Antitrust After the Interception: Of a Heroic Returner and Myriad Paths; A Review of Richard Posner, *Antitrust Law* (2d ed. 2001)

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Judge Richard Posner deserves as much credit as anyone for making the interception. The interception, that is, of the dubious hail mary cases thrown by antitrust courts in the 1960s—cases in which courts pursued multiple, conflicting objectives and promoted small businesses at the expense of consumers.[1] Judge Posner, along with other members of the "Chicago School," hauled in the interception by powerfully touting economic efficiency as the sole goal for antitrust. We now find the author running back the interception return, headed towards the end zone of an antitrust regime characterized by coherent, "economically rational" doctrine and enforcement (p. viii). And at least for the first few yards of the return, which cover the ground of the goals of antitrust, the "Post Chicago School" blocks for Judge Posner, relieving him of the task of making the case for an economic approach to antitrust. We are far indeed from 1976, when the title of the first edition of his book, *Antitrust Law: An Economic Perspective*, implied the possibility of other perspectives (p. vii.).

Before reaching the end zone, however, the return confronts imposing obstacles, such as the enforcement and administration of the antitrust laws, and the lightning speed of the new economy. This review evaluates Judge Posner's success in confronting these obstacles, as he leads the reader on a tour (whose structure this review will follow) (1) "to explain the economic approach to new generations of lawyers and students," (2) "to update the approach in light of theoretical advances since the mid-1970s," and (3) "to apply it to the new issues of antitrust law that have emerged in the last quarter century" (p. viii.).

Description: The Economic Approach and Tour of the Case Law

Judge Posner succeeds as few, if any, do in explaining economic concepts. Throughout *Antitrust Law*,[2] he deftly uses economic theory to illuminate various business practices. He also offers a straightforward, conversational writing style, and a no-holds-barred analysis of judicial (primarily Supreme Court) opinions.

Judge Posner begins with the economic theory of monopoly, and continues by leading the reader on a wide-ranging tour of the building blocks of the antitrust landscape: price fixing, divestiture, mergers, exchanges of information among competitors, vertical restraints, and exclusionary practices such as tying, predatory pricing, vertical integration, exclusive dealing, and boycotts. A few examples of his didactic instruction include his explanations of (1) the economic basis of monop-

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[1] *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145, 152–54 (1968); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. Von's Grocery Co., 384 U.S. 270 (1966); Simpson v. Union Oil Co., 377 U.S. 13 (1964); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[2] Richard A. Posner, Antitrust Law (2d ed. 2001).

oly, founded upon the seller's power over price and its operation in the elastic portion of the demand curve, where additional increases in price would lead to a greater "proportional reduction in the quantity demanded" than the "proportional increase in price" (pp. 9–12); (2) the difficulty, in evaluating predatory pricing claims, of determining whether a firm sells at less than its marginal cost, since such a measurement "does not appear on a firm's books" but "is a hypothetical entity" (pp. 204, 218); and (3) the capacity of vertical restraints, such as territorial restrictions and resale price maintenance, to prevent free-riding but also, perhaps, to reflect the manufacturer's status as "the cat's paw of cartelizing dealers" (pp. 172, 184–85).

Judge Posner also elucidates the evolution of antitrust doctrine by revealing the roads not taken: the economic analysis of pricing that lost out to "proof that the defendants had conspired" (since "lawyers and judges are more comfortable with conspiracy doctrine") in the law of price-fixing (p. 53), and the inability to "measure elasticities [of demand] reliably by the methods of litigation," which resulted in the dominant influence of market definition in antitrust law (p. 148). And he explains the prevalence of tying cases that involve patents by referencing the development of the doctrine of patent misuse, where the issue "was whether the patentee had improperly extended the patent monopoly by monopolizing an unpatented product tied to the patented product" (p. 198).

The tour of economic practices would not be complete without pointing out courts' now-repudiated monuments to earlier, less-economically-oriented eras. The carcasses on the side of the road are legion: *Columbia Steel*, *Brown Shoe*, *Von's*, the "scandalous" *Simpson*, the "feeble" *Schwinn*, and *Utah Pie*, to name just the most battered.[3] (Pp. 120, 122–29, 180–81, 186–87, 221, 223.) Another heap of cases and doctrines on the road to disrepute follows, with any life within them exceeding their usefulness, according to our tour guide: divestiture as a Section 2 remedy, overbroad conceptions of barriers to entry, the potential competition doctrine, submarkets, the *Hardwood* case, *Maple Flooring*, *Colgate*, the per se rule against resale price maintenance, and Kodak's aftermarkets.[4] (Pp. 73–74, 111, 114–15, 143–44, 152, 161–67, 178, 189, 236–37, 242.)

But Judge Posner refuses to join the "pessimists" who question a role for antitrust today (p. ix). He dismisses as "academic" proposals "to curtail antitrust enforcement drastically or even to repeal the antitrust laws altogether" (p. x). And he recognizes the "substantial . . . potential social gains from an effective antitrust policy" (p. 17), concluding that antitrust doctrine is "sufficiently supple" to cope with problems presented by the new economy (p. 256).[5]

Revision: Responding to the Theoretical Advances of the Past Twenty-Five Years

The next obstacle confronting Judge Posner is more menacing. For now that we all speak the economic language of antitrust, the issues are more nuanced. In exploring Judge Posner's success

[3] United States v. Columbia Steel Co., 334 U.S. 495 (1948); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Von's Grocery Co., 384 U.S. 270 (1966); Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

[4] American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925); United States v. Colgate & Co., 250 U.S. 300 (1919); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992). Most of the cases that Judge Posner discusses in the second edition appear in the first edition.

[5] For example, he differs from Robert Bork, *see* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 149–55, 299–309 (1978), in recognizing that firms might occasionally employ practices such as predatory pricing or exclusive dealing as rational profit-maximizing tactics (pp. 194, 210–11, 252–53).

in updating *Antitrust Law*, four developments introduced (or revitalized) by the Post-Chicago School are illustrative: (1) more elaborate applications of game theory, (2) the "raising rivals' costs" theory, (3) attention to unilateral competitive effects from horizontal mergers, and (4) new perspectives on barriers to entry.[6]

Game Theory. Analysis based on game theory—the antecedents of which trace back to the nineteenth century "granddaddy" of the Cournot equilibrium[7]—has burgeoned in the past two decades. In fact, game-theoretic analysis underlies many of the Post-Chicago School contributions, including the next two developments discussed in this section. Stated at its most basic level, the analysis posits that firms' optimal actions incorporate the anticipated reactions of their competitors, and vice versa.

Judge Posner raises game theory in two contexts. In discussing oligopoly pricing, he notes that game theory models "do not yet yield implications that differ from those of non-game-theoretic approaches" like those advanced by George Stigler in the 1960s (pp. 59–60). And in the realm of predatory pricing threats, he advises the reader that the conditions required for the theory to operate are too exacting, which offers "a clue to the limited inroads that such analysis has made in antitrust thinking" (p. 212).[8] It is true that the theory has failed to provide courts with a readily-applicable set of tools. But perhaps game theory is more helpful than Judge Posner acknowledges. At a minimum, it provides a structure for systematizing anecdotal evidence of collusion and imposes discipline on economists to specify firms' "strategic variables, [] timing, and [] information structure."[9] And it could supplement Judge Posner's seventeen characteristics identifying markets propitious for collusion (pp. 69–79) by incorporating factors such as the likelihood of punishment facing firms that deviate from the (tacit) cartel agreement in repeated games.

Raising Rivals' Costs. The profusion of Post-Chicago scholarship on game theory is second only to the ink spilled on the "raising rivals' costs" (RRC) theory. A firm raises its rivals' costs "by restraining the supply of inputs available to rivals, thereby giving the purchaser power to raise prices

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[6] The "game theoretic analysis of strategic behavior forms the core" of the Post-Chicago approach, *see* Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 518 (1995); the raising-rivals'-costs and unilateral-competitive-effects-from-horizontal-mergers theories are two of the most important contributions of the Post-Chicago School, *see* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 337; and "[t]here is perhaps no subject that has created more controversy among industrial organization economists than that of barriers to entry," *see* W. Kip Viscusi et al., Economics of Regulation and Antitrust 158 (1995).

Judge Posner also addresses the "aftermarkets" hatched out of the Supreme Court's holding, in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481–82 (1992), that a manufacturer in a competitive "primary" market could have monopoly power in the "secondary" market of the servicing or parts of its own equipment. He explains that the pricing of replacement parts is an example of price discrimination, and not otherwise a concern, since "[t]he seller who exploits his 'monopoly' over replacement parts will find himself without many purchasers of his original equipment in the next period" (pp. 236–37).

[7] The model posits that "each firm in the market is assumed to choose the quantity to produce that will maximize its profits, given that every other seller is doing the same thing" (p. 307).

[8] For example, where a monopolist seeks a reputation for predatory pricing, game-theoretic analysis would question the likelihood of such a tactic based on the exacting conditions of a finite number of potential entrants and a prescribed sequence in which they can enter. In that situation, the last entrant "knows that the monopolist will not engage in predatory pricing against him because . . . there are no more potential entrants to deter" (p. 211). The next-to-last entrant also "knows that the monopolist will not engage in predatory pricing" against it "because the only effect of doing so will be to bring on" the last entrant (p. 212). And, after a process of backwards induction, the first potential entrant will enter and "the monopolist will not engage in predatory pricing" (p. 212).

[9] Drew Fudenberg & Jean Tirole, *Understanding Rent Dissipation: On the Use of Game Theory in Industrial Organization*, 77 Am. Econ. Rev. 176 (1987); *see* Franklin M. Fisher, *Games Economists Play: A Noncooperative View*, 20 Rand J. Econ. 113, 120 (1989).

in its output market."[10] Judge Posner traces the origin of RRC back to Aaron Director and Edward Levi, initial founders of the Chicago School, who observed that a monopolist might profitably "'decide to impose additional costs upon itself for the sake of a restriction' on suppliers or customers 'if the effect of it would be to impose greater costs on possible competitors'" (p. 251 (citations omitted)). And Judge Posner takes leave from others in the Chicago School by conceding the possibility that the practice "can be an effective method of predation" (p. 197).

His argument against RRC, however, fails to persuade. As an initial matter, the example he offers to demonstrate the theory's hypothetical nature utilizes a firm that lacks monopoly (or, to be precise, monopsony) power (p. 197). This alone ensures that it does not present a "plausible case[] of exclusionary practices" (p. 195). More fundamentally, Judge Posner advises the reader that RRC "is not a happy formula" since it "is neither a necessary nor a sufficient condition of predation" (pp. 196–97). Such a proclamation, however, proves less than initially meets the eye. RRC obviously is not a necessary condition of predation; all this says is that there can be other types of predation besides RRC, such as predatory pricing, which, even if it forces a competitor to sell below cost, does not raise its costs. Additionally, RRC—like any practice that is exclusionary in some, but not all, cases—is not a sufficient condition of predation because a firm often will raise its rivals' costs simply by being more efficient. But the proof of these two negatives does not dispense with RRC as a potentially viable theory.[11] A more persuasive critique would be that any ray of illumination that RRC shines on otherwise-hidden anticompetitive practices is lost in the glare of the searchlight that cannot distinguish between predatory and exclusionary conduct.[12]

Unilateral Competitive Effects. The third development, the "unilateral competitive effects" theory of horizontal mergers, is not mentioned in *Antitrust Law*. The Horizontal Merger Guidelines explain that "[a] merger between firms in a market for differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level."[13] With Judge Posner's gaze transfixed on the prevention of the "collusive pricing" that could be facilitated by "high levels of concentration in a market" (p. 118), this omission is not surprising. Nonetheless, it is disappointing, for the reader is not treated to the author's thoughts on relatively recent advancements in the agencies' evaluation of mergers such as the use of computerized point-of-sale scanner data. By directly shedding light on sellers' demand elasticities, such a tool could render market definition less vital. Judge Posner eagerly desires such a development, expressing hope that "a considerable simplification of antitrust litigation" would result from studies that "use elasticity estimates to estimate market power directly" (p. 71 n.30). But his abrupt conclusion that such a project is improbable (pp. 71–72, 147–48) leaves the reader wondering how he would have utilized tools such as scanner data.[14]

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[10] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L.J. 209, 224 (1986).

[11] Nor does Judge Posner's proposed test for exclusionary practices, which asks whether practices "exclude . . . an equally or more efficient competitor," trace this distinction since (1) RRC focuses not only on *exclusion* of a rival from the market, but also on the raising of the costs of a rival that remains in the market, and (2) his test would allow, for example, practices that impose on less-efficient firms barriers to entry in the form of economies of scale that increase "the optimum monopoly price" (p. 225). *See infra* text succeeding note 16 for a discussion of Judge Posner's periodic sympathy for expansive conceptions of barriers to entry.

[12] *Cf.* Stephen Calkins, *Comments on Presentation of Steven C. Salop*, 56 ANTITRUST L.J. 65, 66 (1987) (explicating the "fifteen or more steps . . . needed to find a violation" in a "'summary illustration'" of RRC based on *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)).

[13] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 2.21 (1997).

[14] For a discussion of Judge Posner's incomplete treatment of the FTC's successful challenge to the Staples-Office Depot merger, which was

Barriers to Entry. The final development involves barriers to entry, an issue on which commentators have markedly different perspectives. The Chicago School, for one, has embraced a steadfastly skeptical position on such barriers—that they, for example, are "ghosts that inhabit antitrust theory"[15]—thereby reducing the likelihood of finding anticompetitive activity. In contrast, the Post-Chicago School is more likely to find such barriers in economies of scale, advertising, and irreversible investments.[16] In *Antitrust Law*, Judge Posner articulates the standard Chicago School approach. He informs us, in a passage on the effect of new entry on the likelihood of collusion, that he has "deliberately avoided using the term 'barrier to entry,'" which is commonly used expansively "to mean any obstacle that a new entrant must overcome in order to gain a foothold in the market," such as "the capital costs of entering the market on an efficient scale" (p. 73). Such a use is "dubious" since "the firms already in the market must incur expense to remain there [and] must continuously overcome, therefore, the same hurdle that faces a new firm" (p. 73). It naturally follows, then, that even if economies of scale (not to mention vertical integration, advertising, and the amount of capital required for entry) "increase the length of time required for new entry," they nonetheless "do not create a barrier to entry" (pp. 74, 114–15).

But Judge Posner then reverses course: economies of scale "may sometimes . . . create a barrier to entry" (p. 74). They may "increase . . . monopoly profits [by] forestalling new entry" (p. 252). They may, through "bundling and tying . . . forc[e] the entrant to enter with a more complex product," which could "slow[] or deter[]" entry (p. 236). And they may, by delaying entry, "tend to increase the optimum monopoly price," which is "presumptively inefficient" (pp. 2, 225). While there obviously are two sides to the debate, the author's conflicting positions leave the reader disoriented.

The myriad proposals that Judge Posner lays out in Antitrust Law *reveal the author's command of the material of antitrust. The downside is that Judge Posner often substitutes breadth for depth, failing to fully explore ramifications of his proffered tests such as their interdependence and administrability.*

Prescription: New Tests, the New Economy, and New Administration

New Tests. The myriad proposals that Judge Posner lays out in *Antitrust Law* reveal the author's command of the material of antitrust. The downside is that Judge Posner often substitutes breadth for depth, failing to fully explore ramifications of his proffered tests such as their interdependence and administrability. It also is curious that he makes so many proposals given that he believes that antitrust doctrine is "in pretty good shape" (p. 266).[17]

An abbreviated review of Judge Posner's tests will focus on his proposed standard for exclusionary practices.[18] A plaintiff must prove that a defendant with monopoly power employed a practice that is likely to exclude from its market "an equally or more efficient competitor"; the defendant can rebut such a finding by showing that the practice "is, on balance, efficient" (pp. 194–95). A brief glance at courts' current potpourri constituting Section 2 analysis—which, depending on

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based in part on econometric analysis of pricing data, see Jonathan Baker, *Horizontal Merger Analysis Grows Up: A Review of Chapter 5 of Richard Posner's* Antitrust Law (2d ed. 2001), ANTITRUST SOURCE, Jan. 2002, at 3–5, http://www.abanet.org/antitrust/source/jan02/baker.pdf.

[15] BORK, *supra* note 5, at 310.

[16] *See* Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 ANTITRUST L.J. 645, 651–52 (1989). The Harvard School also relied on such barriers, according to Judge Posner, in condemning tie-ins, vertical integration, resale price maintenance, and persistent concentration in certain industries. *See* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 934–39, 945–47 (1979).

[17] *See also* p. viii ("Today, antitrust law is a body of economically rational principles largely though not entirely congruent with the principles set forth in the first edition.").

[18] This section also addresses his proposals for vertical mergers and efficiency-generating exclusionary practices. Judge Posner offers additional tests for collusion (pp. 69–93), the propriety of divestiture (p. 102), information exchanges among competitors (pp. 169–70), price discrimination (p. 205), predatory pricing (pp. 216–17), boycotts (pp. 240–41), and unilateral refusals to deal (p. 242).

the case, focuses on the defendant's intent, a change in the market, denial of an essential facility, harm to a competitor, or some other factor—demonstrates the promise of Judge Posner's test, which could advance a more justifiable, economically-grounded analysis. But the test would have benefited from further development. One problem is that Judge Posner does not reconcile this general test with several approaches he propounds for *specific* exclusionary practices. For example, without incorporating the concept of "an equally or more efficient competitor," the test for vertical mergers focuses on the defendant's intent, and the analysis for exclusionary practices that also offer efficiencies (which is raised in the discussion of the new economy) looks to whether a practice is "employed widely in industries that resemble the monopolist's but are competitive" (pp. 228, 253).

Administrability also presents a concern. How exactly will we know if a competitor is "equally or more efficient"? Judge Posner offers only one example, in which a monopolist's lowering of its price towards (but not below) cost would exclude a less efficient firm (p. 196). Turning to the rebuttal, how are we to calculate whether the practice "is, on balance, efficient"? Judge Posner himself recognizes the intractability of this undertaking elsewhere (as detailed in the margin),[19] but does not explain how such arduous and error-laden inquiries are ameliorated when incorporated into his proposal.[20]

Another administrative difficulty, and an example of a proposal with surprising consequences, involves the burden-shifting construct utilized in the test for exclusionary practices that offer efficiencies. The defendant can use the practice if it is "employed widely in industries that resemble the monopolist's but are competitive" (p. 253), and the plaintiff can rebut this presumption by demonstrating that "forbidding the use of the practice will, by increasing the rate or speed of new entry, completely offset the effect of the prohibition on the monopolist's costs" (p. 254). Judge Posner does not explain how to balance the lowering of costs brought about by earlier entry against the benefits of adopting practices apparently efficient in other industries. And the failure to fully develop the analysis leads to the result that the defendant will *lose* an exclusionary-practices case if the plaintiff can show that the benefits of new entry equal the costs to the defendant of not implementing the practice.

The New Economy. By "new economy," Judge Posner refers to the manufacture of computer software, the provision of services by Internet-based businesses, and the communications services and equipment that support the first two industries (p. 245). He lucidly sketches the characteristics of the new economy: falling average costs, modest capital requirements, dramatic innovation, quick and frequent entry and exit, network effects, standardization, path dependence, and switching costs (pp. 245–50). And he illustrates the powerful position held by a monopolist with an intellectual-property-protected product in a network effects market (p. 249). It is heartening to learn that Judge Posner believes that antitrust doctrine is "sufficiently supple" to cope with the new economy, as he sets off to determine how to adjust antitrust enforcement, focusing on the use of neutral experts and streamlined trials (p. 256).

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[19] Determining whether conduct "produced a benefit equal to or greater than the harm caused" would "impose a heavy burden on the courts and the parties" and would lead to "frequent . . . mistakes in application, making the solution somewhat illusory" (p. 268); "[b]alancing the costs and benefits of an exclusionary practice that also has efficiency characteristics may well be beyond the capacity of the courts" (p. 253); "it is very difficult to measure the efficiency consequences of a challenged practice [a]nd so throughout this book we shall [endeavor not] to compare directly the gains and losses from a challenged practice" (p. 29).

[20] Incongruity also can be found in Judge Posner's test for vertical mergers, which prohibits those made with "an exclusionary or otherwise improper intent" (p. 228), despite his earlier exhortation that "[a]ny doctrine that relies upon proof of intent is going to be applied erratically at best . . . [in part because] the availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not of the underlying reality" (p. 214).

The complexity of the issues presented by the new economy, according to Judge Posner, calls for expertise. In particular, the author advocates the use of competent neutral experts or "an ad hoc technical committee composed of two party-nominated and one neutral technical expert" that would assist the judge in administering a consent or litigated decree (pp. 277–78). Although these are only partial solutions—he acknowledges that the neutral expert (of whom "there may be very few" (p. 277)) cannot resolve many of the issues, which involve "imponderables" and "are not problems simply to be solved by the application of the relevant economic principles" (p. 279)—they are worth considering.

His second suggestion is of even greater import. Judge Posner is exactly right that "law time" is not the same as "new-economy real time," with the result that antitrust cases involving new-economy firms "may drag on for so long relative to the changing conditions of the industry as to become irrelevant, ineffectual" (p. 279). His solution is to streamline trials. Rather than hew to the "Anglo-American court trial, unchanged in their essentials for centuries" with each party getting to put in its evidence, and the sequence proceeding through direct, cross, redirect, and recross examinations, Judge Posner proposes an "agreed-upon narrative of the relevant facts" jointly prepared by the parties, with trials limited to the disputed issues (pp. 283–84).[21] This could potentially be a promising solution to one of the most intractable difficulties with antitrust litigation. But the proposal would have been even stronger if Judge Posner had engaged the obvious counterargument.

The need to quickly resolve cases always strolls hand in hand with longstanding, significant "constraints" on judicial efficiency, constraints that serve important purposes. Rather, however, than "balance expedition against due process," as Judge Posner identifies the project (p. ix), the reader is treated only to the expedition side of the ledger. But the fundamental principle of due process cannot be diminished by linking it with the "2000 presidential postelection mess" (p. 279). This is not to say that expedition should not ultimately emerge triumphant; it is to say that before we anoint it the victor, we must account for due process. Judge Posner also seems to modestly overstate matters in claiming that "much of the trial is taken up with evidence not addressed to any issue in dispute but introduced simply in order to create a favorable atmosphere" (p. 283). One can imagine a case, for example, in which the search for the defendant's intent—needed for Judge Posner's tests on vertical mergers (p. 228) and predatory pricing (p. 216)—will encompass an array of witnesses and documentary evidence that go to the "issues in dispute."[22]

New Administration and Enforcement. In addition to the proposals designed for the new economy, Judge Posner offers three ambitious ideas for improving antitrust administration and enforcement: (1) simplify the statutory framework, (2) adjust the remedies available for violations, and (3) limit the role of the states in bringing antitrust lawsuits.

First, he suggests simplifying the "almost entirely superfluous" statutory structure (p. 259). His preferred choice would be "a simple prohibition of unreasonably anticompetitive practices," though he also contemplates repealing all of the antitrust statutes except Section 1 of the Sherman Act, which "is sufficiently broad to encompass any anticompetitive practice worth worrying about that involves the cooperation of two or more firms," or, alternatively, Section 2 (pp. 259, 260). As an ini-

[21] *Cf.* Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1, 40 n.170 (1998) (discussing FTC rules changes designed to minimize trial delay (1) by requiring parties, at prehearing conference, to submit proposed stipulations of law and fact, and to designate testimony to be presented by deposition, and (2) by encouraging written submissions of direct examinations of experts).

[22] It also is unclear whether the expedited approach would apply to only antitrust trials or (to pick two other potential settings) patent infringement lawsuits involving Internet business methods and litigation involving e-commerce contracts.

tial matter, it is not clear that this game is worth the candle: Judge Posner recognizes that "the courts have . . . succeeded in largely though not entirely erasing the statutory differences that have no basis in sensible antitrust policy" (p. 264). In particular, he points out that "the *Alcoa* approach is no longer the law"; "*Standard Stations* has gone down the tubes"; the consideration of exclusive dealing arrangements requires "'the most careful weighing of alleged dangers and potential benefits'"; and mergers, predatory pricing, and tying are "treated the same" under various statutory provisions (pp. 263–64).

But even if the courts had not practically erased the statutory differences, Judge Posner's proposal would not offer benefits commensurate with the costs of completely revamping the statutory structure. Take, for example, the author's most "attractive alternative": prohibiting "unreasonably anticompetitive practices" (p. 260). Even if such a proposal relieved courts of the task of justifying and reconciling multiple statutes, it would have no effect on two more pressing concerns. First, as Judge Posner admits, it would "allow for categorizing some practices as per se illegal and others as requiring more extended inquiry" (p. 260), thus inviting the *exact same* categorization problems that plague antitrust analysis today, where more attention often is paid to placing an activity into a particular category than to analyzing its competitive effects. Second, it is unclear how to apply such an indeterminate test. "Unreasonably anticompetitive" does not solve any cases.[23] So in those cases that do not involve per se analysis, some type of "more extended inquiry"—be it full rule of reason, "quick look," or something else—is warranted. Given that, as detailed above, Judge Posner's proposals for analyzing particular practices are themselves subject to significant administrability concerns, the statutory simplification (even assuming, contra the current state of the law, a pressing need therefor) would not address the fundamental difficulties underlying antitrust analysis today.

For his second improvement, Judge Posner tackles the antitrust remedial system, the purpose of which is deterrence, and the penalty for which should equal "the cost that [the violator's] violation imposed on society" (pp. 266–67).[24] The author recognizes that his approach "will not work well in cases in which the social costs of a violation are very difficult to quantify" (p. 268). But all he offers in support of his proposal are examples for which the social cost cannot easily be measured: mergers (for which it is "extremely difficult" to "measur[e] the increase in market price that the merger [] brought about") and price fixing (for which he offers proxies such as the defendant's profit, since it "of course is not true [that] the social costs of price fixing could be determined without difficulty") (pp. 268–70). The one example that "present[s] less of a dilemma," exclusionary practices, does so because the focus for that category is on the "costs [for] *competing* firms," which "bears no necessary relation to the social cost inflicted by the practice" (p. 268 (emphasis added), p. 270). Moving on from this rough beginning, the author proceeds to offer insights on the criminal sanction of imprisonment (which is a deadweight loss to society and imposed too rarely to be a deterrent), fines (which are inadequate), and treble damages (which overdeter for mergers and most exclusionary practices and underdeter for concealable offenses such as price fixing) (pp. 270–72).

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[23] Nor does the proposal that retains the monopolization offense where such a term "mean[s] simply conduct that unjustifiably promotes supracompetitive pricing" (p. 260).

[24] Although Judge Posner does not define the concept in the discussion on remedies, the reader learns elsewhere that the social cost includes not only "deadweight loss" but also monopoly profits and the costs "incurred in the process of seeking and resisting monopolization" (pp. 16–17, 292 n.1, 299). In addition, the concealability of certain offenses, which "drives the probability of being punished for committing the violation below 100 percent," requires "the punishment cost . . . of the [] violation [to be] raised above the social cost" (p. 269).

Third, Judge Posner calls for the states to be "stripped of their authority to bring antitrust suits, federal or state" except for situations "in which a private firm would be able to sue"; for example, where firms conspire to raise the price of goods sold to the state (p. 281). Although he laments the states' "free rid[ing] on federal antitrust litigation" and "poor quality" of the lawyering in many of the offices of state attorneys general, Judge Posner's principal concern appears to be the "excessive[] influence [of] interest groups that may represent a potential antitrust defendant's competitors" (p. 281). In this regard, the state system, according to Judge Posner, fares worse than the federal, which is not plagued to nearly the same degree by such groups because the federal enforcement agencies are "dominated by lawyers most of whom go on to jobs in the private sector" and so "must demonstrate their professionalism" (p. 285).[25]

Judge Posner's suggestions address the crucial question of how to mobilize the cumbersome machinery of antitrust litigation to confront the nimble, Schumpeterian new economy.

Judge Posner's argument is subject to question from two angles. First, he presumes that interest groups representing competitors can have only a negative effect on antitrust enforcement. But such an assumption requires support, in particular because he has recognized (a) that competitors (because of their access to information and "stake in antitrust enforcement") might be "antitrust enforcer[s]" who at least are "more efficient" than consumers[26] and (b) that "injured competitor[s]" should be able to file damages suits against "predator[s]" since such suits would "provide adequate deterrence" of exclusionary practices (p. 268). Second, focusing on a revolving door between private law firms and the federal enforcement agencies does not dispense with charges of interest group influence on the federal level since (1) it is precisely *because of* the revolving door that, as Judge Posner earlier recognized, government lawyers may wish "to gain trial experience of an amount and at a level of responsibility usually denied young [attorneys] in private firms"[27]; and (2) the position represents an about-face for the author, whose earlier writings on the subject were not quite so sanguine, contending (a) that the performance of the FTC "has been gravely deficient throughout its entire history"[28]; (b) that the agency has been "guided more by solicitude for parochial interests than by consideration for the general welfare"[29]; and (c) that enforcement at the Antitrust Division is in the hands of trial lawyers, who "tend to be combative . . . young or mediocre, or . . . zealots," certainly "not the right people to be the custodians of the government's antitrust policy, [which] is what they are."[30]

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[25] Judge Posner also points to the role of federal judges, who are insulated from interest-group pressures because of their secure tenure and, curiously, "broad discretion [resulting from] the open-endedness of the major federal antitrust statutes" (p. 285).

[26] Richard A. Posner, Economic Analysis of Law 345 (5th ed. 1998).

[27] Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 86 (1969); *see also id.* (further noting that "[t]he value of [FTC staff attorneys'] trial experience to future employers is unaffected by whether the cases tried promote or impair the welfare of society"); Richard A. Posner, *A Program for the Antitrust Division*, 38 U. Chi. L. Rev. 500, 533 (1971) (trial lawyers at the Antitrust Division "owe their authority and independence . . . partly to the accumulation of skills and experience that makes them valued by private firms"); *cf.* Posner, *supra* note 2, at 111 (government lawyers "derive . . . career advancement from the trial of an antitrust case"). A greater receptivity to interest groups' entreaties does not lie far from the quest for trial experience.

[28] Richard A. Posner, *The Federal Trade Commission*, *supra* note 27, at 82.

[29] *Id.* at 83. *see also id.* at 85–87 ("the personal goals of FTC members and staff"—which include "retain[ing] their jobs . . . obtain[ing] greater appropriations for their agency . . . [and] gain[ing] trial experience"—"influence the character and direction of the Commission's activity"); *id.* at 84 ("the structure of incentives operating on the members and staff" of the FTC is an "obstacle" to improvement of the agency); *id.* at 85 (because it is "extremely difficult to evaluate . . . the performance of regulators," it is "possible for them in many instances to bend their regulatory duties to the service of personal interest").

[30] Richard A. Posner, Antitrust Law: An Economic Perspective 231 (1976). Even if the passage of time and changes in the agencies softens these positions, a somewhat-weakened apprehension of such concerns still rises at least to the level of persuasiveness of the revolving-door hypothesis.

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To a significant extent, Judge Posner's three objectives in *Antitrust Law* reflect the critical obstacles confronting the interception return that heads towards the end zone of a coherent system of antitrust doctrine and enforcement. The author successfully evades some of the tacklers: he guides the reader on a lucid economic tour of business practices and cases, and offers an array of ambitious proposals covering the entirety of the antitrust landscape and bespeaking an impressive knowledge of the field. Judge Posner's return also confronts recent theoretical advances in the field; here, he neglects some of the significant developments offered by the Post-Chicago School and does not fully engage others. And finally, the returner is losing ground to other tacklers ready to pounce on his proposals: administrability, counterarguments, and contradiction.

But Judge Posner breaks free from perhaps the most dangerous tackler: the new economy. As he darts towards midfield, we should throw a few blocks for him. For Judge Posner's suggestions address the crucial question of how to mobilize the cumbersome machinery of antitrust litigation to confront the nimble, Schumpeterian new economy. We owe it to antitrust to consider his proposals seriously, to ensure that the discipline remains an agile participant in, rather than helpless bystander outside, the new economy. ●