 35, at 135); Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP. 27 (2003); *but see* Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3, 7–8 (2003).

is like the question: is there a god? No one has scientifically proven his/her existence, but no one has disproven it, either.

More importantly, there are benefits, intangible yet invaluable, to both religion and antitrust. Both serve to humble the seemingly powerful to a something greater than themselves, be it a god or government antitrust enforcers. As Teddy Roosevelt said of the first successful prosecution of the Sherman Act, to breakup the Northern Securities Railroad Trust: "[T]hrough it we emphasize in signal fashion, as in no other way could be emphasized, the fact that the most powerful men in this country were held to accountability before the law."[42] And later, Roosevelt sagely explained, "The very reason why we object to State ownership, that it puts a stop to individual initiative and to the healthy development of personal responsibility, is the reason why we object to an unsupervised, unchecked monopolistic control in private hands."[43]

III. An Irrational Fear of Corporate Consolidation?

Rockefeller uses the evolution of "anti-merger" policy, in the form of the 1914 Clayton Act's section 7[44] prohibition on mergers or acquisitions that may tend to create a monopoly or substantially lessen competition, to make the point that the antitrust laws are "standardless," with "little predictability."[45] Indeed, at one point it was misguidedly held that a merger creating economic efficiencies (in the form of lower per unit production costs) was grounds for *preventing* a merger, whereas today it can be the very reason given for the government "clearing" (i.e. not seeking a court order prohibiting) a merger, even in the face of concerns that the combined firm may appear to have enhanced "market power."[46]

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[42] Letter from Theodore Roosevelt to George B. Cortelyou (Aug. 11, 1904), *in* THEODORE ROOSEVELT CYCLOPEDIA 387 (Albert Bushnell Hart & Herbert Ronald Ferleger eds., rev. 2d ed. 1989), *available at* http://www.theodoreroosevelt.org/TR%20Web%20Book/TR_CD_to_HTML424.html.

[43] Theodore Roosevelt, *The Thraldom of Names*, THE OUTLOOK, June 19, 1909, at 391, 394.

[44] Clayton Act § 7, 15 U.S.C. § 18 (2006).

[45] ROCKEFELLER, *supra* note 1, at 24.

[46] *See* Ron Knox, *FTC Prefers Dynamic Efficiency Defense*, GLOBAL COMPETITION REV., Feb. 9, 2009. *Compare Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568

Even recently, the results of implementing section 7 prohibitions have been roundly criticized. For example, as Rockefeller notes, the FTC prevented the merger of the Beech-Nut and Heinz Baby Food businesses, notwithstanding that the overwhelmingly dominant competitor, Gerber (with an 80+% market share), saw the merger as certain to result in *more* effective competition against it, thus enhancing overall competition.[47] The FTC prevailed in court saying it was sufficient for it to show that there would be a "substantial[] . . . lessen[ing] [of] competition" between Beech-Nut and Heinz, with the industry becoming a duopoly.[48] That was deemed "bad" because it made price coordination "easier," whereas having three competitors (even if two were weak), was considered somehow "better."[49]

But the reality is that the government interferes with few proposed mergers or acquisitions. However, many are stopped by antitrust practitioners at the consideration stage, through a few simple, but sensible questions: What are the legitimate business purposes for this merger or acquisition? Is there a reason other

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(1967), *with* U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES 30 (1997) (Revised Section 4 Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the FTC, April 8, 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf, *and DOJ Closes AT&T/BellSouth Probe; Merger Isn't Likely to Reduce Competition*, 91 ANTITRUST & TRADE REG. REP. 381 (2006).

[47] ROCKEFELLER, *supra* note 1, at 71 (referring to the FTC's opposition to "an increase in concentration of jarred baby food").

[48] Fed. Trade Comm'n v. H.J. Heinz Co., 116 F. Supp. 2d 190, 194 (D.D.C. 2000).

[49] ROCKEFELLER, *supra* note 1, at 69; *see H.J. Heinz Co.*, 116 F. Supp. 2d at 199 ("When the efficiencies of the merger are combined with the new platform for product innovation, however, it appears more likely than not that Gerber's own predictions of more intense competition . . . will come true.") The D.C. Court of Appeals reversed, Fed. Trade Comm'n v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001). The transaction was abandoned because of the certainty of further substantial delay, with no petition for *certiorari* filed. The outcome has been vigorously criticized. *See* William J. Kolasky, *Lessons from Baby Food: The Role of Efficiencies in Merger Review*, 16 ANTITRUST 82 (2001); William J. Kolasky, The Role of Economics in Merger Enforcement: Efficiencies and Market Definition Under Conditions of Price Discrimination, Presented at Charles River Associates Conference: Current Topics in Merger & Antitrust Enforcement (Dec. 11, 2002), *available at* http://www.wilmerhale.com/files/Publication/dc2851b0-d785-489f-befb-b7b6fc31c73d/Presentation/PublicationAttachment/e8a4d48a-fc20-409a-9408-16847c949896/Antitrust%20-%20CRA%202002%20Paper%20_Kolasky.pdf.

than to eliminate competition from an innovative or lower-pricing competitor or to prevent a potential competitor from access to the market? How will the transaction result in lower costs of production or marketing, increase innovation, produce better quality or services, or lower relative prices, thereby allowing the company to sell more products and make more money?

Many times there are no credible answers to these questions. And the empirical evidence is that few mergers ever produce the benefits that the business proponents have claimed will result from these aggregations of corporate power.[50] In any event, isn't it good policy to require business people to justify to themselves, their lawyers, the government, and, ultimately, their shareholders that the *real* purpose of a merger or acquisition is to achieve some legitimate business purpose?

The reality is that any merger that has an actual pro-competitive business purpose can be consummated. There will be some expense (often substantial in today's electronic document age), and there can be some (considerable) delay, but, if the benefits are as represented, the deal can and will get done. The larger the transaction, the more dramatically positive will be the cost-benefit analysis of persevering through the regulatory hurdles of a section 7[51] competitive-effects analysis and the Hart-Scott-Rodino Antitrust Premerger Reporting Act requirements.[52]

That said, the business and antitrust communities would benefit from more transparency in the DOJ Antitrust Division's and the FTC's merger-clearance standards and from a real-world updating of what Rockefeller points out are the "so-called" 1992 "DOJ/FTC Merger Guidelines."[53] For example, much of merger analysis calls

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[50] Raymond S. Hartman, *Predicting the Efficiency Effects of Mergers*, 9 J. FORENSIC ECON. 295 (1996); John Kwoka & Michael Pollitt, *Industry Restructuring, Mergers, and Efficiency: Evidence from Electric Power* (Cambridge Working Paper in Economics No. 0725, 2007).

[51] Clayton Act § 7, 15 U.S.C. § 18 (2006).

[52] Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a (1976); FTC HSR Coverage Rules, 16 C.F.R. 801 (2010); FTC HSR Exemption Rules, 16 C.F.R. 802 (2010); FTC HSR Transmittal Rules, 16 C.F.R. 803 (2010); U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES 30 (1997) (Revised Section 4 Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the FTC, April 8, 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

[53] *See* ROCKEFELLER, *supra* note 1, at 65.

for the definition of the product and geographic "market" that may be monopolized or in which competition is likely to be substantially lessened by the exercise of enhanced "market power."[54] As Rockefeller explains, the "generally accepted" test for the existence of this "all purpose hobgoblin" of "market power" is an "imagined hypothetical situation," used to "define the market" in which the "market power" is to be measured.[55] But, as Rockefeller correctly observes, the process of determining what the "market" is requires "assumptions about a future that cannot be known."[56]

The test—called "a SSNIP," for "Small but Significant Nontransitory Increase in Price"—seeks to assess whether, in the future, as a result of unilateral conduct or a merger, a firm (or group of firms) will be able "profitably" to maintain a "supra-competitive" price (meaning at least 5% higher than it would be under competitive conditions), for a sustained (one year) period of time.[57] That condition can only prevail if the firm or combined firm can effectively restrict "market-wide" output of the relevant product in the geographic market likely to be restrained.[58]

That means there must be neither:

(a) competitors in (or outside of) the geographic market (e.g. foreign firms if the market is the United States) capable and willing to produce and sell into the market the additional output required to offset the OPEC-like restriction of production of the affected good or service; *nor*

(b) sufficient close substitute products or services to which consumers can turn to satisfy their demand and, thereby, drive the price back to competitive levels by effectively filling up the gap of reduced output needed to raise the price artificially.

This can be seen in the following supply/demand chart. The gap between the competitive supply (Qc) and the artificially raised *supra*-competitive price supply (Qs) can be filled up by:

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[54] U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

[55] *See* ROCKEFELLER, *supra* note 1, at 38, 42–44.

[56] *Id.* at 2.

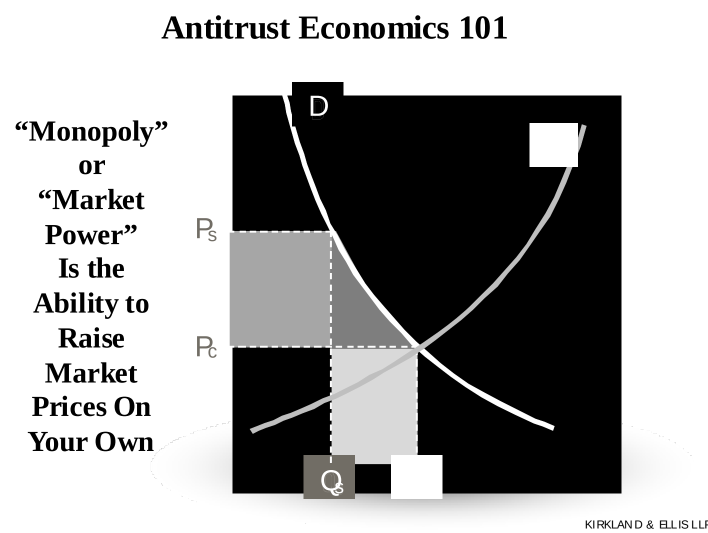
[57] *Id.* at 43–44.

[58] *Id.* at 42–43.

(a) other competitors of the monopolist (or merged firms) or non-price-fixing cartel members (i.e. cheaters) expanding their production; *or*

(b) other products or services which consumers can use to satisfy their needs in lieu of price fixed good or service.

Either can be sufficient to defeat any effort at the—successful, i.e. profitable—exercise of market power.



As Rockefeller correctly notes, the SSNIP market-definition test is premised on a "probably wrong" assumption, i.e. that "the terms of sale of all other products are held constant."[59] Rockefeller rightfully reminds that "[t]he one thing we know about the future is that things do not stand still."[60] Rockefeller points out that none of the purported SSNIP "analysis" can be "verified" by any "empirical referents."[61] The SSNIP test applies a "static analysis of a dynamic world"; it is "a facade for subjective decisions as to what the decisionmaker feels is fair."[62] The reality, according to Rockefeller, is that "market power" is at best an "imagined power": "No one is controlled or dominated";

[59] *Id.* at 43–44.

[60] *Id.* at 44.

[61] *Id.* at 43 (citing Frederick M. Rowe, *The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics*, 72 GEO. L. J. 1511, 1563–65 (1984)).

[62] *Id.* at 70–71, 46.

"no one can be forced to buy"; "the only real power a seller has is derived from satisfying buyers."[63]

The weaknesses of the SSNIP test for market definition, so-well exposed by Rockefeller, should be acknowledged by the DOJ and the FTC.[64] The focus should be on whatever "natural experiments," i.e. actual, historical competitor and customer reactions to price increases or output reductions (from strikes, natural disasters, etc.), which may exist *and* credible evidence as to the real purpose of the proposed transaction.[65]

The Merger Guidelines' "safe harbor" market share concentration thresholds that establish the intensity of the agencies' merger review should be dramatically revised upwards.[66] The current thresholds are woefully out-of-step with actual practice.[67] Indeed, the government largely ignores the "Guidelines" *except* in the rare instance when they go to court to challenge a proposed merger, as they did in the *Baby Food* case.[68] And there, contrary to the government's "duty to do justice, not just try to win cases,"[69] the government lawyers routinely cite as the

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[63] *Id.* at 44–45.

[64] Thomas J. Klotz, Monopoly Power: Use, Proof, and Relationship to Anticompetitive Effects in Section 2 Cases (Dec. 1, 2008) (FTC Working Paper).

[65] *See, e.g.*, *Assessment of U.S. Merger Enforcement Policy: Testimony Before Antitrust Modernization Commission of the Federal Trade Commission* (2005) (statement of Prof. Robert Willig); Mary T. Coleman, David W. Meyer & David T. Scheffman, *Empirical Analysis of Potential Competitive Effects of a Horizontal Merger: The FTC's Cruise Ships Mergers Investigation*, 23 REV. OF INDUS. ORG. 121 (2003).

[66] *See* EWING, *supra* note 22, at 277–84 (discussing whether a separate merger control regime is necessary or desirable).

[67] HHIs are calculated by summing the squares of the market shares of all market participants. The current thresholds are: 1) post-merger HHI below 1,000, the market is unconcentrated and the merger is unlikely to have anticompetitive effects; 2) between 1,000 and 1,800, the market is moderately concentrated and may pose the risk of anticompetitive effects; and 3) above 1800, the market is highly concentrated and any merger that causes an increase in HHI of more than 50 points potentially raises significant competitive concerns. In addition, if the increase in HHI is greater than 100 points in a highly-concentrated market, the presumption is that the merger is likely to create or enhance market power or facilitate its exercise. *See* Revised Section 4 Horizontal Merger Guidelines Issues by the U.S. Department of Justice and the FTC, April 8, 1997, *available at* http://www.justice.gov/atr/public/guidelines/horiz_book/4.html.

[68] Fed. Trade Comm'n v. H.J. Heinz Co., 116 F. Supp. 2d 190, (D.D.C. 2000).

[69] "[The Government] is the representative ***not*** of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . is *not that it shall win a case, but that justice shall be done*." Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

prevailing law "out of date" Supreme Court judicial decisions that, Rockefeller properly observes, are generally considered to "no longer mean[] what [they] once said."[70] Rockefeller equates this approach with the arbitrary and selective enforcement of 55 mph "highway speed limits" on the nation's interstates.[71]

The agencies should also more regularly explain the specific facts that prompted them to clear those mergers they have not challenged or have approved subject to some divestiture or post-merger conduct requirements. It would be particularly important for the agencies to be more specific as to what cost-savings or other economic efficiencies are deemed to trump otherwise apparent increases in "market power."[72]

IV. THE MAGIC OF MARKET POWER?

Just as few mergers—and fewer still, justifiable mergers—have been stopped under the antitrust laws, particularly over the last twenty years, so too, very few firms have been found to have violated section 2 of the Sherman Act[73] by abusing "monopoly" market power. There was a blitzkrieg of activity in the early Teddy Roosevelt "Trust Busting" days, with forty-four trusts broken up in the early 1900s,[74] but since then, the attacks have been few and far between, with the posterchilds being IBM,[75] AT&T,[76] and Microsoft.[77]

Rockefeller decries as "fruitless" the burden and expense of the major government investigations and follow-on private litigations that ensued in these later actions.[78] But nowhere does Rockefeller

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[70] ROCKEFELLER, *supra* note 1, at 21, 65.

[71] *Id.* at 72.

[72] Thomas M. Jorde, *Restoring Predictability to Merger Guideline Analysis*, CONTEMP. ECON. POL'Y, July 1986, at 1.; Darren S. Tucker and Bilad Sayyed, *The Merger Guidelines Commentary: Practical Guidance and Missed Opportunities*, THE ANTITRUST SOURCE (May, 2006).

[73] 15 U.S.C. § 2 (2006).

[74] HAROLD HOWLAND, THEODORE ROOSEVELT AND HIS TIMES: A CHRONICLE OF THE PROGRESSIVE MOVEMENT 93 (1921).

[75] *In re* IBM Corp., 687 F.2d 591 (2d Cir. 1982); ROCKEFELLER, *supra* note 1, at 32.

[76] U.S. v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1982); ROCKEFELLER, *supra* note 1, at 89.

[77] U.S. v. Microsoft Corp., 65 F. Supp. 2d 1 (D.D.C. 1999); ROCKEFELLER, *supra* note 1, at 85.

[78] *Id.* at 39.

offer anything to suggest that but for these government interventions, the nation and its citizens would be better off. Indeed, but for the actions to halt IBM's efforts to use its then-dominance in data-processing equipment and its secret "microcode" to prevent erosion of its "market power" by plug-compatible peripheral products, would there have been a Microsoft? And, but for the challenges to Microsoft's manipulation of its operating system to prevent and limit competition in the software market, would there have been *more* innovation? Likewise, would the cellular telephone revolution have been as quick and dramatic under AT&T, without its initial break-up?

Certainly, the definition of what constitutes the illegal exercise of "market power" has been evolving since the Teddy Roosevelt Trust Busting days.[79] And, Rockefeller is not being unfair when he says that, ultimately, "market power is market power is market power."[80] But, just like one knows a rose is beautiful or, as has been said of "obscenity," "I know it when I see it,"[81] under any definition, Microsoft had "market power" and abused it. The trial record exposed Bill Gates's real intent in providing Microsoft's Internet Explorer "for free": it was to drive Netscape and its internet browser out of business as a potential threat to Microsoft's operating system's monopoly. Thus, Gates approached AOL and said, "How much do we need to pay you to screw Netscape? This is your lucky day."[82]

That is not conduct to be condoned. And, contrary to the suggestions of Rockefeller (and others) that the anti-monopoly policies of section 1 of the Sherman Act[83] chill much pro-competitive activity, my experience is that it is not that hard to counsel the business people Rockefeller says are victimized by uncertainty as to what is or is

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[79] *See* EWING, *supra* note 22, at 144–73.

[80] ROCKEFELLER, *supra* note 1, at 39.

[81] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[82] *Microsoft Corp.*, 65 F. Supp. 2d 1. Government exhibit 38 includes the above-mentioned quote. Kirkland was counsel for Netscape in its subsequent, successful private treble damages action against Microsoft. *See* Steve Lohr & David D. Kirkpatrick, *Microsoft to Pay AOL $750 Million; End to "Long War,"* N.Y. TIMES, May 30, 2003.

[83] 15 U.S.C. § 1 (2006).

not an illegal exercise of market power.[84] Like in the merger arena, the outcome can—and does—depend on the answers to a few simple, largely business-logic-related questions.

Does the proposed policy—e.g. offering a free internet browser—make independent economic sense; that is, will it be profitable to the company, absent the elimination of a competitor? How will it result in lower costs of production or marketing, increase innovation, produce better quality or services, or lower relative prices, thereby allowing the company to sell more products and make more money? What is the likelihood that the costs of engaging in the type of "Standard Oil predatory pricing to eliminate competitors" can be "recouped" through future price increases? Will competitors likely be eliminated, with neither they nor others being able to compete in the future by offering the same or substitute products? Will that substitute supply be sufficient to offset the output restraint that the company must engage in to recoup its loses, through future supra-competitive prices?[85]

These questions and answers relate to the actual, likely competitive effects of the exercise of theoretical "market power." They do not turn on the process of "defining the market" by the SSNIP test that Rockefeller rightly criticizes. Ultimately, as the Supreme Court long ago declared in a section 7 merger context, market definition issues are "entirely subsidiary to the crucial question in this and every" antitrust case, which is whether the activity, be it the abusive exercise of market power by merger partners or by a single firm "monopolist," "may substantially lessen competition."[86]

V. IS THE GOVERNMENT AN EFFECTIVE PROTECTOR?

Rockefeller questions the "faith that government can [or will] protect us from [Standard Oil-like] evils."[87] He even attacks the Antitrust Division's "criminal cartel enforcement" program as a "useless, mischievous activity."[88] Rockefeller points to evidence of

[84] ROCKEFELLER, *supra* note 1, at 45; *see also* George Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement*, 20 CATO J. 295 (2001).

[85] *See* Tefft W. Smith et al., *How to Limit LePage's Effect*, LEGAL TIMES (Wash. D.C.), Mar. 20, 2006, at 33.

[86] United States v. Pabst Brewing Co., 384 U.S. 546, 549–50 (1966).

[87] ROCKEFELLER, *supra* note 1, at 5, 99.

[88] *Id.* at 99.

a U.S.-government-organized aluminum production cartel in 1994 as proof of the unreliability of the otherwise "self-righteous tone" of the government prosecutors.[89] According to Rockefeller, the real result of the prohibition on price fixing has been "to increase concentration" by prompting more mergers.[90] He cites University of Chicago School economists for the proposition that the per se prohibition (meaning that no proof of market power or actual effects is required) is unnecessary because "experience teaches that cartels do not hold."[91]

That may be theoretically true because, indeed, there is "no honor among thieves." And make no mistake, price fixing is a crime. It is, at least, attempted "robbery," something Rockefeller admits is a definable offense.[92] Price fixing is done to get more money from customers than would be obtained if the price fixers competed. It is not done to achieve the type of cost-saving efficiencies that often motivate mergers. From my own experience in defending many of these cases, the efforts at price fixing involve face-to-face meetings and phone calls, deliberately concealed from customers and fellow employees. It is morally corruptive of the individuals involved, requiring lies and falsified expense and other reports, and results in an ongoing paranoia about being "caught." The offenders are seldom people who "made a mistaken judgment" in "matching" a price, as suggested by Rockefeller.[93]

It is true that price fixing often does not work very well. That is because, again by my experience, most business people fail to see the reality—recognized by OPEC—that prices cannot be "fixed" above competitive levels, without a sufficient restriction in market-wide output, as shown in the supply/demand chart above. The incentives are overwhelming for the participating colluders to cheat on the *secret* agreement, be it to allocate markets or customers, increase prices by a certain percentage (or amount), or to restrict output through decreased capacity utilizations or expansions. "Let the

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[89] *Id.* at 92–93, 96.
[90] *See id.* at 87.
[91] *Id.* at 91 (citing RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY 91 (1998)).
[92] *Id.* at 50–51.
[93] *Id.* at 96.

others cut back on their sales (or production); no one will find out that we didn't; and we will make more money still!"

Indeed, it is the very self-centeredness of price fixers that has provided the mechanism for the Antitrust Division's recent successes in detecting, punishing, and deterring future price-fixing efforts. Since the mid-1990's, the DOJ has been utilizing its corporate "leniency" program to get companies to voluntarily confess to the misconduct of their employees.[94] Companies do so because they can thereby avoid paying any fine for the violation and, in the process, stick their fellow cartelists with potentially $100 million plus fines, disadvantaging them as competitors going forward. These big fines, the largest to date being $500 million on Hoffman La Roche for leading an international cartel (resulting in as much as 50% increases in vitamin prices), have been coupled with prison terms, albeit often short (six to eighteen months) relative to the economic severity of the crime, for at least some of the more junior individuals involved. Indeed, the threat of jail for individuals as well as the likelihood of large fines for the corporations (and follow-on class actions and treble damage actions) are the centerpieces of the Business Ethics and Antitrust Compliance programs that are a staple of current U.S. corporate culture.

A major benefit of the DOJ's prioritization of its criminal price fixing enforcement program and its message that "jail time will be sought in every price fixing case because price fixing is like selling drugs to school children"[95] is that it has empowered lower level

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[94] DEPARTMENT OF JUSTICE, CORPORATE LENIENCY POLICY (1993), *available at* http://www.justice.gov/atr/public/criminal/leniency.htm; DEPARTMENT OF JUSTICE, LENIENCY POLICY FOR INDIVIDUALS (1994), *available at* http://www.justice.gov/atr/public/criminal/leniency.htm; Scott D. Hammond, Dept. of Justice, Dir. of Criminal Enforcement, Cornerstones of an Effective Leniency Program, Speech to ICN Workshop on Leniency Programs (November 22-23, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206611.htm; David Burns et al., *Criminal Antitrust Enforcement in 2008*, Global Competition Rev., Feb. 12, 2009.

[95] *cf.* R. Hewitt Pate, The DOJ International Antitrust Program — Maintaining Momentum, Address Before the American Bar Association Section of Antitrust Law (Feb. 6, 2003), *at* http://www.justice.gov/atr/public/speeches/200736.htm ("Recently, we have concentrated not just on prosecuting corporate cartel members but also on punishing individuals who create and operate the cartels. We remain convinced that the single best deterrent to cartel behavior is the imposition of meaningful prison sentences against the guilty individuals. Recently, we have sought the imposition of prison sentences with increasing frequency and sought longer periods of incarceration. In the past fiscal year, defendants in

employees to "just say, 'No!' I won't do that because I could go to jail!!" when pressed by more senior executives to do "something" to get prices up or keep them from falling further. These are infrequently directives but rather suggestive comments like Henry II's "Will no one rid me of this meddlesome priest?" that resulted in the assassination of Thomas Becket.[96]

The success of the U.S. Leniency Program in ferreting out price fixers and deterring others from even attempting to fix prices has prompted the European Union and many other antitrust enforcers around the world to implement similar programs.[97] This is decidedly not because such efforts are a "useless, mischievous activity portrayed as law enforcement," as Rockefeller asserts,[98] but rather because it is sound public policy to punish and deter price fixing.

By my experience, the prohibitions on price fixing have not chilled the type of collaborative activities amongst competitors that do have innovation, cost saving, demand building, and other procompetitive benefits. Individuals can engage in legitimate trade association, standard setting, cost benchmarking, and other activities, provided reasonable precautions are taken (like having written agendas and legal oversight). The unfortunate reality is that, in the past, these legitimate and desirable activities have been abused as "covers" for secret, illegal side-meetings to try to fix prices.[99]

Division cases were sentenced to more than 10,000 jail days -- a record -- with an average sentence of more than 18 months. In the last four years, a total of over 75 years of imprisonment have been imposed on antitrust defendants, with more than 30 defendants receiving prison sentences of one year or longer. It is not just U.S. executives who are facing prison sentences, but foreign executives as well. Business people from Canada, France, Germany, Sweden, and Switzerland have now served time in U.S. prisons for violating our antitrust laws. "); Gregory J. Werden & Marilyn J. Simon, *Why Price Fixers Should Go to Prison*, 32 Antitrust Bull. 917, 932 (1987) ("[E]fficient hard-core price-fixing is no more likely than efficient child molestation.").

[96] 1 SIMON SCHAMA, A HISTORY OF BRITAIN: AT THE END OF THE WORLD? : 3500 B.C. TO 1650 A.D., 142 (Hyperion 2000).

[97] Organisation for Economic Co-operation and Development, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, (2002), *available at* http://www.oecd.org/dataoecd/41/44/1841891.pdf.

[98] ROCKEFELLER, *supra* note 1, at 99.

[99] *See* James M. Griffin, Deputy Assistant Attorney General, "An Inside Look At A Cartel At Work: Common Characteristics of International Cartels," Address to the ABA Section of Antitrust Law Spring Meeting (Apr. 6, 2000) ("[M]any of the international

In sum, Rockefeller's *Antitrust Religion* fails to give credit where much is due. Be it in anti-monopolization, anti–market-power-enhancing merger, or anti-cartel enforcement, the antitrust laws have done much to preserve and protect our free market, capitalist economy. The antitrust laws encourage competitive rivalry, individual initiative and innovation, and internal growth through superior business skill and acumen. Government enforcement has been reasonably effective and restrained. And this "believer" in the spirit of antitrust has been able to use the prohibitions of the antitrust laws repeatedly over the years to counsel against and head off proposed courses of action that would have served no legitimate business purpose and could have exposed corporations and their shareholders to unproductive expense, government investigations, civil litigation and damage liability, criminal fines for the companies, and jail time for otherwise law-abiding employees.

cartels the Division has prosecuted have used trade association meetings as an effective 'cover' for their secret cartel meetings.").