Readings of particular interest

Antitrust as Big Business

"The Antitrust Industry" by Robert B. Reich, in the *Georgetown Law Journal*, vol. 68 (June 1980), pp. 1053-1073.

Antitrust is more than a body of law; it is also an industry. The industry is composed of attorneys, legislators, corporate officials, bureaucrats, law professors, consultants, and economists—all of whose transactions give the legal doctrines practical effect, shape countless business decisions, and determine the future course of antitrust jurisprudence. Robert B. Reich, director of policy planning at the Federal Trade Commission, describes the structure of this industry and argues that the motives of those who participate in it are often at odds with the objectives antitrust is designed to serve.

According to Reich's calculations, approximately $2.5 billion of antitrust was "sold" in 1979—including $2.1 billion for private attorneys, $81 million for government attorneys, $17 million for judges, $30 million for economists and consultants, and $290 million for duplicating paper, telephone calls, and the ubiquitous travel and hotel accommodations. This sum does not include the indirect costs of antitrust, such as economies forgone due to the threat of antitrust prosecution.

The transactions of the antitrust industry take on a great deal of importance, Reich says, because the higher courts so infrequently articulate the law. Of the few cases that become full-blown controversies, fewer proceed to litigation, still fewer result in final decrees, and only a small portion of these are appealed.

The "buyers" of antitrust services are not necessarily those predicted by the theory that underlies antitrust, Reich says. The theories of monopoly commonly cited as the basis for antitrust law suggest three possible beneficiaries of antitrust enforcement who might serve as "buyers": consumers, seeking to reduce prices; smaller firms, seeking to lower barriers to entry into certain markets; and larger firms, seeking to prevent collusion among suppliers or competitors. None of these groups, observes Reich, has proved to be a determined force for antitrust enforcement. Consumers are too disorganized, and their individual interests in single controversies too small. Smaller firms are often more interested in getting the government to curb competition in their own markets than in challenging firms in other markets. Where these firms do resort to the antitrust laws, it is often to seek protection against wholesale discounting or to ward off unfriendly takeovers. Such uses of the antitrust laws, according to Reich, "rarely, if ever, benefit consumers" and may harm them. Finally, larger firms are often more concerned with avoiding antitrust liability themselves, either by obtaining legal exemptions or through their unlimited willingness to litigate, than with charging other firms with collusion.

Antitrust "sellers"—government enforcers, plaintiffs' counsel, outside defense counsel, and information processors—have their own set of interests and motives. Government attorneys are apt to be judged by the sheer number of antitrust cases they successfully prosecute during their (often brief) tenure, while senior officials may be eager to file highly visible actions unlikely ever to come to fruition. Plaintiffs' counsel are likely to act as venture capitalists, Reich says, seeking out potential defendants and plaintiffs according to the likely return on their own time and effort. Outside defense counsel—more concerned about avoiding mistakes and maintaining their reputations for thoroughness than about saving clients' money—are apt to overprescribe their antitrust services. And information processors—such as antitrust law professors, authors of looseleaf services and treatises, economists, management consultants, and hordes of overworked paralegals —are likely to be a force for change and com-

plexity in antitrust regardless of the desirability of such refinements.

In the light of the perverse incentives of many of these buyers and sellers, Reich examines the possibilities for less expensive means of achieving the purposes of antitrust. He offers several suggestions: (1) tax incentives designed to encourage firms to enter particular markets that appear to have substantial barriers to entry; (2) tax reforms designed to allow new entrants to carry forward their business-expense deductions at appreciated market value, so that their future profits can be offset to the same extent that present deductions can offset the present taxable earnings of "incumbents"; (3) requirements that incumbents disclose their profitability by line of business, in order to inform potential entrants of attractive market opportunities; (4) requirements that all firms disclose product quality attributes, in order to inform consumers that a new entrant's brand may be superior to an incumbent's better-established brand; and (5) expansion of the exemption from the Securities Act of 1933 of smaller issues, and clarification and simplification of the exemption for private offerings, in order to give new entrants easier access to capital markets. Such alternative ways to encourage market entry, argues Reich, might create fewer incentives for costly strategic behavior than does antitrust.

Nuclear Regulation: The European Example

"How Prometheus Came to Be Bound" by Michael Golay, in *Technology Review*, June/July 1980, pp. 29-39.

The regulation of nuclear plant construction in Europe is largely free of the delays and uncertainty that characterize its U.S. counterpart, according to Michael Golay, professor of nuclear engineering at the Massachusetts Institute of Technology. As part of a project sponsored by the Energy Department, Golay surveyed nuclear regulation in France, England, West Germany, and Sweden. "Uniformly," Golay writes, "both electric utility and regulatory personnel report that unjustified licensing delays are not significant factors in nuclear projects" in the four countries.

By contrast, adds Golay, delays were commonplace in the United States even before Three Mile Island. The period between a plant's construction permit and its operating license has drifted up from five to over seven years, and a licensing delay for a single completed plant can cost as much as $320,000 per day.

The difference, Golay maintains, is directly traceable to the political structures prevailing on each side of the Atlantic. Here neither Congress nor the executive has been willing to formulate a coherent policy for balancing the risks and benefits of nuclear power. Instead we have established a licensing system affording the maximum opportunity for intervention by outside pressure groups. The optimal strategy for nuclear opponents has been to wage a plant-by-plant war of attrition, challenging the licensing procedure at every stage—with the inevitable result being random delay.

In Europe, central governments consciously decide where to strike the balance between safety and economic factors, and the resulting policy is implemented with relatively few chances for private groups to challenge the process. While nuclear opponents have engaged in litigation and some violence, they have perforce had to concentrate on changing overall policy by replacing the government in a general election, as happened in Sweden in 1976.

According to Golay, the European regulators generally rely heavily on the professional judgment of a relatively small staff, often with a low turnover rate. What Golay calls "a sense of cooperation, trust, and reasonable compromise" characterizes the European process. So does secrecy: in England nuclear negotiation is shrouded by an official secrets act, and in France even the names of responsible officials are unavailable to the public.

The typical American practice, on the other hand, is to codify in great detail the standards and procedures the regulators must follow—making licensure a "judicial" as opposed to "legislative" matter, in Golay's words—with the broadest possible scope for outside scrutiny. Sweden and West Germany, which like the United States have a moratorium in effect on nuclear construction (but unlike the United States have made it official), fall somewhere between the two extremes on disclosure.

Golay is not optimistic about the prospects for pulling nuclear power out of its procedural

thickets, especially since similar constraints are beginning to affect coal-fired plants and other non-nuclear power sources. A coherent policy may emerge, he suggests, only after serious power shortages cause enough economic distress to focus the collective attention of the U.S. government on the problem.

Sex Discrimination in Insurance

"Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis" by Lea Brilmayer, Richard W. Hekeler, Douglas Laycock, and Teresa A. Sullivan, in *The University of Chicago Law Review*, vol. 47 (Spring 1980), pp. 505-560.

In *City of Los Angeles* v. *Manhart* (1978), the Supreme Court held that using sex-based actuarial tables to calculate employee fringe benefits violates Title VII of the 1964 Civil Rights Act. In this article the authors—two lawyers and two demographers from the University of Chicago—respond to the controversy over that decision.

The authors place the issue in the context of the two kinds of sex discrimination forbidden by Title VII: disparate treatment of individuals because of sex, and equal treatment of individuals that has disparate impact on sexual groups. It is disparate treatment to pay women smaller pensions, even though on average women live longer than men; this is analogous to not hiring women because on average they cannot lift as much weight as men. The insurance industry makes a disparate impact argument: that because of their shorter life expectancy, men as a group will receive a smaller proportion of total benefits if monthly payments are equal. The industry also claims that unequal payments produce equal expected values for male and female annuities. But this is just a reformulation of the group average argument, and it assumes that expected values should be computed separately by sex, which is the very question to be answered.

The authors argue strongly that the statutory ban on disparate treatment is primary and must be enforced even at the cost of disparate impact; that the exceptions to the Equal Pay Act, incorporated into Title VII by the Bennett Amendment, mean that disparate impact by sex in compensation is not forbidden at all; and that none of the recognized exceptions to the ban on disparate treatment authorizes unequal insurance benefits. They chide those who oppose quotas in the affirmative action context but support a group approach to equality on this issue.

In rejecting proposals for a special exception to Title VII, the authors assert that no such exception would be consistent with the policies of the statute; that the characteristics of sex that justify its inclusion in Title VII are fully applicable to the insurance context; and that age does not fully share those characteristics, so the explicit insurance exception in the Age Discrimination in Employment Act is consistent with the omission of such an exception from Title VII. Moreover, the argument that sex-based tables are essential to sound insurance practice is refuted by experience with unisex plans and, in any event, is indistinguishable from the long-rejected argument that sex is the only predictor of success in certain jobs.

In the authors' view, their interpretation of Title VII does not depend on the reasons for sex differentials in mortality (SMDs). But many proponents of sex-based insurance tables argue that lower female mortality is universal and genetic, and rely on this claim to distinguish sex-based tables from admittedly illegal race-based tables. The authors review the demographic and biological research and find that "all major investigators now believe that social, cultural, environmental, and behavioral factors are more important than genetic or biological factors in explaining SMDs."

Far from being universal, lower female mortality is a recent phenomenon, concentrated at older ages in the most developed countries. Even within the United States, SMDs vary widely over time and space. From 1920 to 1970, the SMD as measured by life expectancy at birth in the United States increased from 1.0 year to 7.7 years. This change was far too rapid to have a genetic explanation. Rather, the most important causes of SMDs appear to be men's higher rates of such self-destructive behavior as smoking, drinking, and reckless driving. These factors are changeable, and the authors report some evidence that a decline in SMDs has begun. Male death rates in the United States are now dropping faster than female rates. The authors conclude that the associa-

tion between sex and mortality is largely spurious, and suggest that men who wish to live longer and collect more annuity payments should change their behavior rather than their sex.

Finally, they argue that whatever the causes of SMDs, the fact that they can change as much as 670 percent in the adult life of a single insured makes sex a useless predictor of mortality for insurance purposes. (See "Department of Anticipated Consequences," page 6.)

Federalism and Bank Regulation

"The Patchwork Quilt: State and Federal Roles in Bank Regulation" by Kenneth E. Scott, in *Stanford Law Review*, vol. 32 (April 1980), pp. 687-742.

Regulation of banking in the United States has long been an object lesson in federalism. Despite the institutional division between national and state banks, many state regulations bind national banks and vice versa. State laws vary tremendously, especially on matters of branching and multiple ownership. At the federal level, three separate agencies (the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation) administer four sweeping statutes and a number of important auxiliary ones.

In a study conducted for the Federal Deposit Insurance Corporation, Stanford Law School Professor Kenneth Scott surveys the division between federal and state authority in banking in seven states with widely divergent regulatory schemes. He concludes that while federal dominance has been on the rise, there is a considerable field of jurisdiction still left to the states, its exact boundaries resulting more from political than from economic pressures.

Scott groups the various areas of bank regulation into five major categories, according to the objectives underlying, or at least used to justify, them: ensuring the safety of depositors' funds, preserving competition, protecting consumers, protecting stockholders, and allocating credit. He then classifies the relationship between federal and state regulation in each case into one of four different patterns:

1. *Federal dominance*, where a federal rule applies to both state and national banks, to the exclusion of (or in the absence of) any state rule on the same matter.

2. *Overlay*, where a bank must comply simultaneously with both a federal rule and a state rule; state banks are particularly likely to encounter this pattern.

3. *Independence*, where a federal rule applies only to national banks and a state rule applies only to state banks.

4. *State dominance*, where a state rule governs for both state and national banks, either by express incorporation in the federal statute or by tacit federal acquiescence.

Congress's power to decide which pattern will prevail in a given area is virtually complete for national banks, and nearly as extensive for state banks. Because national banks are "federal instrumentalities," Congress has a free hand in regulating them in any constitutionally acceptable way, defining as large or small a domain for state laws and regulations as it cares to. On some matters, Congress has quite explicitly authorized or prohibited state regulation. More commonly, Congress has not addressed the issue, thereby leaving it to the courts to work out the state role.

The courts have followed a modest strategy of allowing state regulation to operate on national banks except where it would impair their effectiveness or interfere with a pervasive federal regulatory scheme. Scott holds that, given the doctrines of federal instrumentality and federal supremacy, Congress clearly can override state regulation of national banks to whatever extent it sees fit. But in the absence of any express congressional declaration, it is less clear when and where the courts will find the "functional impairment" necessary to justify federal preemption.

State banks, argues Scott, are probably equally subject to congressional control under existing legal precedents. Congress has long employed the indirect device of attaching regulation of state banks to an optional federal benefit, such as insurance of deposits, but in doing so it has not forsworn direct regulation. Many of the recent "consumer protection" measures include uninsured banks within their coverage. Few cases, though, have tested the constitutional limits, if any, to federal control of state banks.

Scott examines the division between federal and state control in each major area of

bank regulation. He finds that federal domination has become the most widespread pattern, especially in the new regulatory areas opened up in the 1960s and 1970s. In its effect on banking operations and profitability, however, state regulation remains quite important. The reason is that chartering, branching, and the establishment of usury ceilings, all traditional areas of state autonomy, are key influences on bank profitability.

It is not easy, Scott suggests, to make sense of the patchwork quilt of bank regulation in terms of logic or efficient public administration. Historically, he says, it is much more plausibly understood as the result of the differing political strengths of contending groups—large and small banks, depositors, debtors, competitors —at the state and the federal level, and of the scope of regulation necessary to achieve a dominant group's economic objectives.

Import Protection: Weighing the Scales

Effects of Restrictions on United States Imports: Five Case Studies and Theory by Morris Morkre and David G. Tarr, Bureau of Economics, Federal Trade Commission, June 1980.

Protectionism is often defended as a way to avert the costs of adjustment incurred by U.S. workers and industries displaced by foreign competition. In this report, Federal Trade Commission economists Morris Morkre and David Tarr attempt to assess those adjustment costs and compare them with the costs that protection imposes on consumers and the economy through higher prices and inefficiency. They conclude that protectionism's costs have been significantly greater than its benefits.

Traditional forms of protection (such as tariffs and import quotas) and newer forms (such as orderly marketing agreements) can be viewed as a type of regulation, Morkre and Tarr point out. In the five industries they studied, all subject to severe import pressure, protectionist measures ranged from largely ineffectual (in the case of color TVs) to stringent (textiles). The ratio of inefficiency costs to benefits ranged from a low of 3½:1 (sugar) to highs of 25:1 (footwear) and 400:1 (citizens' band radios).

Morkre and Tarr include in their estimates of inefficiency costs not only the "dead-weight losses" of inefficiency but also transfers from U.S. consumers to foreign producers and governments, which are a loss to the United States but not to the overall world economy. The full cost to U.S. consumers is for each industry a much larger figure, most of it representing a transfer to domestic producers and to the U.S. government. Morkre and Tarr's estimates of benefits include only the production that would be forgone if imports were permitted and workers consequently lost their jobs. For both costs and benefits, the authors used the present values of four years' worth of costs and benefits (except in the case of CB radios, where the tariff ends after three years).

President Carter imposed a tariff increase on CB radios for the years 1979–81, temporarily moving the basic 6 percent rate to 21 percent for the first year, 18 percent for the second, and 15 percent for the third. Morkre and Tarr estimate consumer losses attributable to the additional duties at $114 million, of which production and consumption inefficiency waste (dead-weight losses) represent $26 million. Compared to other industries such as steel and automobiles, Morkre and Tarr believe, the earnings losses of displaced CB workers are small—only $60,000 in all. As a result, they estimate, the costs of the tariff exceeded the benefits by 400 to 1.

Sugar imports are subject to a tariff whose level is linked to a parity price index for domestic sugar. The duty on raw sugar was 1.875 cents a pound during 1977, or 21 percent (it went up to 62 percent the next year, partly due to a depressed world price). The authors estimate the cost to consumers over four years, assuming that the 1977 rate prevailed, at $1.56 billion. Of this, $155 million was inefficiency losses, and the remainder was shared equally between government duty collections and gains to U.S. sugar interests. The tariffs were estimated to save workers $45 million, all in the first year. Thus the inefficiency costs of the tariff are approximately 3½ times the benefits.

In mid-1977 the United States negotiated orderly marketing agreements (OMAs) with two of the fastest growing exporters of non-rubber footwear: South Korea and Taiwan. The OMAs, which are voluntary bilateral agreements to restrict imports, were superimposed

on the existing tariff structure. According to the Morkre-Tarr estimates, the annual inefficiency losses attributable to the existing tariff amounted to $11 million. The OMAs imposed a much greater burden: $115 million in inefficiency for the first year alone, and $589 million over four years; the total cost to consumers was $1.025 billion over four years. The significant feature about the OMA inefficiency cost was that most of it, some $91 million in the first year, went to monopoly profits (or scarcity rents) retained by South Korea and Taiwan. The averted earnings losses of U.S. footwear workers came to $23 million, less than one-twenty-fifth of the inefficiency costs. Since South Korea and Taiwan specialize in lower-priced footwear, Morkre and Tarr argue that the OMAs are likely to disadvantage lower-income consumers disproportionately.

The United States restrains textile imports through eighteen bilateral agreements negotiated with textile exporting countries under the multilateral Multi-Fiber Arrangement. Lack of data made it impossible to assess the effects of the quantitative restraints on textile trade imposed by the pacts. Instead Morkre and Tarr estimated the welfare costs of the U.S. tariff on apparel, which represents about two-thirds of all textile imports. They found added costs to consumers from the tariff on apparel to amount to $5.07 billion, of which $1.53 billion was inefficiency losses. The total adjustment cost saved for otherwise displaced apparel and textile mill workers came to $213 million, slightly less than one-seventh the costs.

The final case study illustrates the difficulty of making any firm predictions about the effects of import control. In 1977 the U.S. government negotiated an OMA with Japan that cut Japanese imports of color televisions by about 40 percent, or 1 million units a year. The consequence was a surge in color television imports from South Korea and Taiwan and in imports of incomplete sets from Taiwan and Mexico. Morkre and Tarr state that this occurred partly because the OMA encouraged the formation of color television industries outside Japan and partly because the Japanese yen rose dramatically against the U.S. dollar. As a result, total imports of color TVs actually increased, and there was no rise in the U.S. price. The OMA thus generated little in the way of either costs or benefits to U.S. consumers.

In recent years, the authors maintain, the United States, Europe, and Japan have embraced a "New Protectionism." This has taken the form not of tariffs (which actually have declined) but of quantitative restrictions such as OMAs, sector agreements, and antidumping restrictions. The footwear example may indicate, the authors say, that such nontariff barriers are even more costly to the country imposing them than are tariffs. While a tariff at least generates revenue for the home government, the monopoly profits generated by quantitative barriers are kept by foreign producers and governments.

Statistical Analysis in the Courtroom

"Multiple Regression in Legal Proceedings" by Franklin M. Fisher, and "The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases" by Michael O. Finkelstein, in *Columbia Law Review*, vol. 80, no. 4 (May 1980), pp. 702-736 and 737-754.

Once the arcane preserve of statisticians, multiple regression analysis—which seeks to quantify the effects of different factors on some variable—has increasingly found its way into the courtroom. These two articles examine the uses and abuses of this analytical technique, including the ways litigants often select data bases and methodologies favorable to their case.

Economist Franklin Fisher of the Massachusetts Institute of Technology explains regression analysis, some of its assumptions, and its role in resolving factual disputes in fields as diverse as antitrust and railroad safety; regressions are also employed in regulatory rulemakings, as in the Federal Communications Commission's proceedings on cable TV. Michael Finkelstein of Columbia Law School looks in detail at how multiple regression has been used so far in discrimination lawsuits. When both parties submit regressions using different data bases and assumptions, the court can be left with the formidable task of reconciling the competing models; Finkelstein proposes pretrial determinations to resolve disputed methodologies and sharpen the focus of subsequent arguments.