THE SIMPLICITY OF ANTITRUST LAW

Richard M. Steuer*

Antitrust law has grown increasingly complex, leading some to the misperception that it is often irrational and varies widely from one country to the next. In fact, antitrust is simpler than it seems. Properly applied, antitrust law focuses simply, and entirely, on combating two of the most innate proclivities in human nature—bullying and ganging up—when such conduct harms competition. Once this is understood, the concerns expressed about irrationality and disharmony begin to disappear.

If it is true that all we really need to know we learned in kindergarten, then all we really need to know about antitrust law we learned there too.

I. IT’S SIMPLER THAN ONE MIGHT THINK

On the surface, antitrust seems more complex than this. Since the seminal case of Mitchel v. Reynolds was decided in 1711 and the Sherman Act was passed in 1890, antitrust terminology has grown increasingly complicated. Today, there is a profusion of jargon for antitrust offenses, from abuse of dominance and bundling to technological tying and unilateral effects, plus a host of acronyms and abbreviations such as SSNIPs, HHIs, and UPP. Economics, including econometrics and

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* Member of the New York Bar. The author gratefully acknowledges the encouragement and valuable comments of Jonathan B. Baker and Edward D. Cavanagh, and the able assistance of Jarman D. Russell.

1. ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN (1988).
5. Cascade Health Solutions v. PeaceHealth, 502 F.3d 895 (9th Cir. 2007).
8. Id. § 4.1.2.
9. Id. § 5.3.
10. Id. § 6.1; Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog
behavioral economics, has provided greater insight, but added to the terminological clutter.\footnote{11}

Yet all the years of litigation and study reveal that there really are only two offenses against competition: single-actor bullying and multi-actor ganging up. The rest, except for some outlier offenses,\footnote{12} are simply variations on these two (with merger enforcement meant to guard against both).\footnote{13}

Within the antitrust community, anticompetitive unilateral bullying is labeled monopolization, attempted monopolization, unfair practices, or abuse of dominance. Anticompetitive ganging up is termed combination, conspiracy, cartelization, or boycott, depending on the context. The Sherman Act rests on these two core pillars, as does the competition legislation of the European Union and most other jurisdictions.

This categorization does not mean that all initiatives by powerful firms and all collective activities by competitors are anticompetitive. Monopolists are expected to continue innovating and competing, while competitors are encouraged to create efficiencies necessitating collaboration. Nor does this categorization mean that it is always easy to distinguish what is anticompetitive from what is competitively neutral or even procompetitive. It simply means that all activities harming the economy by undermining the competitive process fit within the category of either bullying or ganging up.

Once this principle is appreciated, it becomes easier to recognize that all competition law, if properly applied, should be directed against, and only against, assaults on competition from bullying and ganging up. It also becomes easier to recognize that there already has been substantial convergence toward this understanding, both within the United States and around the world.

Moreover, it becomes easier to explain to skeptics why competition law exists and why, notwithstanding the cost of compliance and enforcement, the economy is better off having it.


\footnote{12} See infra note 26.

\footnote{13} Antitrust offenses also may be classified by the type of harm they inflict, such as foreclosure of competitors or artificial elevation of prices to customers, rather than by the nature of the behavior involved.
II. CONDEMNATION IS TIMELESS

While bullying and ganging up may be innate, condemnation of these offenses has an impressively long history itself. Unilateral economic bullying traces back at least to stratagems employed to outmaneuver rivals in ancient Egypt and Rome, at medieval fairs and markets, and to crown monopolies that were empowered to exclude competitors. Disapproval of such practices can be traced to early religious and judicial codes. Under English common law, this disapproval evolved into the economic torts of forestalling, engrossing, and regrating.

Economic ganging up traces back to collusion among tradesmen in isolated hamlets and members of the guilds of European cities. Disapproval of such activity, like disapproval of single-firm anticompetitive activity, also finds its origins in religion and early judicial codes. In England, this evolved into the common law against contracts in restraint of trade and the common law and legislation against combinations in restraint of trade.

The common thread was that the sovereign could establish a monopoly or authorize collective anticompetitive action, but without official approval, monopolization and cartelization faced censure.

Over time, these core principles evolved into the law that served as the basis for today’s legislation. The Industrial Revolution transformed manufacturing, distribution, marketing, and retailing, but the law dictating the rules by which firms compete can still trace a direct lineage to the earliest limitations on single firm conduct and collusion.

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17. Letwin, supra note 14, at 368.
18. Id. at 364.
20. Id. at 2–3, 22; Dani Rapp, The Employee Free Choice Act, Unions, and Unionizing in Jewish Law, in THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS 429, 441 (Aaron Levine ed., 2010).
III. CURRENT ANTITRUST LAW IS LARGELY CONFINED TO BULLYING AND GANGING UP—AND SHOULD BE

Today’s competition laws, guidelines, and commentary are rich with contemporary interpretations and illustrations, but all build upon the same foundation, condemning anticompetitive bullying and ganging up. In the Sherman Act, notable for its simplicity, Section 1 reaches agreements in unreasonable restraint of competition and Section 2 reaches monopolization, attempted monopolization, and conspiracy to monopolize.22 Similarly, Article 101 of the Treaty on the Functioning of the European Union prohibits agreements that restrict competition, subject to various exceptions, and Article 102 prohibits abuse of a dominant position.23 In China, the Anti-Monopoly Law likewise includes a series of articles on anticompetitive agreements and another series of articles on abuse of dominance.24 Other nations’ laws follow the same pattern.25

Consistent with this legislation, antitrust offenses, for all their variety, almost invariably are based on proof of anticompetitive bullying or ganging up.26 For example, offenses based on horizontal agreements, such as price fixing, output restriction, market division, and boycotts, all involve anticompetitive ganging up.27 Competitors conspire against customers to

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23. TFEU, supra note 4, arts. 101–02.
26. There are certain outlier offenses that have been codified as part of the antitrust laws but are designed to achieve other goals, such as sections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(d)–13(e) (2006), which create per se offenses for discrimination in providing promotional services and facilities regardless of the effect on competition. Also, as pointed out infra, there have been occasional misguided decisions finding antitrust offenses in the absence of any genuine bullying or ganging up, based largely on misapprehension of the objectives of competition law.
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charge them higher prices or to limit their choices. Customers conspire against sellers to drive down the prices of what they buy. In contrast, legitimate joint ventures and ancillary restraints represent examples of competitors collaborating to create something new without colluding to impede competition that otherwise would exist.

Offenses based on vertical resale agreements such as resale price maintenance involve either unilateral or collective conduct. As the Supreme Court recently explained in the Leegin case, vertical restraints can be unreasonable when they are abused by a powerful buyer or seller, or where they are likely to facilitate conspiracy among either manufacturers or distributors to limit competition. Vertical restraints are unlikely to offend the antitrust laws when there is no market power being exerted and the restraint was initiated unilaterally by the seller.

Offenses based on vertical purchase requirements, such as exclusive dealing and tying, require proof of the foreclosure of competition by a firm possessing sufficient market power to become a bully. Monopolization

28. See, e.g., Palmer, 498 U.S. at 49 (noting that horizontal territorial agreements are “formed for the purpose and with the effect of raising” prices); Nat’l Soc’y of Prof’l Eng’rs, 435 U.S. at 695 (holding that prohibitions on competitive bidding “prevents all customers from making price comparisons”).


30. See, e.g., Texaco Inc. v. Dagher, 547 U.S. 1, 8 (2006) (joint venture agreement was not an anticompetitive horizontal price-fixing agreement); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23–25 (1979) (holding that blanket licenses granted by clearinghouses did not constitute a type of price fixing); cf. Am. Needle, Inc. v. Nat’l Football League, 130 S. Ct. 2201, 2216 (2010) (deeming the League subject to antitrust scrutiny while also noting that its constituent competitors “share an interest in making the entire league successful and profitable”) (reasonableness to be determined on remand).


32. Id. at 892–94.

33. Nine West Grp. Inc., Docket No. C-3937, 2008 WL 2061410 (F.T.C. May 6, 2008) (modifying a 2000 consent decree to permit respondent to enter into minimum resale price maintenance agreements, under reporting obligations, where restraint was instigated by the manufacturer, not the dealers, and the manufacturer lacked market power). However, the rule of per se illegality against minimum resale price maintenance remains under the laws of certain states. See, e.g., California v. DermaQuest, Inc., 2010-I Trade Cas. (CCH) ¶ 76,922 (Cal. Super. Ct. Feb. 23, 2010) (the State of California brought a case against DermaQuest, a maker of skin care products, under California’s antitrust law on a per se theory and the case was ultimately settled); Verified Petition, People v. Tempur-Pedic Int’l, Inc., No. 400837/10 (N.Y. Sup. Ct. Mar. 29, 2010) (the State of New York brought a case on a per se theory against mattress manufacturer Tempur-Pedic under New York law).

offenses, such as predatory pricing and other forms of predation, require proof of anticompetitive activity by a firm with the power to control prices or exclude competitors, or the strong likelihood of achieving that power.\textsuperscript{35} All of these essentially are instances of single firm misconduct, notwithstanding the fact that the imposition of vertical agreements may play a role.\textsuperscript{36}

Merger offenses require proof that the merger threatens to create or enhance the power to bully or collude and harm competition. In the case of horizontal mergers, the offense requires proof that the merged firm will be able to exercise market power over customers or suppliers, usually by changing prices, or that the merger will facilitate collusion among the merged firm and its remaining competitors.\textsuperscript{37} In the case of vertical mergers, the offense requires proof that the merged firm will be able to impede competitors at one or both levels, usually by foreclosing them from needed inputs or outlets.\textsuperscript{38}

This focus on anticompetitive bullying and ganging up is as it should be, because when courts, enforcers and policymakers extend antitrust law further, trouble follows. For example, there has been sharp criticism of the over-deterrence of joint ventures,\textsuperscript{39} challenges to horizontal agreements

\textsuperscript{35} See, e.g., Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) (holding that under both the Sherman Act and Robinson-Patman Act a claimant must show that a competitor has “priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market”); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) (noting that proof that a firm has been “attempting to exclude rivals on some basis other than efficiency . . . characterize[s] its behavior as predatory”).

\textsuperscript{36} See supra note 34 (citing cases demonstrating instances of single firm misconduct, including vertical restraints).

\textsuperscript{37} DOJ/FTC Horizontal Merger Guidelines, supra note 7, §§ 6, 7, 12.


enabling small competitors to compete against larger competitors, rules of per se illegality for a host of distribution restraints, including maximum resale price maintenance and certain forms of tying, proposals for “no-fault” monopolization laws, challenges to mergers resulting in tiny shares of any relevant market, application of the Robinson-Patman Act without regard to effects on competition, the “nine no-no’s” prohibiting most restrictions in patent licenses, and the presumption of market power in all


42. Khan v. State Oil Co., 93 F.3d 1358, 1363 (7th Cir. 1996) (questioning the continued application of the per se rule to maximum resale price maintenance, but applying the standard), rev’d, 522 U.S. 3 (1997) (overturning the per se rule against maximum price fixing). See also ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 134 n.753 (6th ed. 2007) (collecting cases criticizing per se illegality applied to maximum resale price fixing).

43. Compare Int’l Salt Co. v. United States, 332 U.S. 392, 396 (1947) (“it is unreasonable, per se, to foreclose competitors from any substantial market”), with Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 502–04 (1992) (applying rule of reason to conclude that replacement parts were a separate market than manufactured machines and hold that defendant may be unlawfully tying the two dependent upon market power), and Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 31–32 (1984) (applying rule of reason analysis to conclude that a large hospital was not unlawfully tying surgical services to services of anesthesiology firm).


45. United States v. Von’s Grocery Co., 384 U.S. 270, 301–02 (1966) (Stewart, J., dissenting) (discussing mergers and commenting that “the sole consistency that I can find is that in litigation under [Section] 7, the Government always wins”).


47. Compare Bruce B. Wilson, Deputy Assistant Attorney Gen., Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions (Nov. 6, 1970) (describing the patent licensing practices covered by the Nine No-Nos and considered to be per se illegal without regard to economic effect), with Charles F. Rule, Assistant Att’y Gen., The Antitrust Implications of Patent Licensing: After the Nine No-Nos (Oct. 21, 1986), 4 Trade Reg. Rep. (CCH) ¶ 13,131 (supporting the adoption of a rule of reason approach because the practices covered by the “no-no’s” are frequently procompetitive). See also Abbott B. Lipsky, Current Antitrust Division Views on Patent Licensing Practices, Remarks Before the American Bar Association Antitrust Section (Nov. 5, 1981) (further
These are only some of the best-known instances of the antitrust laws being applied to condemn practices that did not genuinely embody unilateral or collective conduct posing a serious threat to competition.

In fact, upon analysis, it turns out that most of the criticism heaped on antitrust enforcement over the years has been directed at instances in which decision-makers lost sight of targeting anticompetitive bullying and gangung up. If neither exists or is seriously threatened, decision-makers need to ask themselves what exactly they are trying to prevent. The answer may lead to the conclusion that there is no violation at all, or that if there is a violation, it is of another law directed at something other than safeguarding competition.

A number of courts have faced reversal over the years for trying to apply antitrust liability to activity that might offend other laws but does not threaten competition. Some courts neglect to find a threat to competition before looking for bullying misbehavior. For example, in *Spectrum Sports, Inc. v. McQuillan*, the lower court was reversed for treating unfair or predatory conduct as attempted monopolization without evidence of a dangerous probability that monopoly power actually would be achieved. The Supreme Court rejected the “notion that proof of unfair or predatory conduct alone is sufficient” to establish a great enough threat to competition to constitute an antitrust violation.

Some courts neglect to find an effect on competition when examining ganging up. In *NYNEX Corp. v. Discon, Inc.* , the lower court was reversed for treating an alleged conspiracy to commit regulatory fraud as an antitrust violation where there was no harm to the competitive process. The Supreme Court explained that the approach taken by the lower court “would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique,” into antitrust cases. Other examples are legion.

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50. *Id.* at 457. The Court added, “[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.” *Id.* at 458.


52. *Id.* at 137.

53. *E.g.*, E.I. DuPont de Nemours & Co. v. F.T.C., 729 F.2d 128, 141–42 (2d Cir. 1984) (vacating F.T.C. order prohibiting advance price announcements and most favored nations clauses, which had condemned consciously parallel pricing in the absence of collusion); Official Airline Guides, Inc. v. F.T.C., 630 F.2d 920, 925–28 (2d Cir. 1980) (reversing F.T.C. order against monopolist publisher’s refusal to publish connecting flight schedules, which did not enhance the publisher’s monopoly); E.J. Delaney Corp. v. Bonne Belle, Inc., 525 F.2d 296, 306 (10th Cir. 1975) (reversing judgment for plaintiff on claim of attempted
Recognizing that competition law is directed against anticompetitive single-firm bullying and collusive ganging up is important, but only the first step to antitrust analysis. Even more important is appreciating that, properly interpreted, competition law should not be directed against anything else, and that, to the extent it is applied more expansively, it is likely to reach haphazard and unfortunate results. The key to public confidence in competition law is to remain faithful to this focus. Acknowledging the limits of competition law is essential to preserving it.

IV. GLOBAL COMPETITION LAW HAS LARGELY CONVERGED

Convergence has been the Holy Grail of competition law for thirty years. Today, there are nearly 170 jurisdictions with competition laws around the world,54 and over fifty more in the United States alone. While convergence long seemed out of reach, despite the efforts of academic pioneers and such bodies as the International Competition Network and the World Trade Organization,55 the reality is that there is more convergence today than seemed possible not long ago. Virtually every competition regime limits anticompetitive bullying and ganging up, and while the language and procedures vary enormously, the direction is largely the same.

Different competition laws look very dissimilar on the surface, with a variety of thresholds, safe harbors, exemptions, enforcement mechanisms, and special industry rules, plus a different glossary of terms for each regime. For example, the antitrust statutes of the United States generally are less detailed than the EU competition statutes. Safe harbors in the United States derive from case law and are reflected in enforcement guidelines while in other jurisdictions they are written into the statutes themselves or delineated in block exemptions.56 Yet underneath, the

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56. See, e.g., Commission Regulation 267/2010, 2010 O.J. (L 83) 1–7 (EU) (discussing
principles on which these laws rest are largely the same.

This is all the more remarkable given the fact that some regimes are based on judge-made common law rules while others are based on codes and regulations. What is striking is not how different these structures are but how similarly they apply legal and economic principles to comparable facts and reach largely similar outcomes—not in every instance, but more and more over time. Commentators never tire of isolating and dissecting the actual or perceived dissonance among decisions in different jurisdictions addressing the same or similar practices—and there have been some whoppers—but for all the historic and cultural differences among legal systems, the core focus, and the outcomes, increasingly are the same.


57. For example, enforcers in the EU increasingly have employed an effects-based analysis similar to that employed by enforcers in the U.S. See Massimo Motta et al., Hardcore Restrictions Under the Block Exemption Regulation on Vertical Agreements: An economic view (2009), http://ec.europa.eu/dgs/competition/economist/hardcore_restrictions_under_BER.pdf (stating that “[t]he issuing of the BER, and of the Guidelines on Vertical Restraints . . . which accompanied it, was rightly heralded as the introduction of an effects-based approach into EC competition law on agreements”) (internal citation omitted); see also Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45/7) (advocating for an effects-based analysis).

58. See Case COMP/M.2220, General Electric/Honeywell, 2001 E.C.R. II–48/1, application for annulment denied; see also Case T–210/01, Gen. Elec. Co. v. Comm’n, 2005 E.C.R. II–5575 and Case T–209/01, Honeywell Int’l, Inc. v. Comm’n, 2005 E.C.R. II–5532 (declaring a concentration to be incompatible with the common market and the EEA Agreement), available at http://www.curia.eu.int/en/content/juris/index.htm; Eleanor M. Fox, The European Court’s Judgment in GE/Honeywell—Not a Poster Child for Comity or Convergence, ANTITRUST, Spring 2006, at 77 (noting the importance of GE/Honeywell as the first “U.S.” merger cleared by the United States and prohibited by the European Union). In years past, the difference between competition law in the EU and in other jurisdictions used to be attributed more to the special priority afforded by the EU to combating barriers between member states. See Eleanor M. Fox, US and EU Competition Law: A Comparison, in GLOBAL COMPETITION POLICY 339, 340 (Edward M. Graham & J. David Richardson eds., 1997) (noting that the respective competition systems have developed out of different concerns and exhibit significant variations).

Of course, much of the convergence is attributable to the practice of many jurisdictions to model their competition laws after those of another jurisdiction with a longer history of enforcement. The EU model has been copied repeatedly, while other regimes are modeled after the American approach.\textsuperscript{60}

It also has helped the process of convergence that even in common law jurisdictions, guidelines and official commentaries have proliferated, making the philosophy behind application of the laws more transparent and easier to grasp.\textsuperscript{61} Further, it has helped that enforcement officials, academics, and members of the bar from around the world have been meeting, communicating, and collaborating for years.\textsuperscript{62} Information sharing, technical assistance, and other collaboration among nations all have facilitated and hastened convergence.

This is not to say that the decision-makers in all these jurisdictions never go astray. However, as in the United States, the most troubling departures abroad have been instances in which the analysis lost sight of core goals and condemned practices for other reasons.\textsuperscript{63} To the extent that decisions have been true to preventing and curtailing anticompetitive bullying and ganging up, and nothing more, there has been greater

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\textsuperscript{60} ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES 13–14 (2001).

\textsuperscript{61} Different jurisdictions have issued guidelines on merger review, vertical restraints, licensing, horizontal collaboration, and other topics.\textsuperscript{See, e.g., Alden F. Abbott and Samuel N. Weinstein, The New U.S. Horizontal Merger Guidelines and International Competition Policy Convergence, ANTITRUST, Fall 2010, at 39 (explaining the role of the 2010 U.S. merger guidelines in fostering international convergence).}


\textsuperscript{63} For example, critics have sharply questioned the EU’s disapproval of the proposed GE acquisition of Honeywell and the proposed Coca-Cola acquisition of Huiyuan Juice Group, a Chinese juice maker, wondering whether political motives played a role.\textsuperscript{See, e.g., Fox, supra note 55, 43 VA. J. INT’L L. at 923 (noting the “perceived illegitimacy” of the EU’s decision to enjoin the merger between GE and Honeywell); Hard to Swallow: China Indicates the Real Targets of its Anti-monopoly Law: Outsiders, ECONOMIST, March 19, 2009, at 75 (suggesting that the Coca-Cola decision signals Chinese anti-monopoly law really may be intended to create barriers for foreign companies).
convergence and less to criticize. Although there continue to be differences, convergence has been growing stronger.

V. THE ECONOMY IS MORE PRODUCTIVE WITH LIMITS ON ANTICOMPETITIVE BULLYING AND GANGING UP

Naturally, convergence itself is not a desirable objective unless there is convergence on a rule that benefits society. The law must prohibit undesirable activity—here, anticompetitive activity—without prohibiting desirable activity—here, efficient, pro-competitive or competitively neutral conduct. Additionally, the law must be clear enough so that those responsible for administering it are reliably able to distinguish what is desirable and permissible from what is not.

In an environment in which some observers find contemporary antitrust law both unfathomable and arbitrary, critics have called for abridgment of antitrust enforcement or outright repeal of the antitrust laws, allowing firms to compete as they wish. Antitrust enforcement has been derided for stifling innovation and undermining competitiveness, raising questions about the very value of competition law. In the 1980s, Commerce Secretary Malcolm Baldrige remarked that the antitrust laws “place additional and unnecessary burdens on the ability of U.S. firms to compete.” Economist Lester Thurow advised that “America should abolish its antitrust laws” because “[a]n economy where growth is stopped


and living standards are falling behind those of its competitors cannot afford a legal system that cripples its industrial future.\textsuperscript{67} Does monopoly actually stifle innovation or does it encourage even greater innovation? Does greater concentration really result in appreciably less competition? Is the benefit of detecting and challenging monopolization and cartels worth the cost? The empirical work on this issue is incomplete, though certainly spirited.\textsuperscript{68}

Unfortunately, the compendium of misguided antitrust decisions is long enough to substantiate much of the criticism.\textsuperscript{69} When the Supreme Court reverses its own rulings and Congress repeals its own laws—as has happened more than once\textsuperscript{70}—it becomes apparent that at least some antitrust enforcement (take your pick as to which) has been counterproductive. The issue, however, is not whether mistakes have been made but whether the economy would be better served with laissez-faire and self-correction or with limits on anticompetitive activity. The reversal of prior rulings and the repeal of earlier laws do not mean that the economy would be better off without any antitrust enforcement at all. The critics may be correct with respect to instances of misguided or miscalibrated enforcement, but not with respect to deterring the misuse of monopoly power and conspiracies to raise prices or cut output. There is ample evidence of the savings achieved by preventing and eliminating cartels.\textsuperscript{71} Agreements to raise prices or reduce output, except in the most unusual circumstances, make markets less efficient and the economy worse off.\textsuperscript{72} The evidence is more mixed with regard to the benefits associated with


\textsuperscript{68} ABA \textit{SECTION OF ANTITRUST LAW, REPORT ON REMEDIES} (2004); Crandall & Winston, \textit{supra} note 64.

\textsuperscript{69} \textit{See supra}, notes 39–46.


preventing and eliminating monopolization, but there is evidence of benefits in many, if not all, instances. 73 For example, there is ample evidence that the acquisition, or maintenance of, monopoly power through the use of dirty tricks or by raising rivals’ costs without creating any efficiencies, makes markets less efficient and the overall economy worse off. 74 In contrast, there is little empirical evidence indicating that economies are more productive where monopolization goes unchecked and anticompetitive collusion is tolerated. 75

The answer is not to eliminate antitrust law root and branch. Rather, it is to confine antitrust law to addressing anticompetitive bullying and ganging up, and to provide enough clarity to make the right outcomes easier to perceive. The economy is better off with antitrust than without it, as long as the limits are observed.

73. See Baker, Preserving a Political Bargain, supra note 64, at 616–20 (describing both sides of the debate); Baker, supra note 71, at 33–35 (noting that prices fell for some services offered by companies subject to antitrust litigation while acknowledging that there were still impediments to competition). But see, Mark A. Lemley & David McGowan, Legal Implications of Network Economic Effects, 86 Cal. L. Rev. 479, 522 (1998) (noting that network effects in various industries may create a variety of competition scenarios that do not always require antitrust intervention).


75. Michael Porter concluded, after a four-year study of competitiveness, that “[i]n global competition, successful firms compete vigorously at home and pressure each other to improve and innovate.” Michael E. Porter, The Competitive Advantage of Nations, 117 (1990). He found that when active rivalry is maintained in an industry, and when there is an interchange of information among competitors about needs and technology, “the conditions for competitive advantage are the most fertile.” Id. at 152. In contrast, he found that “[o]ne of the most common, and often the most fatal, causes of lost national advantage is the ebbing of domestic rivalry, since pressure to improve and adjust is often lost with it.” Id. at 169. See also F. M. Scherer, Industrial Market Structure and Economic Performance, 483 (2d ed. 1980) (noting that high industrial concentration “is apt to retard progress by restricting the number of independent sources of initiative and by dampening firms’ incentive to gain market position through accelerated research and development.”); Walter Adams & James W. Brock, The Business Complex, 48–64 (1986) (discussing the role of big corporations in technological innovation); Ken Ohmae, Japan vs. Japan: Only the Strong Survive, Wall St. J., Jan. 26, 1981, at 20 (“Japanese companies do not do so well on world markets in industries . . . where one firm accounts for more than 50% of the Japanese market.”); Baker, supra note 71; Willow A. Sheremata, Barriers to innovation: a monopoly, network externalities, and the speed of innovation, 42 Antitrust Bulletin 937, 971–72 (Winter 1997) (stating that network externalities provide a monopolist with barriers to entry, securing the monopolist’s position and reducing the incentives for all firms in the industry to innovate).
VI. SIMPLE RULES FACILITATE COMPLIANCE, ENFORCEMENT, AND PUBLIC SUPPORT

Fortunately, the growing sophistication of antitrust analysis, both legal and economic, has made decision-makers better equipped to reach the right determinations—if they can maintain the right focus. The cause of rogue decisions seldom has been defective rules or tools, but rather a misunderstanding of the principles behind the rules. If judges, enforcement officials, and lawyers confine their focus to unilateral and collective activity that threatens serious harm to competition, the proper application of the legal and economic principles and tools will become clearer. To a large degree, the backlash against antitrust enforcement is in reaction to the complexity, and resulting confusion, that has fostered bad policy decisions, bad enforcement decisions, and bad judicial decisions. Once antitrust becomes too complicated to explain on an elevator ride, it is in danger of being misinterpreted by courts and losing widespread support.

How does one reconcile the benefits of greater sophistication against the capacity to foster confusion and chaos? There is no need to rewrite the laws, which are simple enough. There generally is no need to rewrite the many guidelines either, although several might benefit from some clarification. It would suffice for counselors, enforcers, and judges to understand that the beacon of antitrust and competition law is not just maximizing consumer welfare and economic efficiency, but achieving that goal by confining enforcement to preventing bullying and ganging up that seriously threatens competition. When decision-makers train the weapons of the antitrust arsenal on other practices, they run the risk of both reaching the wrong results and losing public support. When their aim is true, everyone is better off.

Innate as they are, anticompetitive bullying and ganging up are not about to disappear any time soon, as demonstrated year after year by the single-firm misconduct that continues to surface and the cartels that continue to be exposed. The challenge is to foster a competitive economy in the face of our baser instincts through intelligent application of the law.

Antitrust is not that complicated. Once this is appreciated, both the direction and the value of antitrust become easier to comprehend, apply, and explain: Don’t put up with bullies who stifle competition. Don’t permit ganging up to diminish competition. Then, let competition sort out the winners and losers, and may the best competitors win.