Interest Groups and the Antitrust Paradox

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Economists have generally assumed that the intention of the antitrust laws is to increase economic efficiency. Many observers, however, have noted that the antitrust laws are applied inconsistently and often do not use economic analysis to promote economic efficiency. Judge Robert Bork (1979) referred to this failure of the antitrust laws to promote economic efficiency as the "antitrust paradox," and Peter Asch (1970) called it the "antitrust dilemma." The special interest theory of regulation developed by Stigler (1971) and others assists in understanding the antitrust paradox, because pursuant to it one must not expect antitrust to be applied to benefit the general public.[1]

The special interest view of economic regulation has found its way into evaluations of the antitrust laws.[2] For example, Judge Richard Posner (1969, p. 87) claimed that Federal Trade Commission (FTC) investigations are seldom in the public interest and are undertaken "at the behest of corporations, trade associations, and trade unions whose motivation is at best to shift the costs of their private litigation

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[1]Stigler (1985) does not see the special interest theory as completely convincing in the case of antitrust. Some extensions of the special interest theory of government are found in Posner (1974), Peltzman (1976), McCormick and Tollison (1981), Becker (1983), and Holcombe (1985). Some of the many empirical examinations of the theory include Abrams and Settle (1978), Jarrell (1978), Kau and Rubin (1978), McCormick and Tollison (1981), Smith (1982), and Ross (1984). A parallel development to the literature on interest group regulation is the rapidly growing literature on rent seeking. See Tollison (1982) and Benson (1984) for a discussion of the relationship between the two developments and reviews of the relevant literature.

[2]See, for example, Posner (1969), Faith et al. (1982), Weingast and Moran (1983), Benson (1983b), Benson and Greenhut (1986), and High (1984–85).

to the taxpayer and at worst to harass competitors." The special interest theory of regulation goes a long way toward explaining the antitrust paradox, but there are important differences between antitrust and most other regulatory constraints on business. Moreover, there are many facets of antitrust that are not readily explained by that theory.

Several aspects of antitrust law differentiate it from the types of regulation that are normally considered within the special interest framework. Regulation is normally concerned with one or a few industries, but the antitrust laws are considerably broader in scope. In addition, the courts play a much more visible role in antitrust than they do in regulation. One can legitimately question how laws as broad in scope as the antitrust laws can be the product of special interests. One can further question how special interests could hope to benefit from court decisions that normally are considered to be outside the influence of narrow special interests.[3] These basic issues are evaluated throughout the paper.

Our thesis is that the antitrust laws are a result of a special interest struggle between small and large economic entities seeking changes in the general economic environment rather than the specific favors usually associated with special interest legislation. We explain why a rather general approach was sought for antitrust laws, not the typical goal of many narrowly focused special interests. We also explain Judge Bork's antitrust paradox, both in origin and application, and account for enforcement by both courts and governmental bureaus of the property rights assigned under the antitrust laws.

The Antitrust Process

There are three main participants in the antitrust process: special interests; legislators; and the commissioners, bureaucrats, and judges who interpret and enforce the statutes. These groups are not mutually exclusive. In particular, bureaucrats and commissioners may also act as interest groups and possess considerable political power that often is used to further their own interests. Stigler (1971) observed that the object of special interest groups is the transfer of wealth, but this is rarely accomplished by a simple transfer of funds from the public treasury, especially in the antitrust arena. Rather, as Benson (1984) noted, wealth transfers are provided through governmental assignments of or transfers of property rights.

[3]Posner (1972), Rubin (1977), Priest (1977), and Holcombe (1983, chap. 9) all suggest a type of invisible hand mechanism leading the courts to reach efficient decisions.

The process of assigning or transferring property rights can be divided into two distinct stages: first, the assignment of property rights; second, the enforcement of the resulting property rights assignment. The first stage is a legislative function; for the assignment to be worth anything, an enforcement mechanism must also be established. These two stages can be thought of as a single object demanded by interest groups because different enforcement levels are possible given any assignment of rights. Thus, one goal of interest groups is to obtain and defend favorable property rights.

When examining antitrust issues there is particular reason for distinguishing between the assignment and the enforcement of rights, because legislators assign antitrust rights but do not enforce them, even though in theory they could. Legislators delegate the enforcement function to agencies (commissions) and to the courts, and the legislature's delegates wield considerable power and independence.[4]

The Basic Model

Legislators favor special interest groups but never to the extent that the favored group would prefer. They favor the group up to the point where the marginal political benefit received in exchange for the favor equals the marginal cost in terms of lost support from other groups (Peltzman 1976, p. 217). Of course, the favored group would most prefer to receive greater benefits, that is, up to the point where the marginal benefit is zero. Stigler (1971, p. 4), Posner (1974, p. 350), Peltzman (1976), and Becker (1983) concluded that the political exchange in the United States results in an efficient transfer of wealth from a political perspective. There should be no excessive waste or unnecessary inefficiencies caused by such exchange. As Tullock (1965), Eckert (1973), Hilton (1972), Benson (1983b), and Benson and Greenhut (1986) observed, however, the bureaucrats and commissioners to whom the antitrust enforcement power is delegated do not have incentives to behave efficiently. Why the delegation? The answer is because the legislature has a time constraint, and time spent enforcing the rights it has granted reduces the new rights assignments that the legislature can make (Benson 1983b). In addition, the legislature requires the agreement of a large number of people for it to take

[4]In many cases, enforcement agencies have the ability to assign rights, bypassing the legislature. This opens the possibility that an agency might favor an interest group the legislature does not wish to support and tend to corrupt public officials (see Benson and Baden 1985). One would expect that any deviation between legislatively supported interest groups and agency-supported interest groups to be a short-run phenomenon, however, because ultimately the legislature can control the agency through its budget.

action, so it will be an inefficient organization for accomplishing the enforcement of rights (Erlich and Posner 1974). For these reasons, the legislature delegates the enforcement of the rights it assigns.

The favored interest groups will also want the enforcement function delegated. The theory of bureaucracy suggests that a bureau will produce more output than would be most preferred by the legislature (Tullock 1965; Niskanen 1968, 1971, 1975); and when enforcement of a rights assignment is the output, the result will be over-enforcement (Benson and Greenhut 1986). Because the favored interest will prefer a rights assignment larger than the legislature will grant, over-enforcement by the enforcing agency will benefit the special interest. This explanation applies not only to all types of regulation but to antitrust as well. Special interests will prefer that the enforcement of rights be delegated because the rights will be over-enforced, increasing the special interest's benefits. As Niskanen (1975) observed, agency managers' incentives are closely linked to the size of the agency's budget; and although his model was applied generally to bureaucracy, it fits antitrust as well.[5]

The antitrust model examined in this paper is a straightforward use of Niskanen's bureaucracy model applied to the regulatory environment characterized by Peltzman and others. In general, special interests approach the legislature with demands for favorable property rights assignments. And rights are assigned in a way that establishes a majority for the legislator. After assignment, enforcement is delegated to an agency that over-enforces. If one then considers the agency to be an interest group, one can even support the Stigler-Peltzman predictions of political efficiency. The initial assignment was made due to a political exchange with an interest group; but once the enforcement mechanism is in place, the enforcer becomes another interest group, thus increasing the demand for enforcement. The supposed conflict between the Stigler-Peltzman interest group approach and the Niskanen bureaucracy approach raised by Weingast and Moran (1983) may not exist at all if bureaucrats play an interest group role.

Several vital aspects of the antitrust laws warrant specification at this point. First, the laws are economy-wide rather than focused on just one or a few industries. Second, the laws are couched in very vague language, so that what constitutes a violation is largely a matter of interpretation. Third, the laws involve a commission. Fourth, they involve the courts. The importance of these features distinguishes

[5]Niskanen's early model (1968, 1971) has been subjected to a number of criticisms, several of which were dealt with by Niskanen (1975). See also Benson (1981, 1983a).

our antitrust model from the bureaucracy model and from Stigler's model of special interest legislation.

In essence, the antitrust laws represent a transfer of rights from large economic entities to small ones, the response of the legislator having been tuned to the times. This is why the laws are economy-wide in scope, rather than being centered on a few industries.

The advantage of having a vague statute is that it could be enforced, not only against those viewed as a present threat to small entities but also against any future threats. In addition, the special interest vagueness allows paradigms to be applied, such as the incipiency doctrine, in which substance can completely disregard the realities of existing competition and economic theory (Greenhut and Ohta 1979; Greenhut et al. 1985). It also explains away (and contradicts) the idea that the antitrust statutes were designed to improve the country's markets and to yield more efficient economic relationships.

What about antitrust enforcement being effected by commissions and courts? Are not appointed commissions less aggressive than the classical bureaucracy model would suggest? Hilton (1972), Eckert (1973), and others have proposed different outputs by commission regulators than by civil service regulators. Essentially, Hilton considered commissioners to be maximizing support, in effect seeking future employment.[6] But maximizing support is certainly consistent with favoring powerful political interest groups. Eckert viewed their salaries as being fixed and not tied to budget size; thus, he characterized commissioners as effort minimizers. It may appear to follow, then, that commissions have no real impact, as Stigler and Friedland (1965) suggested with respect to electric utilities. But commissions enforcing rights that are in the best interest of the regulated industry, as Stigler (1971) suggested is likely, could easily appear to be doing nothing if by doing "something" observers mean "restricting the industry." Furthermore, non-salary perquisites of the office are tied to the size of a commission's operator and level of enforcement. Thus, while the incentives for excessive enforcement may be relatively weak for a commissioner, they still exist, and the general conclusions of Niskanen's view of enforcers hold.

The courts also offer a basic difference vis-à-vis civil servants in the bureaucracy model. One difference is they are less subject to capture than are bureaus. A second difference is that they will be the final authority, because vague legislation fails to identify specific actions that violate the assigned rights. It is our objective to apply

[6]See also Mitnick and Weiss (1974), Russell and Shelton (1974), and Joskow (1974) for arguments similar to Hilton's.

the bureaucracy model to a set of laws, the antitrust laws, that are economy-wide in scope, vague, and enforced by commissioners and the courts.

Completing the Theory: Ambiguity and the Courts

The Sherman Act was basically inspired by and lobbied for by interest groups made up of small economic entities, particularly from the agricultural sector. Rather than a specific act aimed against, say, machinery companies, the general law could also protect small farmers from large banks or other present or future entities that might threaten them.[7] This same principle applies today with regard to civil rights legislation. Rather than specific laws, a general law to protect civil rights can be enforced by the courts against any present or future violators. The point is that if the special interest group has a large enough constituency and a distinct identity (for example, small economic entity, minority race), a general regulation enforced by the courts can provide more benefits to the interest group than a specific regulation.

While it is true that a series of specific regulations could accomplish the same thing, this would require the special interest to continue returning to the legislature for additional legislation whenever it appeared that a transfer of rights would be beneficial. A general transfer of rights from large economic entities to small ones will continue to benefit the small entities in specific instances that the small entities could not foresee. Because the characteristics of the recipient of the transfer are relatively well defined, this type of transfer will provide more benefits than would a specific regulation. *With a general transfer of this type, however, it is not always clear* when the law has been violated, so the courts enter as an interpreter of the intent that underlies the law. As long as the courts interpret the intent as being the protection of small economic entities from large ones, the small entities that compose the special interest will benefit from the transfer.

The ambiguity of a general transfer of this type also benefits the recipient, because one can never be certain when the line has been crossed that constitutes a violation. In the case of antitrust, this could cause large economic entities to wield their power carefully, lest they be accused of a violation. Again, this is to the benefit of the small economic units that made up the special interest.

[7]Note, however, that the Interstate Commerce Commission (ICC) act was passed at about the same time to regulate rail rates, in part because of pressure from farmers (and, of course, from the railroads themselves).

Another factor is that the courts are likely to be less influenced by special interests than by a governmental agency. In many circumstances a special interest would prefer enforcement by an agency as a means of increasing the effective transfer of rights, but this may not always be so. When rights are transferred from large economic entities to small ones, there is always the threat that once an enforcing agency is established, the large entities will use their economic power to influence the agency, resulting in a transfer of rights back to them.[8] When rights are being transferred from large entities to small ones, there is good reason for the special interest to prefer the enforcement of rights to take place through the courts. A court enforcer may prevent the large economic entities from capturing the enforcing agency.

In summary, antitrust laws tend to transfer rights from large entities to small ones. There are two reasons for special interests to prefer court enforcement. First, the general transfer can apply to cases not specifically mentioned in the law; court interpretation is required to identify these particular cases. Second, court enforcement will prevent the large economic entities from whom rights were transferred from capturing the enforcing agency to reverse the transfer.

Interest Groups and Antitrust

The demand for antitrust legislation began building during the 1870s and 1880s (Areeda 1974, p. 44). It involved the formation of many organizations "with revealing names like the National Anti-Monopoly Cheap Freight Railway League" (Neale 1970, p. 12). The primary source of pressure was from farm groups that faced what they perceived to be excessively high rail rates as well as high prices of farm equipment and other manufactured goods. They believed that the high prices were caused by monopoly power exercised in the market and by import tariffs. There was also a general belief among farmers that eastern financiers controlled the credit market and charged them unfairly high interest rates. "Dissatisfaction with manufacturers of farm machinery and other goods, railroads, and eastern financiers became the cry against monopoly" (Areeda 1974, p. 43), and because "the farmers were better endowed with political influence than economic strength, . . . organizations like the National Grange and the National Farmers Alliance insistently demanded

[8]This can be observed today in the Department of Energy. Originally established to control large oil companies, much of its early effects amounted to a transfer from large oil companies to small ones and to the general public. The department's recent programs, however, primarily benefit large energy producers.

some control of the railways and of monopolies in general" (Neale 1970, p. 12). Neale concluded that "the paramount aim of politicians" in passing the Sherman Act was to meet this demand for action by such organizations.[9]

The business interests that farmers opposed were not without political power themselves, and Congress did not choose full-scale regulation or nationalization of these enterprises due to the political pressure from business (Areeda 1974, p. 44). Thus, the Sherman Act represents congressional attempts to balance the interests of various interest groups, as described by Peltzman (1976). Interest group pressure rather than a desire for economic efficiency led to the passage of the Sherman Act, and Neale (1970, p. 473) noted that the courts have consistently refused to consider economic efficiency issues in judging whether an antitrust violation has taken place, although many Department of Justice and Federal Trade Commission economists stress such issues in their analyses.

The passage of the Sherman Act fits well into the model of special interest legislation. It was clearly understood at the time that farmers demanded some antitrust action and that the passage of the Sherman Act was a response to that demand (see Gordon 1963). It was never intended to produce efficiency; even the name gives away the fact that the law was intended as a transfer of property rights away from trusts. What else could antitrust mean?

The form of the Sherman Act can also be understood within the context of the model. The act was passed to benefit the farmers as a special interest group, but the businesses the act opposed also had considerable political power. In balancing the interests of both groups, Congress could hardly legislate away the businesses. Viewed in this light, the vague nature of the statute and the delegation of its enforcement to the Department of Justice and to the courts make good sense from the standpoint of the farmers for whom the act was passed. Because the act generally declares combinations, contracts, or conspiracies in restraint of trade to be illegal, it is simply a vague piece of legislation that endorsed the common law and was designed to protect small economic entities from being harmed by large ones. Because the farmers were small entities and the railroads, banks, and manufacturers were large entities, the act appears to be a one-way transfer of property rights to the farmers (and any other small businesses that might feel harmed).

[9]Baxter (1979) and Katzman (1980) have argued that there is no strong evidence that one group is being favored by the antitrust laws; but Williamson (1979), commenting on Baxter's argument, found room for disagreement.

The structure of the act benefited the farmers in several ways. First, because the act did not name offenders ahead of time (it was not aimed at railroads or banks specifically but at anyone acting to restrain trade), action could be taken not only against present offenders but also against future ones. Because individual farmers could always foresee being economically small entities in relation to the other businesses with whom they dealt, the umbrella of the act protected farmers from a wide variety of economic threats.

Second, because of the act's vagueness, it enabled small economic entities to bring complaints under the act in a wide variety of circumstances. That vagueness would also ensure that there was always the possibility of a violation, having the corollary effect of making larger businesses behave cautiously even before any enforcement proceedings began, simply because of the threat of action.

Third, because victims could bring complaints, the Sherman Act could be over-enforced, even though an agency does not have the direct power of enforcement.[10] As a result, the act ended up providing more benefits to the special interests that the act favored than Congress had originally intended. The act was an example of special interest legislation and was recognized as such at the time of its passage.

The next major development in antitrust was the passage of the Federal Trade Commission Act and the Clayton Act in 1914. The establishment of the FTC was the result of many sources of political pressure, including the big businesses that found themselves constrained by the vagueness of the Sherman Act. There was considerable pressure from business organizations for more clearly articulated standards, and some observers have concluded that the establishment of the FTC was a victory for those businesses that wanted to ensure their political power and protect themselves from competition (Areeda 1974, pp. 47–48; Kolko 1963). In this view, the FTC was created to advise businessmen, to approve of their collusive organizations, and to create order in markets. As in the model above, large businesses could not effectively capture the courts, but the FTC gave them an agency through which they could use their economic power and influence.

Clearly, the FTC is not solely a pro-business agency, but was developed through compromise. The *Ralph Nader Study Group*

[10]Neale (1970, pp. 374, 385) noted that both the Federal Trade Commission and the Department of Justice rely almost exclusively on complaints to determine when the antitrust laws should be enforced, and that complaints predictably come from those who believe they are being injured.

Report on Antitrust recognized that "in 1914 both sides—those advocating a kind of business advisor and those seeking more energetic trustbusting—compromised to produce the Federal Trade Commission" (Green et al. 1972). And Areeda (1974, p. 48) noted that "similar differences of opinion were reflected in the Clayton Act, passed in the same year. . . . These differences were compromised in the ultimate enactment." As Peltzman's theory of regulation would predict, the favored group will not receive the maximum possible benefit. The FTC and Clayton acts, however, can clearly be seen as a transfer of rights to big business in response to the larger-than-intended transfer away from big business that had been the result of the Sherman Act.

It is interesting that the 1914 rights transfer was reversed somewhat as the FTC and the courts began to rule against incipient violations. In *Triangle Conduit and Cable Company v. FTC* (168 F.2d 175, 7th Cir. [1948]), for example, the court held that manufacturers utilizing a basing-point pricing system in order to stabilize competition among themselves were in violation of the Sherman Act. In itself, this decision seems unremarkable.[11] But the court proposed that unilateral adoption of a basing-point pricing scheme by an individual firm could also be prohibited, as long as other firms might adopt similar schemes. Even if unilateral at the start, the court saw this as the first step toward a conspiracy (see Greenhut [1970] 1974, chaps. 7, 14). In *Fashion Originators Guild v. FTC* (381 U.S. 357, 367 [1965]), the Supreme Court held that it was an object "of the Federal Trade Commission Act to reach not merely in their fruition but also in their incipiency," and in *E. B. Muller and Co. v. FTC* (142 F.2d 511, 517 6th Cir. [1944]) the Sixth Circuit Court ruled that "the purpose of the Federal Trade Commission Act is to prevent potential injury by stopping unfair methods of competition in their incipiency." Clearly in antitrust cases this represents a transfer of rights from large economic entities to small ones. The party bringing the complaint has to show neither actual nor present harms; it must only show that some harm can be predicted as a result of the offending policy.[12]

Exemptions and Interest Groups

Perhaps the strongest evidence of the influence of interest groups on antitrust legislation lies in their success in gaining immunity to

[11]See Greenhut ([1956] 1983) for a concurrence with the decision.

[12]The incipiency doctrine reflects the public's distrust of oligopolies as well as the general failure (including that of economists) to distinguish between organized (collusive) and competitive oligopolies, the market prices and factor incomes of which are

the antitrust laws (Adams 1965). Agricultural interests comprised the major pressure group pushing for the early antitrust laws, so it is not surprising that agricultural organizations were able to obtain specific exemptions from coverage under the antitrust laws. Section 6 of the Clayton Act partially exempts agricultural organizations, allowing farmers to form cooperative associations without violating the law. The Capper-Volstead Act of 1922 extends the Clayton Act to exempt capital stock agricultural cooperatives that were not exempted under the Clayton Act.

The courts have interpreted the Clayton Act as allowing farm organizations to "set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws."[13] Thus, agricultural interest groups—who were instrumental in having the antitrust laws passed as a transfer of property rights to them—also had the political power to see that the laws were not applied to them, even when their actions represented combinations or contracts in a restraint of trade that clearly would have been considered a violation if committed by another business entity. A similar exemption was given to fishermen's organizations in the Fisheries Cooperative Marketing Act of 1934. In some cases, the courts ruled in favor of the special interests; in others the interests were able to get additional acts passed that specifically exempted them.

In 1908, the Supreme Court ruled in *Lowe v. Lawlor* (208 U.S. 274) that a nationwide boycott organized by a union to persuade wholesalers and retailers not to buy a particular firm's product was an interference with the interstate shipment of goods and, therefore, a restraint of trade. The Court awarded treble damages and ordered the union and individual union members to pay shares of the award. Following the decision, labor union officials "immediately commenced pressure for exemption of labor from the antitrust laws." The drive resulted in the Clayton Act's declaration that labor organizations are exempt from the antitrust laws (Northrup and Bloom 1965, p. 313). Section 6 of the act reads: "[N]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help,

of opposite order (Greenhut [1970] 1974). This doctrine and its increasing use, reflected even in Judge Learned Hand's *Alcoa* decision, are based on the failure to recognize that conscious parallelism of action by oligopolists can derive from competitive behavior and in turn generate market-efficient results. The vested interests of those who identify with the small entities must condemn any form of Loschian conjectural variations behavior (Greenhut et al. 1975) and thus relegate the antitrust laws to a set of restrictions with no roots at all in any quest for economic efficiency.

[13]Maryland and Virginia Milk Producers v. United States, 362 U.S. 458, 466 (1970).

and not having capital stock or conducted for profits, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws." Section 20 of the act prevents the use of federal injunctions against strikes, boycotts, picketing, and similar activities "in any case between an employer and employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment."

Despite the Clayton Act's exemption of labor from the antitrust laws, the Supreme Court ruled in 1921 in *Duplex Printing Company v. Deering* (254 U.S. 433) that labor unions could be held accountable under the antitrust laws for some of their actions. In this case, a union that was trying to organize the Duplex plant had succeeded in getting members of other unions to refuse to handle the firm's products. The Court held that Section 20 protected a union only when its members were employed by the company they were acting against. The American Federation of Labor turned to Congress; after continual pressure, the Norris-La Guardia Act was passed in 1932, which deprived the federal courts of antitrust jurisdiction in almost all labor disputes.

The labor case parallels the agricultural case. Though labor interests were not actively seeking passage of the antitrust laws, this powerful lobbying group nevertheless managed to remain exempt from the laws' influence. If the courts did not rule in favor of a special interest, then the special interest was able to turn to Congress to have exemptions to the antitrust laws legislated for it.

Other exemptions could be mentioned. For example, if regulated industries are the beneficiaries of regulation, as Stigler (1971) argued, then the regulated firms should be able to protect their benefits from potential challenges through the antitrust laws. As Areeda (1974, pp. 105–14) and Adams (1965, pp. 277–84) noted, regulated industries are largely exempt from the antitrust laws. Similarly, the Miller-Tydings Act (1937) and the McGuire-Keough Act (1952) were results of a movement among small retailers that had successfully obtained passage of "fair trade" laws in 45 states prior to 1937. This legislation exempted firms from antitrust laws in states with legalized minimum resale prices. The "fair trade" laws, which are widely viewed as protecting small shopkeepers from the more efficient larger retail chains (in a clearly collusive manner in restraint of trade), caused Neale (1970, p. 276) to note that "many political groups which would yield to none in zeal for trust busting are to be found in the van of the so-called fair trade movement. . . ." The Robinson-Patman Act preventing price discrimination is yet another example of an antitrust law *designed to protect* a special interest, that interest once again being small retailers who could not buy in large enough quantities to receive quantity discounts often given to chains.[14] The exemptions to the antitrust laws are all easily recognized as the result of special interest pressure on the legislature.

The Antitrust Laws over Time

Neale (1970, p. 11) observed that "there is evidence that the aims and scope of antitrust policy have changed a good deal since the passage of the Sherman Act, and may easily change some more in the future." Following the interest group theory of regulation, this is precisely what one would expect if the relative strengths of interest groups change over time (Benson 1984; Weingast and Moran 1983). For example, Clarkson and Muris (1982) noted that prior to 1969 the bulk of the FTC antitrust enforcement was aimed at discouraging price competition under Robinson-Patman when it threatened the well-being of small firms. After significant criticism, the FTC in 1969 suddenly closed about 600 of its investigations, reorganized the commission's work to deemphasize Robinson-Patman, and began several large-scale industry investigations. Similarly, the settling of the AT&T case and the closing of the IBM case within months of each other can be seen as a response to a change in the political climate during the Reagan era.

Posner's (1969, p. 83) study of the FTC emphasizes that a congressman must support the demands of interest groups in his district, noting that "the welfare of his constituents may depend disproportionately on a few key industries. The promotion of the industries becomes one of his most important duties as a representative of the district." One might well expect cases to be biased in favor of the firms in the districts of legislators serving on committees that have oversight over the FTC; this is exactly what Faith et al. (1982) found. Weingast and Moran (1983, p. 775) reached a similar conclusion with regard to oversight committees, noting that "markedly different preferences on the committee lead to major shifts in agency policy." Because oversight committees are merely a reflection of interest group demands, Weingast and Moran and Faith et al. conclude that the FTC's output is best explained by the interest group theory.

[14]See Ross (1984) for a discussion of the interest groups who were influential in obtaining passage of the Robinson-Patman Act and for empirical estimates of the benefits obtained and the costs incurred by various groups as a result of the enforcement of the act.

This discussion places a different light on the general vagueness of the antitrust laws. Earlier, the vagueness of the laws was seen as a means to transfer rights to one well-defined group (for example, small economic entities) from other unspecified groups. Small farmers could obtain transfers from railroads, banks, manufacturers, and any other future economic threats without the threats being spelled out in the law. But the laws' vagueness also benefits the legislature; due to its oversight capacity, the legislature will be able to influence the type of enforcement in response to the changing power and demands of interest groups, all without writing a new law.

In light of the fairly obvious political nature of the passage and enforcement of antitrust laws, we might wonder why such widespread acceptance of the efficiency-enhancing goals of antitrust appears to characterize the economics profession. This view appears to be an after-the-fact rationalization, however, because economists were not advocates for or even concerned with passage of the earliest statutes. As Scherer (1970, p. 424) reported:

> About the only group in America other than big businessmen outspokenly unconcerned about the trust problem were the professional economists. Many were captivated by Darwin's theory of biological selection. They saw the growth of big business as a natural evolutionary response consistent with economies of scale, or when economics were patently absent from mergers, as a step necessary to eliminate cut-throat competition. But in that unenlightened era, the views of unenlightened economists concerning big business had little influence on public policy.

Clearly, Scherer holds with the efficiency-enhancing perception of antitrust, and he reflects the view that came to dominate the profession early in the 20th century.

Summary and Conclusion

This paper has fit the antitrust laws into the special interest theory of regulation, stressing the influence of special interests on antitrust. The paper also spotlighted the significant differences between antitrust and other forms of regulation, emphasizing the vagueness of the antitrust statutes, their broad focus, and the fact that the laws are generally subject to interpretation and enforcement by the FTC and the courts rather than by a narrowly focused agency. It is clear that the effects of antitrust diverge from those of other forms of regulation. For example, the interaction of vagueness and use of the courts sometimes requires legislators to pass new statutes in order to protect the favored special interest. On the other hand, to the extent that the

FTC serves as the final authority, the legislators' interest in reelection is being protected by insulating the legislature from direct responsibility for specific actions. Most generally, we propose that antitrust in the United States centers on special interest effects and the legislators' quests for reelection. The real antitrust paradox is to have expected legislatures to be concerned with the general welfare.

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