The Jurisprudence of Antitrust

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I. INTRODUCTION

ANTITRUST law is widely perceived to be the legal guardian of the competitive process. To the extent that it performs its role, the nation benefits. In the short-term, the nation benefits from a market process which efficiently allocates society's resources in accordance with consumer demand. In the long-term, the nation benefits as more efficient producers gradually replace less efficient producers, thus lowering the cost and increasing the supply of goods and services.

Like all law, antitrust law changes over time. Congress expected as much: it wrote the Sherman Act in the broad and sweeping terms appropriate for conferring responsibility on the courts to develop antitrust standards through case-by-case adjudication. Even when it identified particular patterns of behavior as antitrust concerns in the Clayton Act, Congress left to the courts the responsibility for determining when these behavior patterns raised the potential for an anticompetitive impact. In the Federal Trade Commission Act, the Congress delegated to the newly created Federal Trade Commission the task of working out, incrementally, the operational meaning of the "unfair methods of competition" which Congress prohibited in that Act. In the committee reports accompanying the latter legislation, Congress was explicit about its intention to delegate this task to caselaw development by the Commission.

Today, we have a set of antitrust laws which are enforced by two agencies of the federal government: the Department of Justice and the Federal Trade Commission. These laws are also enforced by private actions, including private actions brought by state attorneys general. In past decades, private actions frequently followed in the wake of government actions. Indeed, section 5 of the Clayton Act, which provides that a final judgment or decree rendered in a proceeding brought by the government is prima facie evidence of the defendant's violation in a civil suit brought by private parties, necessarily contemplates an initial government action followed by a series of private actions in its wake. The model

is the government action breaking up a major trade restraint and the injured private parties benefiting from the government initiative.\(^7\)

Yet today, most antitrust suits are private actions.\(^8\) Not only are most antitrust suits brought by private parties, but these suits are the source of the major developments in the antitrust caselaw. The government, which once dominated the antitrust policy agenda through its litigating activities, is in danger of losing the control over policy that it once exercised. Moreover, a new force is arising in the antitrust policy arena: the state attorneys general.\(^9\) They are increasingly active, increasingly taking the initiative, and pose the newest potential for disrupting the federal law.

This multiple—and largely private—enforcement of the federal antitrust laws, combined with the institutional limitations of the judiciary to formulate antitrust policy, has created a crisis of sorts in antitrust law. The law in the case reports can no longer be assumed to represent the operational law. Indeed, to a large extent the caselaw is misleading. Yet at the same time that the caselaw is losing its place as the primary source of antitrust law, new sources of antitrust law are arising. To a large extent these consist of various sets of guidelines issued by the Department of Justice. Yet, the Department’s guidelines offer no assurance that they will be followed by the courts. They are not binding on private parties and the courts have not always respected them. Furthermore, the legitimacy of the guidelines is routinely challenged by rival sets of guidelines issued by the National Association of Attorneys General.

This article assesses the problematic state of antitrust law. The first parts of the article examine the state of the current caselaw and explore its relevant history. The article then identifies the factors contributing to the indeterminacy and the apparent internally conflicting state of the contemporary law. It identifies a variety of sources of antitrust law in addition to the caselaw. Building on that background, the article then draws conclusions about the institutional limitations of the judiciary for crafting workable antitrust law and how those limitations can best be overcome.

II. THE PROBLEMATIC STATE OF THE ANTITRUST CASELAW

In years past, antitrust law existed primarily in the case reports. In accord with the generally prevailing practices of hierarchically-structured common law jurisdictions, opinions of the United States Supreme Court were widely accepted as the highest authority on the meaning of the law. While the Court necessarily had to play a role commensurate with its limited time and resources, it is fair to describe that role as formative and


supervisory: the Court's opinions formed the core of the antitrust corpus, and the lower courts attempted to align their own decisions with that core.

Today, the caselaw is permeated with Supreme Court opinions which are widely viewed as obsolete. Supreme Court precedents formally governing exclusive purchasing agreements and corporate mergers embrace archaic positions which are widely recognized as no longer valid. In addition, the Supreme Court caselaw governing both horizontal and vertical price-fixing agreements is confused and in disarray. So too is the Supreme Court caselaw governing horizontal territorial allocations. As a result, antitrust lawyers must turn elsewhere for guidance as to the current state of the law.

This disarray results from more than the process of common law growth and development. The common law grows when courts notice that the heretofore prevailing judicial resolution of an issue is becoming less appropriate, generally because the social or economic conditions that formed the predicate for that judicial resolution have changed. Thus, for example, when the courts abandoned the rule of charitable immunity, they did so largely because the wide availability of insurance had rendered the rationale for that immunity logically untenable.

The disordered state of antitrust caselaw, however, is more pervasive and more problematic than the routinized change normally exhibited by the common law. Rather, the antitrust caselaw displays the effects of a mismatch between the institutional structure in which the law is formulated and the substantive needs of the productive enterprise which the law is intended to foster.

III. HOW WE GOT HERE

During most of the period prior to World War II, there were relatively few antitrust cases. The Justice Department brought few cases, and there were few private actions.10 The antitrust cases reported during that period were mostly government-instituted lawsuits. Almost all of the important decisions made their way to the Supreme Court under the Expediting Act (which provided for direct review by the Supreme Court of a district court decision in government-initiated antitrust litigation).11 Although the government substantially increased its antitrust caseload beginning in the immediate pre-war period12 and continued that higher level of involvement thereafter, antitrust law, until the 1960s, consisted primarily of Supreme Court decisions which can best be thought of as delineating (in the understanding of the day) the boundaries of behavior consistent with a competitive marketplace and therefore of intruding very little into routine business decisionmaking. The importance of antitrust

12. SHUGHART, supra note 10, at 83-85.
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law during this period thus lay primarily in symbolically reaffirming the competitive process as normative for business and commercial behavior.

The struggles over the definitions of the per se rules support this understanding. Thus, the Court's various positions on horizontal price fixing and the rule of reason ranging from Trans-Missouri\textsuperscript{13} and Joint Traffic Ass'n\textsuperscript{14} through Standard Oil\textsuperscript{15} and American Tobacco\textsuperscript{16} to Chicago Board of Trade\textsuperscript{17} and Trenton Potteries\textsuperscript{18} and even to Socony-Vacuum\textsuperscript{19} in 1940 could be easily reconciled with widely-held contemporaneous open-textured conceptions of the competitive process. So could the Court's various decisions involving vertical price fixing: Dr. Miles,\textsuperscript{20} Colgate,\textsuperscript{21} Schrader's,\textsuperscript{22} Beech-Nut,\textsuperscript{23} and General Electric.\textsuperscript{24}

When antitrust precedent consisted primarily of Supreme Court decisions in government-instituted litigation, the creation of that precedent necessarily involved the input of the government enforcement authorities—the Department of Justice or the Federal Trade Commission—and a check on that input by the courts, usually the Supreme Court. The courts played their role by endorsing the government's position only when persuaded of its plausibility and practicality and rejecting it when unconvinced. Thus, the Court accepted a per se condemnation of horizontal price-fixing agreements entered into by firms controlling three-quarters of the market's supply of the relevant goods in Trenton Potteries\textsuperscript{25} but rejected the government's arguments in Chicago Board of Trade that the per se rule should be applied to a horizontal agreement in circumstances in which price was subject to the daily determination of market forces.\textsuperscript{26} The Court's check kept the antitrust condemnations within the wide orbit of professional and business tolerance and thus fostered the acceptance of antitrust law as a normative standard applicable to industrial and commercial behavior. When antitrust cases were employed as a way of publicly confirming the nation's commitment to a competitive marketplace, the system worked reasonably well.

Beginning in the late 1950s, this model of antitrust enforcement and judicial decisionmaking underwent a major process of transformation. The Court began increasingly to write antitrust opinions which were no longer limited to describing contemporary understandings of the competitive process. Instead, the Court began to write opinions which carried

\begin{enumerate}
\item United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
\item United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).
\item Standard Oil Co. v. United States, 221 U.S. 1 (1911).
\item United States v. American Tobacco Co., 221 U.S. 106 (1911).
\item Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).
\item United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
\item Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
\item United States v. Colgate & Co., 250 U.S. 300 (1919).
\item 273 U.S. at 394, 397-98.
\item 246 U.S. at 239-41.
\end{enumerate}
widespread and unsettling ramifications. It began reformulating and expanding per se rules, condemning substantial amounts of behavior that had theretofore been considered innocuous. Before the 1960s were over, the laws governing vertical arrangements would be extensively rewritten. During that decade the Court would issue a series of decisions creating immense clouds of uncertainty over corporate merger-and-acquisition activity. Antitrust law was changed from a largely symbolic endorsement of competition as a generally self-enforcing and widely accepted behavioral norm into a system of coercive rules whose content was increasingly questioned by large sectors of the business and academic communities.

While some of these decisions were issued in private litigation, most of these expansionary antitrust decisions were issued in government actions where the Court was responding to the urgings of government litigators. In short, the responsibility for this transformation in antitrust law from symbolic reaffirmation of a widely accepted norm to a set of coercive rules lay not on the Court alone. Courts always rely heavily upon the input of the parties before them. The Supreme Court had reason to give special deference to the government's positions, because the government possessed the institutional capacity and resources (which the Court lacked) to develop a coherent position on antitrust issues as a whole. Indeed, if antitrust was to develop beyond the largely symbolic role that it had hitherto played, the government would be the institutional actor best equipped to guide that development.

Beginning about 1974, the Court began to view the antitrust law which it had created during the previous decade and a half as wrongly conceived. The Court's rejection of government contentions in three merger cases of that year\(^27\) and in two of the following year\(^28\) are widely understood to evidence the Court's change of position. Its decision in the *GTE Sylvania* case in 1977\(^29\) confirmed its new approach. In *GTE Sylvania* the Court reversed the detailed control which it had assumed over the terms of distribution arrangements during the previous decade. In a series of decisions extending into the 1980s, the Court attempted to undo the work that it had so enthusiastically performed in the 1960s.

The result of this reversal of course is that the antitrust caselaw corpus which had been erected prior to 1974 has become largely obsolete. The body of decisions which the Court has issued since that time is not comprehensive enough to substitute formally for the entire preexisting


\(^{28}\) United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86 (1975); United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975). The latter case differs from the others in that its rationale did not rest upon an elaboration of substantive antitrust doctrine. Rather, it was decided against the government because there was no showing that the merging companies were engaged in commerce as required by § 7 of the Clayton Act.

caselaw. The Court itself has overruled only one of its prior decisions. Furthermore, the Court is reluctant to confess that its earlier work is in error. As a result, precedent is misleading and large amounts of antitrust law are indeterminate. Exacerbating this situation are other changes, changes which have taken place in the very process by which antitrust law had been produced in the past. These changes have made the necessary rewriting and restructuring of antitrust law increasingly problematic.

IV. AN OVERVIEW OF ANTITRUST CASELAW DEVELOPMENT

It is familiar history that antitrust caselaw changed dramatically between the 1960s and the 1980s. My contention here is that the changes which commenced in the mid-1970s had an earlier counterpart in the period of dramatic antitrust law development which took place in the period from the late 1950s to 1973. In this earlier period almost all areas of antitrust caselaw underwent major change. These changes occurred as a result of cases brought by an activist Justice Department and a cooperative Supreme Court. Beginning with the Du Pont/GM case in 1957 and continuing until its General Dynamics decision in 1974, the Court began erecting and expanding a host of judicial impediments to corporate mergers and acquisitions, impediments which exerted a discouraging effect on mergers vastly beyond that necessary to maintain the competitive vitality of the marketplace. This was also the period in which the Court established a number of new and sweeping per se rules, rules which the Court has since either abandoned entirely or drastically qualified. During the 1960s, the Supreme Court decided in favor of the government in virtually every case that was brought before it. It is not apparent that the government's selection of cases was guided by any consistent economic theory. It is even less apparent that the Court's disposition of these cases was guided by any coherent approach whatsoever. Indeed, Justice Stewart, dissenting in Von's Grocery, evidenced his own bewilderment with the haphazard structure of antitrust merger precedent which the Court was creating: "The sole consistency that I can find is that in litigation under § 7, the Government always wins."

Shortly after the Court signaled its change of approach in its General Dynamics decision of 1974, it took steps to narrow the standing of private parties to bring antitrust lawsuits. In 1977, the year that it overruled

32. General Dynamics, 415 U.S. at 486.
33. Exceptions include: White Motor Co. v. United States, 372 U.S. 253 (1963) and Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963). The former required that the lawfulness of distribution restraints be disposed of after trial and the latter decided that the lawfulness of a territorial division should be examined initially by the Civil Aeronautics Board.
Schwinn, it began a substantial revision in the law governing antitrust standing. As I will explain below, this revision in the law of standing reflected and supported the substantive changes which the Court was introducing. Nonetheless, as shown below, even the Court's retrenchment and qualifications of the 1970s and 1980s fail as intelligible and predictable guides to the substantive law. The experience of the past thirty years thus raises grave doubts about the Court's ability to bear the primary responsibility for antitrust policy development. Its attempt to reshape antitrust law during the 1960s can best be described as a disaster, and its attempt to recover from that disaster remains incomplete, with significant portions of its prior caselaw remaining uncorrected and unrevised and thus constituting misleading signals to the unwary.

A. THE COURT'S FAILED ATTEMPT TO DEVELOP ANTI-MERGER STANDARDS

In Du Pont/GM the Court created a cloud over vertical acquisitions undertaken by large companies. So long as one of the parties occupied a substantial share of the product market, the other party would be vulnerable to a charge of "foreclosing" others to that share and thus of violating the Clayton Act. To exacerbate the unsettling effect of this decision, the Court also indicated that all vertical acquisitions were vulnerable to continuous—and apparently perpetual—reevaluation as market conditions changed. The result was that originally innocuous vertical acquisitions could be condemned years or decades later on the ground of changed factual environments.

Following Du Pont/GM (which was decided under the original 1914 version of the Clayton Act's corporate acquisition provision), the Court decided an array of cases under the then current (i.e., 1950) version of that provision. In its 1962 decision in Brown Shoe, the Court used an assumed efficiency-effect of the merger as a reason for invalidating it: the Court thought that an efficient vertically integrated enterprise would possess a cost advantage over unintegrated smaller rivals and that the preservation and protection of small business was an imperative which overrode other considerations. Ten years later it again manifested hostility towards vertical combinations when it forced Ford Motor Company to disgorge Autolite, a spark-plug manufacturer acquired by Ford in an attempt to exploit the replacement market for spark plugs.

36. The Court ruled that the appropriate time for assessing the antitrust consequences of an acquisition was at the time of suit, thereby subjecting acquisitions to perpetual vulnerability to Clayton Act challenge. See 353 U.S. at 589, 607.
38. Brown Shoe, 370 U.S. at 344.
In *Brown Shoe* the Court applied an effective five percent market share test to condemn the horizontal aspects of the merger at the retail level.\(^{40}\) *Brown Shoe* was written as a fact-intensive decision, so it was not immediately clear that the Court would apply a market-share test to other mergers. Moreover, the Court had asserted in its opinion that quantitative tests ought not to govern the evaluation of horizontal mergers.\(^{41}\) The following year in *Philadelphia Bank,*\(^ {42}\) however, the Court adopted a presumption of unlawfulness for mergers resulting in a market share for the combined companies of thirty percent or more. The 30% presumption was then whittled down in a series of cases\(^ {43}\) until it reached 7.5% in *Von's Grocery*\(^ {44}\) and 4.49% in *Pabst*\(^ {45}\) by mid-decade. By the second half of the 1960s, horizontal mergers of any substantial size were understood to be effectively barred by the caselaw. This stringent approach was reflected in the Justice Department's 1968 Merger Guidelines which adopted an eight percent standard for mergers in "highly concentrated" markets.\(^ {46}\) It is generally understood that the Court abandoned this hostile approach towards horizontal mergers in 1974. Its *General Dynamics* decision\(^ {47}\) symbolizes the Court's aboutface, but does not explicitly acknowledge this change in approach.

In the later 1960s, the Court attempted to formulate standards for evaluating the lawfulness of conglomerate mergers and acquisitions and the formation of joint ventures.\(^ {48}\) Once more the Court took an overly hostile approach to these combinations and failed again to provide convincing rationales for its decisions. In these cases it developed a three-pronged analysis for application to nonhorizontal mergers, which considered the merger's "entrenchment" effect, its effect on "perceived potential competition" and its effect on "actual potential competition."\(^ {49}\) This potential competition analysis was thereafter employed by the Court to invalidate the Ford/Autolite combination.\(^ {50}\) The power of these two types of potential competition analysis as anti-merger tools was substan-

\(^{40}\) See *Brown Shoe*, 370 U.S. at 343-44.

\(^{41}\) Id. at 321 n.36.


\(^{43}\) Mediating the transition from the *Philadelphia Nat'l Bank* case to the *Von's Grocery* and *Pabst* cases, were United States v. Aluminum Co. of Am., 377 U.S. 271 (1964); United States v. Continental Can Co., 378 U.S. 441 (1964).


\(^{46}\) U.S. Dep't of Justice, 1968 Merger Guidelines, 4 TRADE REG. REP. (CCH) ¶ 13,101, para. 5. The 1968 guidelines define a market as highly concentrated if the 4 largest firms account for 75% or more of that market. Under these guidelines, the government would challenge a merger by a firm occupying 4% of such a market with another firm occupying 4% of that market.


\(^{49}\) The three prongs of this analysis were present in *Procter & Gamble*, 386 U.S. at 578-81. They were precisely articulated in *Marine Bancorporation*, 418 U.S. at 602, where the limitations of the potential-competition analysis were revealed.

\(^{50}\) Ford Motor Co. v. United States, 405 U.S. 562 (1972).
tially reduced as a result of the Court's 1974 decisions in Marine Bancorporation51 and Connecticut National Bank52 in which the Court insisted upon carrying out the logic of their underlying premises: the potential competition doctrines apply only to concentrated markets and markets are concentrated for a reason. If concentration is a result of market barriers, then the perceived potential competition doctrine can only apply to the extent that the external firm is perceived as able to overcome the barriers. Similarly, the actual potential competition doctrine can apply only when the external firm is capable in fact of overcoming the barriers. The entrenchment effect has been silently put to rest, not by the Court, but by general agreement.53 While the Justice Department has incorporated the potential competition doctrines in its merger guidelines,54 the Department has also recognized the power of potential competitors as a check on market exploitation in circumstances making it appropriate to uphold mergers rather than to condemn them.55

B. THE COURT'S FAILED ATTEMPT TO DEVELOP WORKABLE PER SE RULES

1. Concerted Refusals to Deal

During this same period the Court was actively formulating new or more restrictive per se rules. In its 1959 Klor's decision56 the Court created a broadly phrased and unqualified per se rule against concerted refusals to deal. Klor's was reaffirmed in the Court's 1961 decision in Radiant Burners.57 The Court failed to introduce qualifying language in either of these cases. It was left to the bar, the academy, and the lower courts to divine the limitations upon this sweeping prohibition for the next twenty-five years. Only in Northwest Wholesale Stationers58 did the Court introduce the qualifications upon the per se rule which made it a workable guide to behavior.

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55. U.S. Dep't of Justice & FTC, 1992 Merger Guidelines §§ 1.11, 1.21, 1.32, 1.321, 1.322, 3.0-3.4; U.S. Dep't of Justice, 1984 Merger Guidelines §§ 2.11, 2.21, 2.31, 3.3; U.S. Dep't of Justice, 1982 Merger Guidelines II(A)-(C), III(B).
2. **Tying Arrangements**

Beginning with its 1958 decision in *Northern Pacific*, the Court expanded the scope of the Sherman Act's per se rule against tying arrangements, and continued that expansion through *Loew's* in 1961 and through its first *Fortner* decision in 1969. These cases had eviscerated the previous Sherman Act requirement that the plaintiff establish the defendant's power in the tying product market. Now the presence of a patent or copyright would raise a presumption of market power as would the tying product's "desirability." Even the defendant's ability to raise prices or impose other burdensome terms with respect to any appreciable number of buyers—a power possessed by any seller of a premium brand product—was apparently sufficient to invoke the per se rule in a tying case. Having made all tying arrangements effectively illegal per se under the Sherman Act in *Fortner I*, the Court started withdrawing from that extreme position in its second opinion in that same case eight years later. Even so, it was not until the Court's *Jefferson Parish* decision in 1984 that counsel could be confident that a client with a relatively small market share would not be vulnerable to a charge of illegal tying. With a majority of the Court holding that a thirty percent market share was insufficient to establish the market power requisite for application of the per se rule, and with four members of the Court urging the abolition of the per se rule governing tying, observers of the Court's work had reason to believe that the Court was moving towards the latter position. Indeed, *Jefferson Parish* confirmed the view that the standards for a tying violation under the Sherman Act and the Clayton Act had coalesced and that the establishment of a tying violation under the latter Act had to meet the now reinvigorated standards of the Sherman Act.

Then in unpredictable fashion, the Court in *Eastman Kodak* abruptly abandoned the insights provided by economic analysis and adopted a renewed hostility towards tying, this time in a way which provides a new disincentive towards product innovation, a matter the Justices did not even discuss. The tying caselaw currently is indeterminate. There are per se rules and they do have a significant market power component, but that market power requirement can be satisfied by the manufacturer of any

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64. *Id.* at 43.
physically differentiated product who sells replacement parts for its product. In that case, the per se rule applies even to the smallest company. In short, we have a history of a continuous expansion of the per se rule against tying to embrace virtually all tying arrangements by the end of the 1959-69 period; then we have a period of retrenchment (1977-84) in which the market power component is reintroduced and in which the line of development appears to point towards eventual abolition of the per se rule. Finally, we have a new reversal in which the per se rule is applied to virtually any seller of replacement parts for a product of its own design. The Supreme Court's tying caselaw, in short, exhibits even more abrupt twists and turns than caselaw in other antitrust areas and is currently unsettled and unpredictable.

3. Nonprice vertical restrictions

The caselaw on vertical restrictions, like the caselaw in other areas, has switched course dramatically during the last thirty years. In this area, however, the Court has been forthright about acknowledging its change and has articulated governing criteria which the bar and the lower courts are able to follow. As in the other substantive areas, the Court began in the 1960s with a sweeping hostility towards business arrangements, modifying its approach in the 1970s to a more accommodating one. In 1967 the Court's rightly infamous Schwinn decision gave us a new per se rule against territorial and customer restrictions on dealers and distributors purchasing for resale. No satisfactory rationale for that decision was ever articulated. Schwinn was resisted by the lower courts and condemned in the academic literature. Ten years after its issuance, it was overturned in GTE/Sylvania. In GTE/Sylvania the Court recognized the legitimacy of the academic arguments for the procompetitive effects which can be produced by non-price vertical restraints, an acknowledgement which was sufficient to bring the rule of reason into play. In subsequent cases, the Court emphasized the self-interest of the manufacturer or supplier in enlisting the cooperation of its dealers in expanding sales volume, an interest which ensures that distribution arrangements are structured to intensify competition.

4. Vertical price maintenance

The weakest points in the Court's distribution caselaw involve vertically-exercised price control. Vertical price fixing has been illegal per se since the Dr. Miles case so decided in 1911. The logic of its Sylvania decision, however, points towards radically revising or abolishing the per

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71. GTE Sylvania, 433 U.S. at 36.
73. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
se rule over vertical price fixing. Yet, in Sylvania, the Court refused to extend the rule-of-reason approach which it there adopted for vertical nonprice restraints to the area of vertical price restraints. Eleven years after Sylvania, the Court in Business Electronics74 provided a rationale for holding vertical price fixing illegal per se in the limited circumstances where vertical price-fixing arrangements could reinforce restraints imposed by a horizontal manufacturing cartel or a manufacturing oligopoly.75 In either circumstance vertical price fixing would deter cheating on the cartel or oligopoly pricing. The logic of Business Electronics indicates that the per se rule against vertical price fixing should be confined to cases of cartels or oligopolies—or perhaps even replaced by the rule of reason—but these limitations are not generally understood and the Court has not taken any action to clarify this part of its caselaw.

C. The Court’s Contradictory Approach to Per Se Rules

Over the years the Court has sought to justify per se rules as a short-cut to identifying anticompetitive behavior. In 1911, the Court referred to contracts or agreements which could be condemned out of hand because their “nature and character” showed them to be unreasonable.76 In recent years, the Court has said that per se rules should apply only to practices which facially appear to be those “that would always or almost always tend to restrict competition and decrease output.”77 Yet while the Court verbally defines per se rules in this way, the Court continues to apply per se rules to behavior which manifestly does not fit that definition: it has approved the application of a per se rule to an equipment manufacturer’s decision to supply replacement parts only to equipment owners and to its own servicing organization;78 it has maintained the per se rule condemning vertical price fixing;79 and, it has done nothing to qualify the per se rule condemning horizontal allocations of territory ar-

75. The Court also acknowledged that vertical pricing agreements could be employed by a retailer-cartel as a means for implementing a horizontal price-fixing agreement. In such a case the manufacturers who entered these agreements would be pressured to do so by the retailer cartel. Because retailer cartels having the power to pressure manufacturers appear rare, this possibility is largely of theoretical interest.
78. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992). The Court’s ruling, requiring the trial court to determine whether the service market is dependent upon the equipment market, assumes the continuing validity of the per se rule and contemplates the imposition of liability for conduct which should be deemed innocuous at worst. See Gifford, supra note 69.
articulated in *Sealy*\(^{80}\) and later reaffirmed in *Topco*,\(^{81}\) which impede small and medium size business firms from cooperating in the promotion of a jointly-owned brand. In a courageous tour de force by the District of Columbia Circuit in the mid-1980s, then Judge Robert Bork was virtually compelled to write a treatise on antitrust law to justify patently procompetitive conduct which appeared to conflict with two Supreme Court precedents holding such cooperation per se illegal.\(^{82}\) Bork concluded that the Supreme Court had impliedly overruled its decisions in *Sealy* and *Topco* and that because of this implied overruling, his court could approve a cooperative arrangement among trucking companies enabling them to offer nationwide service. Thus the Court gives the appearance of applying one kind of law while tolerating substantial indeterminancy at the level of business behavior. This method of antitrust administration creates major problems for the bar, imposes unnecessary uncertainty upon business and creates needless decisional burdens for the overworked lower courts.

V. THE ORDERED CHAOS OF CONTEMPORARY ANTITRUST LAW

A. INDETERMINANCY IN THE RULES

Although the Court signaled a shift in the law applied to distributorship restrictions in *GTE/Sylvania*, the implementation of that shift in the lower courts took many years. Indeed, the most dramatic result in lower court litigation was that terminated dealers changed their pleadings from a reliance upon the abrogated per se rules of *Schwinn* to new per se contentions based upon allegations that the termination took place pursuant to a conspiracy between the manufacturer and one or more other dealers which was "vertical in form but horizontal in effect"\(^{83}\) and therefore subject to a per se rule, or that it was in some way related to an objective of reducing price competition among dealers.\(^{84}\) Although most of the various ways of claiming dealer-terminations to be per se illegal have finally been put to rest, it has taken many years to do so and the expenditure of millions of dollars in lawyers' fees. The Court itself was called upon in *Monsanto* and in *Business Electronics* to curtail litigation that should have been halted with its decision in *Sylvania*. Indeed, the need for the Court to decide *Business Electronics* a full eleven years after it had decided *Sylvania* reveals the clumsiness of the caselaw in reforming itself.

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The law governing resale price maintenance remains in a state of indeterminancy. As previously observed, the Court has not formally overturned Dr. Miles, but it has done so by implication. The lower courts, however, are generally unaware of any change in the law governing resale price maintenance agreements. And, indeed, the state attorneys general are busy bringing private actions against manufacturers and suppliers for engaging in this behavior.

There well may be political factors at work. As noted below, the Court has effectively adopted Telser's analysis of the procompetitive effects of vertical price maintenance. But when the Justice Department asked the Court to overrule Dr. Miles in its amicus brief in Monsanto, that request produced a storm of outrage in Congress. Professors William Eskridge and Philip Frickey have recently analyzed the Court's work in terms of maintaining institutional equilibria with the other governmental branches. Shredding the rationale for the per se rule against resale price agreements may not provoke substantial congressional reaction, but explicitly overruling Dr. Miles may be perceived by the Court as unduly threatening to its relationship with Congress. Viewing the Court's work in this way helps to explain its behavior but, of course, does not resolve the problems of the law's indeterminacy.

A similar indeterminacy exists in the laws governing exclusive supply contracts, where the formally governing law is set forth in two Supreme Court decisions which are widely regarded as obsolescent. The Court's recently decided Eastman Kodak decision introduces vast indeterminacy into the laws governing tying arrangements and monopolization and casts a cloud upon product innovation. Again, various important antitrust standards vary from circuit to circuit. The standards governing monopolization drawn from the Court's decades-old decision in Griffith, and followed in the Second Circuit, are currently rejected in the Ninth

85. The Court has stated (1) that per se rules are limited to behavior which is always or almost always output-reducing, and (2) that the only time that resale price maintenance would be output reducing would be when it serves as a reinforcement mechanism for a horizontal manufacturing cartel (or when the resale price maintenance is imposed by manufacturers coerced by a horizontal dealers cartel). See Business Elecs., 485 U.S. at 723, 725-27. The combination of these two statements mandate that the per se rule of Dr. Miles be confined to instances connected with horizontal cartels or oligopolies. This would be tantamount to treating vertical price fixing as subject to an evaluation under the rule of reason.

86. Thomas Greene et al., State Antitrust Law and Enforcement, in 2 33d ANN. ANTI-


88. See William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993 Term—


Even the widely adopted Areeda/Turner predatory pricing standards are rejected in the Eleventh Circuit. The Court is gradually attempting to reduce the amount of indeterminacy. Its recent decision in Spectrum Sports was designed to standardize the law governing attempted monopolization, where the Ninth Circuit had maintained its own idiosyncratic approach for thirty years. Again in its recent Brooke Group decision, the Court was trying both to seize the initiative on predatory pricing analysis and to remove the anomalous situation in which the lower courts were in a state of effective rebellion against the formally governing Supreme Court precedent relating to price discrimination with primary-line effects under the Robinson-Patman Act.

B. THE DIMINISHED LITIGATION ROLE OF GOVERNMENT AND THE HEIGHTENED ROLE OF PRIVATE ACTIONS

Under the traditional model of antitrust law development, the government selects cases for litigation on the basis of the policy issues which it wants resolved. In so doing, the government shares control of policy with the courts. The courts, acting as a check on the government, implement the policy which the government urges only when it persuades them of its rationality and effectiveness. That model no longer applies.

Today the government is a minor actor in the litigation of antitrust cases. It no longer controls the agenda of antitrust caselaw development. Most cases are brought by private parties. At least since the early 1970s, antitrust caselaw has been created almost entirely in private actions. Indeed, since the Court's rejections of the Justice Department positions in its decisions of 1974-75, the Department's contribution to antitrust caselaw as a litigating party has been meager. The FTC's pres-

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97. See Gifford, Predatory Pricing Analysis in the Supreme Court, supra note 95, at 451-55.
98. See supra notes 10-30 and accompanying text.
99. See supra notes 5-9 and accompanying text.
ence before the Court as a litigating party has been somewhat greater, but its overall contribution to law development has been even less.

Major antitrust principles have been adopted in private litigation. The Supreme Court caselaw on predatory pricing is a creature of private litigation. The Areeda/Turner predatory pricing rule was adopted by the lower federal courts in private litigation. The law governing vertical nonprice restrictions on distributors and dealers is the product of private litigation. The related law governing vertical pricing arrangements has largely been formulated in private litigation as has the current law of monopolization. What we have in the way of law governing tying arrangements has been developed in private litigation. The law governing concerted refusals to deal is mostly the product of private litigation.

When most of the cases in which new law is made are initiated by private parties, the issues brought before the courts will not reflect a studied strategy of law reform. The cases arise haphazardly from the way the interests of the litigants mix with the current state of law development. Moreover, the presentation of policy arguments will reflect the interests of the litigants. Arguments which reflect overall societal interests will sometimes be downgraded for tactical litigating reasons. As a result, the courts will be less well informed than they ought to be and will be handicapped in formulating the law. Moreover, the litigants themselves may lack the expertise to articulate the national interest at all or in terms which the courts understand. Even the skills of experienced antitrust counsel may lie in exploiting the particulars rather than in the development of a comprehensive vision for antitrust law as a whole.

The Supreme Court, of course, is in a better position than are the lower courts to control its antitrust agenda. It can exercise control over its docket to select cases for decision and in that way influence the process of

antitrust caselaw reform. In order to do that effectively, however, the Court needs an overall vision as to the direction of reform and the interrelations among various parts of antitrust law. Without outside assistance, it is extremely difficult for the Court to acquire or to maintain such a vision and therefore to use its docket control to advance the process of reform.

C. THE ROLE OF STATE ATTORNEYS GENERAL AND STATE ANTITRUST LAW

In addition to their role as official enforcers of state antitrust law, the attorneys general of the several states have, as a group, become increasingly active in filing federal antitrust lawsuits. In so doing, the state attorneys general sometimes act cooperatively, joining together as plaintiffs in the same lawsuit. A professional association of the state attorneys general, the National Association of Attorneys General (NAAG), issues sets of antitrust guidelines which over the years have interpreted federal antitrust law somewhat differently from the Justice Department. The antitrust agenda of the federal courts thus reflects both the haphazard influence of privately-instituted actions and the more studied separate agendas of the state attorneys general in addition to the input of the Justice Department. According to one source, the NAAG guidelines played a significant role in the decisions of state attorneys general to bring suit in the Clozapine, Mitsubishi, Panasonic, and American Stores cases.

The state attorneys general often take policy positions different from those of the federal enforcement authorities. State attorneys general have commenced antitrust lawsuits which the federal enforcement authorities have considered and declined to institute. Although the Justice Department and the state attorneys general have developed working and cooperative relationships, it remains true that state attorneys general con-

109. See infra notes 110-21 and accompanying text.
110. As a body with a comprehensive view of how the antitrust laws should be construed, NAAG has the technical capacity for offering the Supreme Court both guidance on the selection of antitrust cases for review and advice on their disposition. NAAG thus possesses the theoretical potential for supplanting the historic position of the Justice Department as the primary source of guidance for antitrust policy development. There is, however, no basis for believing that NAAG in fact performs this service.
111. Thomas Greene et al., supra note 86, at 643.
115. See infra note 116.
continue to assert policy positions which differ from those asserted by the federal authorities.

_California v. American Stores Co._ illustrates the inconsistent policies permeating official enforcement efforts. Enforcement decisions within the federal government are allocated to both the Department of Justice and the FTC. These two agencies, however, have generally worked out an allocation of effort between them, the Justice Department accepting responsibility for certain industries and the FTC accepting that responsibility for others. The state attorneys general, however, constitute another and sometimes inconsistent source of decisionmaking. In the cited case, the FTC reached a settlement with American Stores on a proposed merger. The day following the FTC's final approval of the merger on the basis of that settlement, the state of California brought suit, seeking to enjoin the merger as a violation of federal antitrust law. California was initially successful, obtaining a preliminary injunction against the merger. Although the Ninth Circuit first took the view that injunctive relief was not available in a private action, the Supreme Court ruled otherwise. This ruling vastly expands the potential of private antitrust actions to restructure the marketplace and diminishes pro tanto the role of the federal antitrust authorities in antitrust policymaking. This ruling also provides a major new tool to the state attorneys general as they seek to implement competing policy agendas. In 1992 the State of Minnesota brought suit to block a healthcare merger which had previously been cleared by the Justice Department, forcing the merger participants to accept a consent order. State attorneys general are also more apt to bring suit on vertical price-fixing charges than is the Justice Department.

In addition to the different policy positions on federal antitrust law manifested in the litigating activities of the federal enforcement agencies on one hand and of the state attorneys general on the other, the coherence and integrity of federal antitrust policy is also vulnerable to the antitrust legislation of the states. Most states have enacted an antitrust law, generally on the federal model. During the period when federal antitrust

117. See U.S./FTC Clearance Procedures, 7 Trade Reg. Rep. (CCH) ¶ 50,125. See also Memorandum of Agreement Between U.S. Dep't of Justice and FTC (1948), described in, 4 Trade Reg. Rep. (CCH) ¶ 9565.
118. 495 U.S. at 276.
law was used largely to reinforce competitive-market behavior as a normative construct, state antitrust law tended to add additional reinforcement. In recent years, however, the potential for conflict between federal and state antitrust laws has increased.

The transformations of federal antitrust law have had repercussions upon state law. Minnesota, for example, enacted an antitrust law in 1971 which was designed largely to codify the contemporary federal antitrust caselaw. As a result, the provisions of the Minnesota law conflict to a significant degree with the current federal antitrust caselaw which has since undergone a radical transformation. The extent to which state antitrust legislation is vulnerable to federal preemption is unclear, but the Supreme Court has signaled a wide tolerance for inconsistent state legislation in cases involving procedural differences. The Court has expressed broad acceptance of state antitrust laws permitting recoveries which would not be available under federal law. States, for example, are free to enact legislation granting standing under their own antitrust laws to "indirect purchasers" to recover damages for overcharges by their ultimate supplier resulting from monopolistic or cartel-like behavior, even though indirect purchasers have been denied standing under federal antitrust law for reasons of federal antitrust policy. Moreover, defendants can be subjected to liability to indirect purchasers in antitrust counts under state law that are joined with antitrust counts under federal law and are pursued in federal court actions to which both direct and indirect purchasers are parties.

Federal and state antitrust laws potentially diverge on noncompensatory damages. Federal antitrust law specifies that actual damages will be trebled. When the issue arose, however, as to whether punitive damages in unlimited amounts can be assessed under state law for antitrust offenses, the Supreme Court answered in the affirmative. Punitive damages can be assessed in antitrust actions brought in federal court in which counts under both federal and state law are joined. Certainly the Court's recent remedial decisions enhance the status and power of state antitrust laws. They suggest (but as yet inconclusively) that state law may redefine restrictively the areas of substantive behavior which are permitted to business entities under the federal law.

125. ARC Am. Corp., 490 U.S. at 99, 103-05.
VI. THE MULTIPLE SOURCES OF ANTITRUST LAW

A. THE DEPARTMENT OF JUSTICE GUIDELINES, POLICY STATEMENTS AND BUSINESS REVIEW LETTERS

Today the primacy of the antitrust caselaw is in jeopardy. Lawyers increasingly look to the Department of Justice Guidelines for authority. The Department has issued guidelines and policy statements governing corporate mergers and acquisitions,\textsuperscript{128} international operations,\textsuperscript{129} the licensing of intellectual property,\textsuperscript{130} and structures for medical practice.\textsuperscript{131} These various guidelines represent attempts by the Department to seize the initiative in policy development. Without the guidelines, antitrust law would be the creature of judicial decisions, most of which would be rendered in private lawsuits where the Department would have limited input at best.

The Department’s first guidelines were the 1968 Merger Guidelines, issued to codify a decade of expanding prohibitions. These guidelines, however, became obsolete (as did the Supreme Court decisions on which they were largely predicated) during the 1970s. In 1982, the Justice Department issued a thoroughly reformulated set of merger guidelines. These merger guidelines were thereafter reissued in revised form in 1984, and in 1992 a third revision of the guidelines governing horizontal mergers was issued. The Department issued guidelines governing vertical restraints in 1985\textsuperscript{132} which were partially modeled upon the merger guidelines. These were, however, the subject of significant controversy and were revoked in 1993. Department guides for international operations were originally issued in 1977 and have subsequently been superceded, modified, and revised.\textsuperscript{133} Policy statements on health care\textsuperscript{134} and guidelines on intellectual property licensing\textsuperscript{135} are the most recently issued codifications of enforcement policy.


\textsuperscript{130} U.S. Dep’t of Justice & FTC, Antitrust Guidelines for the Licensing of Intellectual Property (Apr. 6, 1995).


\textsuperscript{132} U.S. Dep’t of Justice, Guidelines for Vertical Restraints (1985).


\textsuperscript{134} U.S. Dep’t of Justice, Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust (1994).

Because the guidelines embody a comprehensive approach to a substantive area of antitrust law, they carry persuasive power which particular enforcement policy positions lack. Indeed, the persuasive power of the guidelines tends to exceed that of most reasoned judicial decisions just because the judicial format is not well adapted to generalized policy analysis.

The Department’s business review letters are another source of antitrust law. Their role, however, is a complex one. Viewed narrowly, business review letters merely set forth the government’s position on the lawfulness of a transaction. While they effectively bind the government, they do not foreclose a suit by a private party. From this perspective, they are as likely as not to be rendered obsolete by a judicial decision in an action brought by a private party. Viewed more broadly, however, the business review letters are guidelines in incubation. The Department, through the process of issuing business review letters, is creating the intellectual and experiential base for formulating guidelines and policy statements. This was the path for the health care policy statements.

B. The NAAG Guidelines

As noted above, the state attorneys general, through NAAG, have also issued antitrust guidelines. Indeed, there are competing NAAG guidelines for both the now-defunct vertical restraints guidelines of the Department of Justice and for the Department’s horizontal merger guidelines. These NAAG guidelines are not guidelines for enforcing state antitrust laws, they are guidelines keyed to federal law. The existence of the NAAG guidelines tells us something of the significance of antitrust guidelines generally. The NAAG guidelines recognize the power of antitrust guidelines as comprehensive statements of antitrust policy to influence court decisions. The NAAG guidelines, therefore, constitute attempts by the state attorneys general to seize the initiative from the Justice Department and to influence the judiciary with a competing set of antitrust policies, thus injecting more fluidity and uncertainty to the current state of the law.

The NAAG guidelines originated in the 1980s when the state attorneys general viewed the 1985 Justice Department’s vertical restraints guidelines as too tolerant. NAAG therefore “corrected” the tolerance of the federal government by issuing its own competing set of vertical restraints guidelines in 1985.136 These were thereafter revised in 1988 and 1995. NAAG also issued its own set of horizontal merger guidelines in 1987137 and revised them in 1993.138 Although the NAAG guidelines began as a reaction to the policies incorporated in the Department of Justice guidelines, the revocation of the vertical restraints guidelines by the Department of Justice in 1993 was not followed by a similar NAAG repeal.

Instead, NAAG has just issued a revised and updated set of vertical restraints guidelines.\(^{139}\) The Department's medical guidelines and its intellectual property guidelines have not yet produced a NAAG response.

C. Federal Substantive Caselaw

The federal antitrust caselaw is a principal source of antitrust law. It is the traditional place where the law is made. In a formal sense, it is the source of all nonstatutory antitrust law and it continues, in a practical sense, to perform a critical role in the disposition of cases. Yet because of the radical transformations of federal antitrust caselaw, the federal caselaw is not always a good guide to the actual state of that law. As previously noted, federal antitrust caselaw is in a state of partial disarray. Many Supreme Court decisions are left standing as formally governing precedents which are widely understood to be obsolescent and no longer effective. Yet the Court has not repudiated them. Thus, they stand as false beacons for the unsophisticated and as traps for the unwary. In many areas the Court has lost the initiative to the Department of Justice and its guidelines program. In some areas the Court has attempted to regain the initiative in the development of antitrust law, yet the judicial process is not well adapted to perform the comprehensive revision which is required. As developed more fully below, judicial decisions which signal the Court's acceptance of sets of comprehensive analyses developed from extra-judicial sources work reasonably well. But attempts by the Court to develop law incrementally have been disastrous.

Lower court caselaw is in better shape than Supreme Court caselaw, but it suffers from a lack of guidance from above. Perhaps the most dramatic example of the Supreme Court's failure to guide lower courts lay in the primary-line injury cases under the Robinson-Patman Act. For almost two decades the lower courts were ignoring the Supreme Court's formally governing precedent, choosing instead to follow the Areeda-Turner predatory-pricing analysis despite its conflict with Supreme Court precedent.\(^{140}\) Taking note of this phenomenon a few years ago, Judge Easterbrook reluctantly suggested that the Seventh Circuit perform its formal duty to follow Supreme Court precedent, however ill-informed might be that precedent, until the Court changed it.\(^{141}\) Although the Supreme Court finally removed this particular embarrassment by effectively overruling its obsolescent \textit{Utah Pie} decision\(^{142}\) in its recent \textit{Brooke Group} decision,\(^{143}\) other examples of lack of guidance are not hard to find.

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140. See Gifford, \textit{Predatory Pricing Analysis in the Supreme Court}, \textit{supra} note 95, at 451-53.
The Court waited almost thirty years to straighten out the dangerously expansionary distortions that the Ninth Circuit had introduced into the law of attempted monopolization. In the merger area the Court has similarly failed to exert effective guidance. The Justice Department's guidelines have effectively been substituted for the formally governing Supreme Court precedents as a source to which counsel look for the effective law. Exclusive supply contracts—an area close to the hotly disputed trade issues connected with the Japanese vertical keiretsu relationships—constitute another antitrust domain in which the formally governing Supreme Court precedents are obsolete and the lower courts must look elsewhere for guidance.

D. Federal Standing Caselaw

The close relationship between limitations on the standing of private plaintiffs and the deficiencies of the substantive caselaw is rarely, if ever, acknowledged by the Court. Nonetheless, the relationship is a critical one, because the former offset the consequences of the latter to a significant extent. Indeed, much of the current standing law developed coincidentally with the transformation in the content of the substantive antitrust caselaw which began in the mid-1970s. The “antitrust injury” gloss put on the Clayton Act's section 4 originated in the Court's 1977 decision in Brunswick and the current formulation of the “direct injury” requirement derives from Illinois Brick decided that same year.

When standing is denied to private parties to complain of antitrust violations, the initiative necessarily reverts to the government. Deficiencies in the substance of antitrust law can be tolerated when no one raises them. Some of the deficiencies in current antitrust law are widely recognized. The danger is not that the government will exploit these deficiencies but that private parties stimulated by potential treble-damage recoveries will do so. The law governing vertically imposed price ceilings is widely recognized as an area where the law needs to be reformed. Vertical price fixing has been treated as per se illegal behavior, even when the price fixing consists of ceilings imposed by manufacturers or suppliers on the resale prices of distributors. Most observers do not believe that the latter conduct is anticompetitive. Yet despite the Court's rhetoric that per se condemnation should be limited to conduct which always or almost always produces anticompetitive consequences and a reduction of

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144. See, e.g., Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884 (1993) (the Court repudiated an expansionary approach to the attempted monopolization offense which the Ninth Circuit had created in 1964); Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964).
146. See text accompanying supra note 89.
The law continues to condemn vertical price fixing, including the imposition of price ceilings on distributors by their suppliers. The Court has so far been able to continue its traditional condemnation of such price ceilings while not having to face observable consequences traceable to its own judicial intransigence. It has done this with an imaginative use of standing doctrine. Atlantic Richfield Co. v. USA Petroleum Co. illustrates this scenario. In that case the plaintiff was a gasoline retailer competing with independent stations franchised by Atlantic Richfield. The plaintiff's complaint was based upon Atlantic Richfield's imposition of ceiling prices upon its franchised dealers, an imposition which forced the plaintiff to meet lower prices than would otherwise be the case. The Court was able to turn aside the plaintiff's challenge without reforming the substantive law by holding that the plaintiff's asserted injury (i.e., having to meet the low price levels of the defendant's dealers) was not the kind of injury that the antitrust laws are designed to remedy. This result follows directly from the analysis which the Court first formulated in Brunswick. Now competitors cannot challenge vertically-imposed price ceilings. Presumably the government would not challenge such pro-competitive arrangements. Thus, the Court is freed from reforming this aspect of antitrust caselaw.

Merger law is another area where obsolete substantive caselaw is rescued by standing doctrine. The caselaw is something of an embarrassment, because, as noted above, the formally governing Supreme Court merger precedents are obsolete. Again, however, the ramifications of this dysfunctional caselaw are avoided: almost no one other than the government can complain that a horizontal merger violates the Clayton Act's section 7. Hence, the obsolete standards of the caselaw can remain on the books. The Justice Department's merger guidelines have become more than a statement of enforcement criteria. As the only likely plaintiff, the Department's enforcement criteria have become the effective law.

E. The Academic Literature

Perhaps more than in most areas of the law, antitrust law is particularly dependent upon extra-legal sources, especially the academic literature. The law governing predatory pricing, for example, is based upon a seminal 1975 law review article by two Harvard Law School professors. Their proposal—which has come to be known as the Areeda-Turner test—treats pricing below marginal cost (or under average-variable cost

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151. See supra Part IV.C.
154. See supra Part IV.C; supra note 47 and accompanying text.
which serves as a surrogate for marginal cost) as presumptively predatory and pricing at or above marginal cost (or its average-variable-cost surrogate) as presumptively nonpredatory. With minor modifications from their original proposal, most of the federal circuits have adopted the Areeda-Turner approach to the evaluation of predatory pricing.\(^{157}\)

The law governing vertical restraints was shaped to a substantial extent in the writings of Richard Posner. In his books and articles, Posner set out in detail the analysis which he believed should be applied to vertical restraints.\(^{158}\) Posner constructed a proposed legal approach to vertical restraints which was heavily grounded in economic analysis. Recognizing that manufacturers and suppliers possessed economic incentives to enlist the cooperation of their dealers in expanding sales, Posner pointed out that vertical restrictions must generally be geared to increasing sales, a procompetitive objective. Even when the manufacturer possessed a monopoly, the manufacturer’s incentive would lie in capturing all of the monopoly profits for itself (rather than sharing them with its dealers). Thus even a monopolist manufacturer would be unlikely to employ dealer restrictions as a form of restricting market output.

When the Court decided \textit{GTE/Sylvania}, it basically adopted the analysis provided in the Posner articles. As a result, the Court knew the ramifications of its decision. It was able to recast the antitrust treatment of vertical restraints comprehensively by adopting a broad approach already worked out in the literature.

A seminal article on vertical price restraints published in 1960 analyzes the economics of vertical price maintenance.\(^{159}\) That article, written by Lester Telser, concludes that resale price maintenance is a technique employed by manufacturers to evoke promotional behavior by dealers, thereby expanding the sales volume of the manufacturer’s brand. He also points out that resale price maintenance could be employed by members of a manufacturers’ cartel to impede efforts of any member to cheat on


the cartel's price or output restrictions. Telser's analysis would support the application of a rule of reason to resale price maintenance agreements or limiting the per se rule to the situation of a manufacturers' cartel or oligopoly. Telser also recognizes the theoretical potential of a retailer cartel to coerce manufacturers into formally imposing resale prices on the retailers as a cover for an underlying horizontal agreement among the retailers. Since most retail markets are highly competitive, this use of resale price agreements is of academic interest only.\textsuperscript{160} Although the antitrust laws have traditionally treated resale price maintenance as per se illegal, the law has been gradually moving in the direction indicated by Telser. The Court's 1988 opinion in \textit{Business Electronics} virtually adopts the Telser analysis.\textsuperscript{161}

The law governing tying arrangements is heavily indebted to the pioneering work of Ward Bowman in the 1950s\textsuperscript{162} and generally to economic analysis.\textsuperscript{163} Bowman argued that the "leverage" theory upon which tying law was constructed was flawed. Economic analysis generally teaches that tying is a useful means for price discrimination and can be employed for "metering" purposes, i.e., to charge customers amounts corresponding with the intensity of their uses of the product purchased. Frequently a seller employing a tying policy would be expanding output and therefore lessening the resource distortion which lies at the base of antitrust prohibitions. Whether or not a particular instance of tying produces an expansion of output over what would otherwise occur is dependent upon the facts of the particular case. To conform to the Supreme Court mandate that per se rules be limited to circumstances which always or almost always produce anticompetitive effects, the per se rule governing tying arrangements would have to be abolished. It is probably fair to predict that the existing caselaw cannot withstand indefinitely the pressure exerted by the combined effect of the Court's articulation of the limits of per se rules and the academic literature.

The efficiency aspects of exclusive supply contracts have been recognized in new ways since the publication in 1975 of an influential book on vertical relations by Oliver Williamson.\textsuperscript{164} Williamson pointed out, inter alia, that since purchases of supplies on the market were generally an alternative to in-house production or long-term supply arrangements, the use of one of the latter arrangements indicates that the purchaser believed this arrangement was less costly than the alternatives: in other

\textsuperscript{160} Id.
\textsuperscript{162} Ward S. Bowman, Jr., Tying Arrangements and the Leverage Problem, 67 YALE L.J. 19 (1957).
\textsuperscript{163} See, e.g., ROGER D. BLAIR & DAVID L. KASERMAN, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 52-58 (1983).
\textsuperscript{164} OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES; ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION (1975).
words, that it was more efficient. In this case (as in many others), the interest of the purchaser in minimizing its costs coincides with the public interest in allocating resources efficiently. Recently, the business community has come to appreciate the cost-effectiveness of the Japanese vertical keiretsu relationships. These arrangements are essentially long-term relationships between a final product producer and its input suppliers. Their success demonstrates empirically the theoretical insights articulated by Williamson. The antitrust caselaw has not yet fully caught up with the pertinent economic analysis but it surely will.

VII. INSTITUTIONAL LIMITATIONS OF THE COURTS TO FORMULATE ANTITRUST LAW

At their core, courts are institutions for resolving disputes. Their procedures are designed to arrive at fair and accurate resolutions of the facts in particular cases and to apply governing legal standards to those facts. In common-law jurisdictions, courts bear the additional responsibility of creating legal doctrine through the precedential effects of their decisions. Nonetheless, the strength of judicial decision making lies in the focus of those proceedings upon the particulars of each case.

Although courts are charged with the responsibility of creating precedent, they are only partially equipped to perform that task. Courts are best equipped to articulate broad moral principles underlying human relationships. The Supreme Court has performed this task well when it has issued constitutional pronouncements recognizing the equality of the races and adopting the one-person one-vote principle. Courts enunciating such important values nonetheless are often required subsequently to become mired in the particulars of implementing the broad principle. Even so, what courts lose in the appeal of the broad moral stance, they offset with their competence in dealing with particulars. For the most part, the Supreme Court has been able to stand aloof from the messy problems of implementation, retaining its prestige as the nation’s normative institution of last resort. Even when it is called upon to work out difficult accommodations between competing and widely-held values (as it has in dealing with the outer limits of free expression and in the arena of church/state interaction), the Court is particularly equipped to perform such tasks in the incremental mode of the common-law tradition.

Yet courts become less competent when circumstances force them to legislate broadly over a complex body of behavior with the facts of the


166. See Kevin Kelly et al., Learning from Japan, Bus. Wk. Jan. 27, 1992, at 52.


particular case as their only guide. The facts of a particular case may provide support for the articulation of an open-textured principle which guides (but does not control) future decisions. This is what the Court did in the segregation and reapportionment cases. But in other areas this approach does not quite work. In the business arena, judicial decisions frequently carry immediate ramifications for planned behavior, not only because business firms often avoid conduct which is problematic under existing law, but also because principles or approaches stated in economic language often imply precise applications. Thus, there are some areas of behavior for which workable rules require intensive and longitudinal study and analysis. I argue below that antitrust is one such area.

VIII. SUCCESSFUL ANTITRUST POLICY DEVELOPMENT

Antitrust policy was largely unproblematic during its first fifty years because the caselaw could be understood as a judicial effort to foster and to reinforce a norm of competitive-market behavior. The basic components of such a norm were widely understood to consist of avoiding cartel-like activity: business firms should not agree on price with their rivals nor should they attempt to corner the market on goods. There were, of course, other rules which in hindsight might be questionable but which could be generally accepted as falling within the imprecisely defined concept of a free and open market: no vertical price-fixing agreements and no tying unpatented goods to patented products. The success of the caselaw lay in the largely norm-reinforcing role which was performed by judicial antitrust decisions.

Antitrust policy became problematic in the 1960s when the Court switched from a role of reinforcing a preexisting normative construct into the role of formulating new norms which exceeded the expectations of the professional and business communities. Antitrust law became a set of rules which were imposed coercively rather than a self-enforcing set of generally accepted norms. As previously pointed out, the Court did not


172. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608 (1953) (indicating that patents would confer the market power requisite for a tying violation under the Sherman Act). The tying of unpatented goods to patented products, however, has had a problematic history. The Court determined that the patent law did not authorize a patentee to impose such a tie as a condition of a patent license in 1917. Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917). Such tying was later determined to be patent misuse. Carbice Corp. of Am. v. American Patents Dev. Corp., 283 U.S. 27 (1931). When the Court later expansively interpreted the patent misuse doctrine in the Mercoid cases, Congress reacted by explicitly permitting tying arrangements as a means of exploiting a patent. Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944). Under present law, patentees have broad permission to employ tying arrangements. See 35 U.S.C. § 271 (1988).
adopt this new policy without outside help. The government encouraged the expansionist tendencies of the Court majority. Indeed, the government continued the push for an expansionary antitrust caselaw well beyond the time that the Court itself had concluded that its expansionary decisions had been in error.

The government’s role in this expansionary period is troublesome. The government possessed the resources and capabilities for developing a coherent and comprehensive antitrust policy. The Court had understood that the government’s role over regulatory affairs generally—and including antitrust in particular—was to develop comprehensive policy positions which could then inform judicial decision making. It is possible that much of the Court’s deference to the government during the 1960s rested upon the Court’s belief that the government had assessed the larger ramifications of the legal positions which it was asserting before the Court.

In retrospect, it appears that the Antitrust Division was just performing the role of an aggressive litigator. It asked for as much relief as it thought the Court would give it. Instead of exercising a responsibility to develop a comprehensive view of wise antitrust policy, the Division left to the Court the responsibility for drawing limits. The result was that no limits were drawn and antitrust policy became irrational.

Antitrust observers understand that from 1974 through the 1980s the Court took an approach towards antitrust policy which differed dramatically from its approach of the preceding decade and one-half. The newer approach—often identified with the so-called “Chicago School”—was heavily dependent upon economic analysis and the academic literature. This approach, which the Court reached on its own during the 1970s, was reinforced substantially by the Justice Department after 1981.[173] In reviewing the Court’s work during this period, there is much more to see than the Court’s change in substantive outlook. The process itself, as an exercise in lawmaking, deserves careful examination.

First, if the Court was to reverse course on antitrust policy, it needed external guidance. The Court is not well-equipped to develop a comprehensive regulatory (or deregulatory) strategy. Under traditional theory, it could have looked to the government for help. The government, however, did not provide that help until the Broadcast Music[174] case at the end of the decade. It is reasonably clear that the Court relied upon the academic literature during the mid- and late-1970s as a decisional aid.

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173. There is no political message here. The 1981 Justice Department was part of the Reagan administration which had assumed office that year. But Justice Department inputs into antitrust policy, taking the form of comprehensive assessments (in the form of guidelines or policy statements) of a large area of antitrust concern, have continued through the Reagan, Bush and Clinton administrations. Indeed, Anne Bingaman, President Clinton’s Assistant Attorney General for Antitrust, has been particularly active in issuing such assessments.

174. Broadcast Music Inc. v. CBS, 441 U.S. 1 (1979). In that case Deputy Solicitor General Frank Easterbrook argued for the United States as amicus curiae, urging reversal of the decision below holding blanket licensing by copyright societies per se illegal.
Indeed, because the academic literature (especially in the writings of then-Professor Richard Posner) had worked out the consequences of nonprice vertical distribution restraints, the Court was able to decide the *Sylvania* case with confidence. In subsequent cases involving predatory pricing, evidentiary rules in antitrust law, supplier/dealer interaction and the very purposes of antitrust law, it has relied extensively upon the academic literature, especially as evidenced in the writings of Richard Posner and Robert Bork. During this period the lower courts had dramatically rewritten the law applicable to predatory pricing by similarly drawing from academic literature. In this case, it was the Areeda/Turner article on predatory pricing\(^{175}\) which provided the needed guidance to these courts.

Second, the criteria which the Court was adopting for evaluating antitrust cases was largely signaled, rather than fully articulated. The Court's decision in *General Dynamics* does not explicitly adopt any new criteria which cannot be found in its earlier decisions. Formally, the Court merely ruled that the presumptive effect of statistical evidence can be overcome by a showing that the statistics are misleading.\(^{176}\) *Connecticut Bank* (which is rarely cited as symbolizing the Court's change-of-course) does repudiate the suggestion in *Pabst*\(^{177}\) that the government has no responsibility for establishing a relevant market.\(^{178}\) But reestablishing the relevant market as a part of the government's case would not itself entail a revision of the prior caselaw. *Marine Bancorporation* undermines the facile approaches embodied in the Court's earlier conglomerate merger decisions but on the basis of an economic analysis which had been implicit in the prior cases. All that the Court did in these cases was to apply accepted analytical approaches in an even-handed manner.

Even the later *Sylvania* case does not articulate an elaborate economic theory. Yet most observers of the Court's work knew *Sylvania*'s ramifications. They knew that from the academic literature from which the Court drew. Similarly, antitrust observers knew that when the lower courts adopted the Areeda/Turner marginal-cost/average-variable-cost test for predatory pricing, they could look to the academic literature for limitations upon the use of that test and for its larger ramifications. Thus, when the Supreme Court and the lower courts drew from the academic literature for guidance in the shaping of antitrust policy, they also pointed observers to that same literature as a source of help. In short, the "law," in the Holmesian sense of a prediction of how the courts would decide cases,\(^{179}\) would not be found entirely in the case reports. Indeed, in the circumstances of the mid-1970s the case reports were even more misleading than they are today. Instead, the effective law was signaled in the

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175. *See supra* note 156.
recent case reports, and necessary elaborations were to be found in the academic literature.

The role of the academic literature as a source of antitrust law is quite dramatically illustrated in the government-instituted Professional Engineers case,\(^{180}\) where the Court accepted the position that only factors affecting the operation of marketplace competition are relevant to antitrust analysis. This position had been argued in the academic literature\(^{181}\) and had just been forcefully urged by Robert Bork in his then-recently published Antitrust Paradox.\(^{182}\) The Justice Department at this time, however, had not yet reached that position. Indeed, the Department even conceded in its brief that a professional association could legitimately adopt ethical rules which, because of their anticompetitive consequences, would be illegal for other associations.\(^{183}\) The Court thus reached its newly articulated conception of the rule of reason without government assistance but with substantial reliance upon the academic literature.

Third, beginning in 1982 the Justice Department undertook the task of issuing comprehensive sets of guidelines covering large areas of antitrust subject matter. Starting with mergers in 1982, the guidelines presented a comprehensive view of a number of antitrust issues. They showed how the resolution of a particular case involving one set of facts would imply dispositions of other cases involving different facts, when the cases were evaluated under a common framework. In providing these comprehensive frameworks, the Department had at last begun to perform the work which the older legal theory had assigned to the government but which the government had hitherto failed to perform, at least in the antitrust area. Moreover, the 1982 guidelines evidenced analytical strength, unusual for any government enforcement agency. They resolved one of the conundrums of prior antitrust analysis. In their evaluation of horizontal mergers, the guidelines combined in one conceptual framework the determination of a relevant market, ease of entry and the concept of market power.\(^{184}\) The merger guidelines were slightly revised and reissued in 1984. That part of the merger guidelines which pertained to horizontal

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181. See Robert H. Bork, The Antitrust Paradox (1978); Oliver E. Williamson, Economies as an Antitrust Defense: The Welfare Tradeoffs, 58 AM. ECON. REV. 18 (1968). Posner had urged that “the economic theory of monopoly provides the only suitable basis for antitrust policy” and “an appropriate guide in interpreting our actual antitrust laws.” Richard A. Posner, Antitrust Law: An Economic Perspective 8 (1976). The exclusive concern of the antitrust laws with economic competition was the thesis of Bork’s book which had been published shortly before the Court’s decision and was cited in Justice Blackmun’s concurring opinion. 435 U.S. at 700 n.*. Justice Stevens majority opinion, however, did not cite that work, but instead cited an older work by the same author for that point. See Robert H. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 YALE L.J. 775 (1965).
mergers was further revised and reissued in 1992. The basic approach adopted in 1982, however, has continued in force.

The guidelines thus perform several functions which the Court by itself could not accomplish. They adopt a comprehensive analysis of an area of antitrust concern such as mergers, and provide a policy approach which is consistent throughout. This kind of approach provides an intellectual base which is beyond the capacity of the judiciary. Antitrust observers trying to understand the guidelines are not required to seek out the academic literature in the way that they were effectively required to do in order to fully comprehend the Court's antitrust opinions like *Sylvania*, *Monsanto*, or *Business Electronics*. In contrast to those Court opinions, the guidelines contain both a comprehensive set of standards and the theory upon which those standards are based. Again, the guidelines provide assurance to the concerned public that each decision is not only logically supportable on its own facts but also that the decision is based upon the same evaluative framework as is the decision of other cases. Finally, the guidelines provide a superior basis for predicting future decisions than is generally provided by caselaw. Over time the analytical strengths of the guidelines are carrying the day. The courts are showing increasing respect for the guidelines as evaluative standards, often using them as support in their own decisions.  

Fourth, the Court ultimately began to receive the litigation assistance that it needed from the Department of Justice. The amicus brief submitted by the government in *Broadcast Music* was influential not only in persuading the Court about the merits of that case but, as well, in influencing the way the Court conceptualized anticompetitive behavior generally. In *Broadcast Music* the Court began to focus upon whether challenged business behavior was the kind that would be likely to lead to a restriction of output, a focus which might seem an obvious one for a law whose avowed purpose was the furtherance of competition but a focus which theretofore had not figured prominently in the caselaw. In *Broadcast Music* the Court's focus on output reduction occurred in the

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185. See, e.g., Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1440 (9th Cir. 1995); Olin Corp. v. FTC, 986 F.2d 1295, 1299-1302 (9th Cir. 1993); FTC v. PPG Indus., Inc., 798 F.2d 1500, 1502-03 (D.C. Cir. 1986). Although in both *Olin* and *PPG* the court stated that the guidelines were not binding upon it, both courts employed an analysis which was derived at least in part from the guidelines. 986 F.2d at 1300; 798 F.2d at 1503 n.4.

186. See Brief for the United States as Amicus Curiae at 15, *Broadcast Music*, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) (No. 77-1578). That Brief pointed out that normally a cartel raises prices and decreases output, diverting resources away from their most productive use and reducing the efficiency of the market. It then argued that the effects in the *Broadcast Music* case were critically different because the copyright societies brought about a reduction of licensing costs.

187. In *Broadcast Music* the Court indicated that in determining whether conduct should be condemned under a per se rule, the inquiry should be into "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " 441 U.S. at 19-20. As pointed out in the text, the concern with a decrease in output was later explicitly applied to rule-of-reason analysis.
context of deciding whether behavior was subject to the per se rule. Later that focus would be extended.

In its 1984 decision in the NCAA case the Court restated the rule of reason in terms which again focused upon whether the conduct before it was likely to reduce output. Its restatement was assisted by the government’s amicus brief. The traditional formulation of the rule of reason is that of Justice Brandeis in the Chicago Board of Trade case. The trouble with Brandeis’s version of the rule of reason, however, is that it does not say very much except that it is necessary to inquire into all of the facts. In its amicus brief the government argued that the elaborate inquiry called for by Brandeis would often be unnecessary if the focus were upon whether a challenged arrangement would be likely to reduce output. The government referred to this kind of inquiry as a “truncated” rule-of-reason analysis. The NCAA version of the rule of reason succinctly connects the rule with the substantive concerns of the law. Under the NCAA version a restraint fails the rule of reason if it results in a lessening of output below that which would occur in a competitive market. This is a sophisticated result, one for which the basis was laid in Broadcast Music and for which the government provided analytical and persuasive assistance in its amicus brief at the time of its adoption.

During the 1980s the Department frequently submitted amicus briefs to the Supreme Court in antitrust cases on the Court’s docket. In submitting these amicus briefs, the Department was basing its approach on a studied and comprehensive approach to antitrust policy, the kind of approach which the older legal theory had wrongly assumed the Department had followed in the pre-1981 era. Indeed, the Department submitted amicus briefs in important lower-court antitrust cases as well. For example, in Paschall v. Kansas City Star Co. the Department urged the court to employ economic analysis of seller-distributor relations applicable to the case of a monopoly seller. Although at first rejecting the Department’s position, the court ultimately accepted it.

The Court’s recent decision in the Eastman Kodak case reveals the downside of the Court’s dependency upon input from the Justice Department. In that case the Department submitted an amicus brief supporting the position of the Kodak Company. When the majority declined to follow the Department’s recommendations, it adopted a position which many observers consider naïve. Because the decision of the majority was not premised upon a broad and coherent view of antitrust law into which

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188. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
190. Id.
192. See 727 F.2d at 701 & n.8.
the *Eastman Kodak* decision could be placed, the Court is bound to flounder when it tries to work out the ramifications of that decision.

The Department, of course, makes mistakes. In the Court's 1993 term the Department urged the Court to deny certiorari in the *Spectrum Sports* case, a case which the Court did accept and in which it overruled a longstanding and festering Ninth Circuit precedent. Steve Calkins suggests that the government apparently was unconcerned about the Ninth Circuit’s aberrational attempt-to-monopolize rule,\(^{194}\) a strange position for a Department which should be concerned with fostering an antitrust policy conducive to national well-being.

The conclusion is that the optimum antitrust policy requires the coordinated work of the Justice Department and the Supreme Court. The Court will often be persuaded by the Department. Indeed, the more studied is the Department's position and the more it appears to be part of a comprehensive approach, the more the Court is likely to be persuaded. The Department can provide a depth and breadth of analysis which is unavailable to the Court acting alone. But just because the Department has immense potential influence upon the Court, the Department itself bears a heavy responsibility to ensure that its positions are comprehensively developed. When the Department fulfills that responsibility and when the Court performs the role for which it is best equipped—challenging the Department to provide this studied and comprehensive input—the Court's antitrust decisions are most likely to command lasting respect.

**IX. CONCLUSION**

Antitrust law has grown from the largely symbolic role which it played during its early years into a potent force with which business firms must reckon in their daily affairs. It has undergone at least two major periods of transformation. The first period, from 1957 to 1973, created an antitrust law which imposed substantial inefficiencies upon American business firms. During the second period, beginning in 1974, most of the changes introduced during the 1957-73 period were undone, although at significant cost to the business firms who were parties to cases litigated during this second period. Today, antitrust law is drawn from a complex set of materials, of which the caselaw itself is only a part. The Justice Department's guidelines have played a major role in the second transformation of antitrust law, as have newly developed limitations on standing and the academic literature. The state attorneys general and private litigants forcefully provide policy input, not all of which is consistent with the national interest in a fully efficient marketplace. Successful antitrust policy over a long term requires the courts to be resistant to those demands which do not conform to this efficiency goal. Yet to do so, they

need a coherent vision of antitrust law as a whole and to relate individual claims to this larger vision. Institutional limitations handicap courts in developing this broad perspective. The Justice Department's input can assist the courts to overcome their limitations, but it involves both a challenge and the acceptance of a responsibility vastly beyond the litigating role which the Department played during the period of the 1957-73 transformation. The courts too need to recognize their own institutional limitations.