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SEPARATION OF POWERS, PROSECUTORIAL DISCRETION, AND THE "COMMON LAW" NATURE OF ANTITRUST LAW

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Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law

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A number of critics of the Reagan administration's antitrust policy appear to consider it the duty of the Antitrust Division to prosecute every type of conduct susceptible to challenge under existing judicial precedents construing the antitrust laws, and in doubtful cases uniformly to press for a resolution that would lead to a finding of illegality. While seldom articulated in this extreme form, assumptions along these lines seem to underlie much of the recent criticism that has been leveled against the way in which I have attempted to discharge my responsibilities as Assistant Attorney General in charge of the Antitrust Division.

In this Article I shall argue that such a conception of the functions of the Antitrust Division is wrong. Its adoption as the guiding standard for the Division's operations would require the Division to shoulder obligations that, given its limited resources, it could not possibly discharge in an effective manner, and which it need not shoulder in view of the availability of other enforcement vehicles, particularly private rights of action. More fundamentally, this standard would ignore the legislative purposes underlying the antitrust laws and lead in many situations to economically and socially indefensibile results. In contrast with this standard, I will argue that an exercise of discretion informed by the competitive effects of business conduct and the potential precedential implications of resultant judicial decisions is the approach mandated by the Constitution and antitrust jurisprudence.

The point of departure in any analysis of prosecutorial discretion is to locate its source and scope. Consequently, I will examine first the "common law" approach to antitrust law adopted by Congress and the roles of the judicial branch, the executive branch, and private litigants. Once I have identified the outside bounds of prosecutorial discretion, I will consider the implications of the separation of powers and the com-

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mon-law approach for the proper exercise of this discretion, including allocation of the Division's limited resources in antitrust law enforcement. Finally, I will review several applications in current Division policy.

I. The Common-Law Approach to Antitrust Law

At the turn of the century, Congress created the general statutory framework for government intervention in the marketplace,[1] a framework that remains largely unchanged today.[2] Its cornerstone is the Sherman Act, whose substantive prohibitions make unlawful every "contract, combination . . . or conspiracy, in restraint of trade"[3] and conduct to "monopolize, or attempt to monopolize . . . any part of . . . trade."[4] Closely aligned with these provisions is section 7 of the Clayton Act, which provides that "no person . . . shall acquire . . . any part of the stock . . . or assets of another person . . . where in any line of commerce . . . in any section of the country, the effect . . . may be substantially to lessen competition, or to tend to create a monopoly."[5]

These provisions contain the kernel of antitrust law.[6] They are

1. Regulated markets, such as public utilities, are the one exception. Despite their popularity as a topic of discussion, however, they remain a relatively small part of the United States economy. For example, transportation, communications, public utilities, banking, and insurance—the industries subject to substantial economic regulation—accounted for less than 12% of the value added to national income in 1979. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 426 (1981). It is also true that the bulk of activity within these industries is subject to antitrust scrutiny of one form or another.

2. Of course, there have been a number of amendments to the basic acts as well as the passage of new statutes. Among the most notable of the substantive changes are the passage of the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936) (current version at 15 U.S.C. § 13 (1976)); the Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937), and its subsequent repeal, Pub. L. 94-145, 89 Stat. 801 (1975); and the Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (1976)). However, none of these changes altered the philosophy underlying the original antitrust enactments.

3. Sherman Act § 1, 15 U.S.C. § 1 (1976).

4. *Id.* § 2, 15 U.S.C. § 2 (1976).

5. 15 U.S.C. § 18 (1976 & Supp. V 1981).

6. Two other provisions often discussed in the context of substantive antitrust law are § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976), and the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936) (current version at 15 U.S.C. § 13 (1976)). While the Supreme Court has held that the antitrust reach of § 5 is not bound by the Sherman and Clayton Acts, FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972), in practice both the Commission and reviewing courts use conventional antitrust analysis when applying the section. *See, e.g.,* E.I. du Pont de Nemours & Co., 96 F.T.C. 653 (1980); Brunswick Corp., 94 F.T.C. 1174 (1979), *aff'd sub nom.* Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981); Borden, Inc., 92 F.T.C. 669 (1978), *aff'd*, 674 F.2d 498 (6th Cir. 1982); Beatrice Foods Co., 67 F.T.C. 473 (1965). Moreover, enforcement jurisdiction over § 5 is vested solely in the Federal Trade Commission. This section is, therefore, largely irrelevant to the duties of the head of the Antitrust Division. The Robinson-Patman Act, on the other hand, recognizes as unlawful conduct that injures competitors, regardless of its effects on competition, and as a result is not regarded as a true "antitrust" law. *Cf.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (antitrust laws enacted for "protection of *com-*

broadly phrased—almost constitutional in quality—embracing fundamental concepts with a simplicity virtually unknown in modern legislative enactments.[7] In failing to provide more guidance, the framers of our antitrust laws did not abdicate their responsibility any more than did the Framers of the Constitution. The antitrust laws were written with awareness of the diversity of business conduct and with the knowledge that the detailed statutes which would prohibit socially undesirable conduct would lack the flexibility needed to encourage (and at times even permit) desirable conduct. To provide this flexibility, Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.[8]

A. The Role of the Judiciary

By adopting a common-law approach, Congress in effect delegated much of its lawmaking power to the judicial branch.[9] Three attributes of the basic statutes reflect the breadth of this delegation. First, the jurisdictional reach of the antitrust laws, at least that of the Sherman Act, is as far-reaching as constitutionally permitted.[10] This allows

petition, not *competitors*" (emphasis in original) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

7. The constitutional quality of the antitrust laws has been recognized by the Supreme Court. *See* Appalachian Coal, Inc. v. United States, 288 U.S. 344, 360 (1933) (antitrust laws described as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions").

8. As the Supreme Court observed in National Soc'y of Professional Eng'rs v. United States:

> Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its applications in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

435 U.S. 679, 688 (1978) (footnote omitted).

9. I use the term "delegated" advisedly. Governance by legal norms begins with abstract principles of justice and proceeds along a continuum of increasingly factual specificity until a particular situation is completely identified. Under the doctrine of separation of powers, we recognize the creation of the abstract principles to be within the province of the legislative branch (subject, of course, to various constitutional constraints such as those contained in the Bill of Rights), while the application of these principles to particular facts and named persons belongs to the judicial branch. While the doctrine of separation of powers locates the responsibilities for the extremes of the continuum, it does not provide a clean division of the interior responsibilities between the two branches. Rather, the doctrine confers upon the legislative branch considerable discretion over the degree of the factual specification of its enactments, and leaves to the judiciary the residual. In this sense, Congress "delegates" its lawmaking power to the judicial branch to the extent its enactments require interpretation before they can be applied to particular facts. *See generally* Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361 (1915), *reprinted in* SCIENCE OF LEGAL METHODS 202 (1969).

10. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558-59 (1944). *See* McLain v. Real Estate Bd., Inc., 444 U.S. 232, 241-42 (1980). The courts initially interpreted the Clayton Act's "in commerce" language to provide narrower jurisdictional scope than the Sherman Act. *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 201-02 (1974). Section 7 was amended

the courts to scrutinize the full range of business conduct. Second, the substantive terms within the statutes are either of common-law origin or otherwise readily susceptible to judicial interpretation.[11] Taken on their face, the antitrust provisions could have reached almost all business decisions, whether entered unilaterally or multilaterally, directed toward internal operations or external dealings, or intended for present or future effect. Third, Congress provided little if any extrastatutory guidance to direct interpretation of the basic antitrust provisions.[12] The legislative histories of the antitrust statutes provide only the most basic description of the goals Congress sought to promote—competition and free enterprise—and little indication of how these goals can best be fostered by the judiciary.[13]

Confronted with an expansive, open-ended set of statutory prohibitions and little congressional guidance for their interpretation, the courts have had to distill a more operational conception of the public interest underlying the antitrust laws before applying statutory construction to secure the fundamental legislative goals. They have been forced to develop an understanding of the various types of business behavior as they measure them against this conception of the public interest. They also have had to discover the limits of the extent to which judicial regulation of business conduct can promote the public interest better than unregulated behavior.

Questions regarding the objectives of the law, the measure by which to test conduct against these objectives, and the ability of gov-

in 1980 to make its jurisdiction coextensive with that of the Sherman Act. Pub. L. No. 96-349, § 6(a), 94 Stat. 1157 (1980).

11. For a discussion, see, e.g., W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 96 (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY 181-84 (1954); Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955)

12. It is true that at least some of the legislators thought they were merely enacting the existing common law of restraints of trade. *See, e.g.,* 21 CONG. REC. 2456, 2457, 2563 (remarks of Sen. Sherman); *id.* at 3146, 3152 (remarks of Sen. Hoar). But the common-law precedents at that time did not form a coherent body of doctrine to assist in construing the new antitrust laws; rather, they differed in significant and sometimes contradictory ways from jurisdiction to jurisdiction and often within the same jurisdiction. *See* Dewey, *supra* note 11; Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954). To make matters even less clear, the drafters appear to have misunderstood the focus of the common law to be restriction on competition, a somewhat different notion than restriction or exclusion of competitors. *See* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 36-38 (1966). Both of these factors cast doubt on the reliability of the body of law the framers stated they were seeking to codify as a source of aid in statutory construction.

13. Senator Sherman candidly stated during the course of debate over the Sherman Act:

> I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . . .

21 CONG. REC. 2460 (1890) (remarks of Sen. Sherman).

ernment intervention to further these objectives, are basic to all lawmaking processes. What distinguishes the common–law approach from the legislature's statutory approach is the manner in which these questions are answered and the stability of the answers once given. The press of business, coupled with the constitutional and institutional rules governing legislative action, often prevent Congress from actively supervising the implementation of statutes once they are passed. Instead, the typical statutory approach is to define comprehensive answers to the basic questions of lawmaking at the time of enactment and to modify these answers only if dissatisfaction becomes intense. Consequently, the evolution of statutory law is characterized by long periods of stability occasionally interrupted by relatively basic changes.[14]

By contrast, the common–law approach avoids immediate answers to basic lawmaking questions. Instead, questions are raised and answered narrowly as individual cases are brought to the courts. By the critical use of stare decisis, more comprehensive answers to the basic questions gradually evolve as more cases are decided. As Munroe Smith described the process:

> The rules and principles of case-law have never been treated as final truths but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated.

14. This simple model of legislative supervision is, of course, subject to numerous refinements and qualifications. In many circumstances, legislative control may be exercised through means other than the fine-tuning of its substantive enactments. When the implementation of a statute is exclusively in the hands of the executive branch or an independent regulatory agency, effective control may be exercised through the authorization and appropriations process, or even more informally through oversight hearings and legislative liaison. These alternatives concentrate considerable power in congressional committees, if not individual senators and representatives, and control by the Hill may often be exercised without the need for full congressional action. *See generally* R. FENNO, CONGRESSMEN IN COMMITTEES (1973); R. FENNO, THE POWER OF THE PURSE (1966); M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (1964); Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUBLIC CHOICE 33 (1982); Weingast & Moran, Bureaucratic Discretion or Control: Regulatory Policymaking by the Federal Trade Commission (1982) (Working Paper 72, Center for the Study of American Business, Washington University); Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships*, 44 LAW & CONTEMP. PROBS. 147 (1981). However, where implementation of the law depends significantly on private actions and interpretations by an independent judiciary, effective legislative control turns on the ability to amend quickly the substantive law in response to deviations from the congressionally desired course. This requires actions by both Houses and approval by (or override of the veto of) the President, and consequently is typically too cumbersome to permit effective legislative control.

> The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.[15]

By its very nature, the common-law approach assumes that judicial mistakes will be made, or at least that incomplete answers will be given to the more general questions raised by the case. While the common-law approach lacks the certainty of the statutory approach, it permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law. The need for a process of incremental change was particularly acute in antitrust at the turn of the century, when there was great pressure to control perceived abuses by business but little understanding of what the government could and ought to do to promote competition and free enterprise.

The common-law process of answering basic lawmaking questions was in full bloom by 1897 with the debate between Justices Peckham and White in *United States v. Trans-Missouri Freight Association*[16] over the scope of conduct to be declared unlawful under the Sherman Act. The government had brought a bill to enjoin the Trans-Missouri Freight Association and its eighteen member railroads from jointly establishing rates and other terms of service upon competitive traffic. The lower courts had found no violation of the Sherman Act since there was no suggestion that the defendants had violated the Interstate Commerce Act's requirement that rail rates be "reasonable and just." Justice Peckham, leading a five-to-four majority, held that dismissal of the bill was error. In his view, the Sherman Act prohibited *every* restraint of trade,[17] and the Association's price-fixing arrangement was such a restraint notwithstanding the assumed reasonableness of the rates.[18] Justice White, relying on his reading of the common law, urged in a dissent joined by the three remaining Justices that only "unreasonable" restraints should be unlawful,[19] and, since the rates fixed by the defendants were assumed reasonable, dismissal of the bill was proper.[20] The following year in *United States v. Joint-Traffic Association*,[21] the Court examined another railroad price-fixing agreement indistinguish-

15. M. SMITH, JURISPRUDENCE 21 (1909), *quoted in* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 23 (1921).
16. 166 U.S. 290 (1897).
17. *Id.* at 312, 328.
18. *Id.* at 328-32.
19. *Id.* at 351-52, 355 (White, J., dissenting).
20. *Id.* at 343-44.
21. 171 U.S. 505 (1898).

able in principle from that in *Trans-Missouri*.[22] Justice Peckham, again speaking for a five-to-four majority,[23] refined his earlier views, indicating that while "every" restraint of trade was unlawful, *restraint of trade* under the Sherman Act was not co-extensive with restraint of trade under common law.[24] Rather, the act reached only those "contracts whose direct and immediate effect is a restraint upon interstate commerce."[25]

Justice Harlan joined the debate with his opinion in *Northern Securities Co. v. United States*,[26] insisting that "*every* combination or conspiracy which would extinguish competition between otherwise [competitors] . . . engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act."[27] Since the challenged combination involved a merger between two prior competing railroads, both of which transported passengers and freight interstate,[28] Justice Harlan would have held the combination illegal.[29] Justice Holmes disagreed. In his dissent (notably joined by Justices White *and* Peckham, together with Chief Justice Fuller),[30] Justice Holmes argued that the Sherman Act did not reach complete fusions of interests, even between previously competing entities, in part because the mere formation of such combinations could not

22. *Id.* at 562-65.

23. Justice White and three other justices dissented, although they filed no dissenting opinion.

24. For example, Justice Peckham indicated that a noncompetition covenant binding the seller of a business in his individual capacity was "a contract not within the meaning of the act," 171 U.S. at 568, although it was clearly regarded as a restraint of trade at common law. *See* Mitchell v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); Dyer's Case, Y.B. Pasch., 2 Hen. V f.5, pl. 26 (1415). *See also* H. THORELLI, THE FEDERAL ANTITRUST POLICY 17-20 (1955). This redefinition of "restraint of trade" was anticipated in *Trans-Missouri*. *See* 166 U.S. at 329.

25. 171 U.S. at 568. Justice Peckham further explained:

> [t]o treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce.

Id.

26. 193 U.S. 197 (1904).

27. *Id.* at 331 (emphasis in original).

28. *Id.* at 320.

29. Justice Harlan wrote for four justices; Justice Brewer's concurrence in a separate opinion provided the majority for holding the merger unlawful.

30. Justice White also wrote a dissenting opinion, joined by the three other dissenters, arguing that the formation of a holding company and the acquisition of shares of other corporations—the form of the merger in this case—did not meet the interstate commerce requirement of the Sherman Act. 193 U.S. at 364 (White, J., dissenting).

exclude third parties from competing with the combination.[31] Otherwise, given Justice Peckham's interpretation in *Trans-Missouri* and *Joint Traffic* with which Holmes agreed,[32] the Sherman Act would make unlawful *every* integration of competing interests and require the atomization of economic endeavor.[33]

The judicial view shifted once again in 1911 with the decision in *Standard Oil Co. v. United States*,[34] in which Chief Justice White obtained a majority of the Court and attempted still another restatement of the fundamentals of antitrust law. While Chief Justice White found "every conceivable contract or combination" to be subject to Sherman Act scrutiny,[35] not all such contracts of combinations were unlawful, even if they resulted in a restraint of trade. Rather, the act prohibited only those contracts or combinations which effected "undue" restraints when measured against a "rule of reason,"[36] a test which looked to the nature of the "contracts or agreements, their necessary effect, and the character of the parties."[37] In *United States v. American Tobacco Company*,[38] a case decided two weeks after *Standard Oil*, Chief Justice White elaborated that under the rule of reason

> the words "restraint of trade" . . . only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade.[39]

Chief Justice White had come full circle from his dissent in *Trans-Missouri*. Restraints of trade were to be judged by the "reasonableness" of their character in relation to competition, not their degree as he had originally urged. In reaching this conclusion, Chief Justice White was able to formulate an interpretation of the Sherman Act which retained its essential flexibility to respond to new business practices and new insights regarding the competitive conseqences of business conduct—a quality absent in the articulations of Justices Peckham, Harlan, and Holmes.

This short digression illustrates the conceptual quagmire faced by

31. *Id.* at 408 (Holmes, J., dissenting).
32. *Id.* at 405.
33. *Id.* at 410-11.
34. 221 U.S. 1 (1911).
35. *Id.* at 59-60.
36. *Id.* at 62.
37. *Id.* at 65.
38. 221 U.S. 106 (1911).
39. *Id.* at 179.

those who sought to regulate competitive business behavior at the turn of the century and the need for a common-law approach to antitrust law.[40] This need remains apparent today as the law continues to evolve.

For example, in *Standard Oil* Chief Justice White, in finding that Standard Oil Company had violated the Sherman Act, stressed that the company had acquired its dominant share of the market through merger rather than internal growth, and that it had engaged in a variety of predatory practices against competitors.[41] By 1945, however, in *United States v. Aluminum Co. of America*,[42] Judge Hand was able to find that Alcoa had violated section 2 of the Sherman Act when its dominant market share had not been "thrust upon" it, even though it had achieved its size largely through internal growth and was not accused of predatory conduct.[43] Thirty years later, the tide once again had shifted, and the law required a showing of anticompetitive conduct as a prerequisite to monopolization.[44]

Merger antitrust law provides another example of the continuing evolution of antitrust law. In the 1960s the Supreme Court tightened considerably the market-share standards to which horizontal mergers would be held.[45] Later, however, the Court abandoned its almost religious devotion to market-share analysis and found lawful a horizontal merger that would have been presumptively illegal under prior cases because the defendant had demonstrated that the acquisition threatened no substantial lessening of competition.[46]

In addition, the Court has overruled its earlier decision that non-

40. The early history of the Sherman Act is analyzed with great care and insight in Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 785-79 (1965).

41. 221 U.S. at 75-76. A question has been raised whether Standard Oil did in fact engaged in predatory pricing. *See* McGee, *Predatory Price-Cutting: The* Standard Oil *(N.J.) Case*, 1 J.L. & ECON. 137 (1958).

42. 148 F.2d 416 (2d Cir. 1945).

43. *Id.* at 430-31.

44. *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273-75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). On facts strikingly similar to those in *Alcoa*, the Federal Trade Commission declined to find unlawful the successful expansion strategy adopted by duPont in the titanium pigments business. *In re* E.I. duPont de Nemours & Company, 96 F.T.C. 653, 705 (1980).

45. In 1962 the Supreme Court indicated it would refuse to sanction a horizontal acquisition of as much as 5% in a market characterized by minimal or no entry barriers. Brown Shoe Co. v. United States, 370 U.S. 294 (1962). Four years later the Court appeared to have lowered the threshold market share to no greater than 4.5%. United States v. Pabst Brewing Co., 384 U.S. 546, 550 (1966). That same year the Court struck down a horizontal merger between two grocery chains in which the surviving firm had only 1.4% of the grocery stores and 7.5% of the grocery sales in a relevant market characterized by a significant trend toward concentration and an increase of acquisitions of small companies by large chains. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

46. United States v. General Dynamics Corp., 415 U.S. 486 (1974).

price vertical restraints (such as territorial sales restrictions) were per se unlawful, and ruled instead that such restraints must be analyzed under the rule of reason.[47] The Court has also found that the legality of the sale of blanket licenses for musical compositions by a clearinghouse of composers and publishing houses, an arrangement which under existing precedent seemed to be per se unlawful, is to be examined under the rule of reason.[48]

These examples illustrate both the evolving nature of antitrust law and the fact that the evolution does not always proceed in one direction. Neither this evolution nor its lack of direction should be surprising. It is exactly what the framers of the antitrust laws intended. An adaptive approach to antitrust law is necessary both because of the diversity and rapidly changing nature of the business conduct to be scrutinized, and because of the continuing progress of economic theory in explaining why firms pursue certain strategies and the competitive consequences of their behavior. As the courts gain experience through scrutiny of challenged conduct and as economic theory continues to provide a more complete understanding of business conduct, it is inevitable that mistakes will be exposed in some of the past applications of antitrust law.[49] Moreover, given this nation's complex economic history since the late 1800s and the political and intellectual forces that this history has encompassed, it is likely that the distribution of mis-

47. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), *overruling* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). On remand the contractual restriction on the locations where the plaintiff could sell defendant's television sets was upheld under rule of reason analysis. Continental T.V., Inc. v. GTE Sylvania, Inc., 1982-2 Trade Cas. (CCH) ¶ 64,962 (9th Cir. 1982).

48. Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979). On remand, the clearinghouse arrangement was upheld with respect to blanket licensing of music performing rights for use in television network programming. Broadcast Music, Inc. v. Columbia Broadcasting Sys., 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981). However, in a related case against the clearinghouse brought by independent television stations, the district court found the arrangement unlawful under the rule of reason with respect to the blanket licensing of performing rights for use in non-network programming. Buffalo Broadcasting Co. v. ASCAP, 1982-2 Trade Cas. (CCH) ¶ 64,898 (S.D.N.Y. 1982).

49. Chief Justice White recognized the same evolutionary forces in the early English law of restraint of trade:

> From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary such acts tended to fructify and develop trade. See the statutes of 12th George III, ch. 71, enacted in 1772, and statute of 7 and 8 Victoria, ch. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade.

Standard Oil co. v. United States, 221 U.S. 1, 55 (1911).

takes is not continually skewed in the direction of either a too expansive or too limited law of competition. Errors could be, and were, made on both sides. Even so, in my opinion the antitrust law of today is a major improvement on prior law and far superior to anything that could have resulted from more prescriptive statutory approaches. The common-law approach to antitrust law, if it has not served us well, has served us better than would the available alternatives.

This is not to say that the evolution of antitrust law has reached its apogee. Some areas of antitrust law exhibit substantial doctrinal confusion, if not plain error. Confusion is inevitable as courts apply rules to fact situations different from those in which the rules were developed.[50] More fundamentally, the confusion reflects the still evolving character of the answers to the basic questions in antitrust law. After close to a century of antitrust jurisprudence, a vigorous debate continues over the proper means of furthering the original congressional goals of competition and free enterprise.[51] As a result, uncertainty remains over the measure against which the social desirability (and hence legality) of various types of business conduct should be tested.[52] More-

50. Perhaps the best example of this confusion lies in the attempts by lower courts and the Federal Trade Commission to apply the rules regarding unilateral and multilateral conduct enunciated in United States v. Colgate & Co., 250 U.S. 300 (1919), and United States v. Parke, Davis & Co., 362 U.S. 29 (1960). *Compare, e.g.,* Battle v. Lubrizol Corp., 673 F.2d 984, 991-92 (8th Cir. 1982) (concluding that complaint-and-termination evidence alone is sufficient to infer agreement), *and* Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1238-40 (7th Cir. 1982) (same), *with* Roesch Inc. v. Star Cooler Corp., 671 F.2d 1168, 1172 (8th Cir. 1982) (concluding that mere complaint-and-termination evidence is insufficient to support an inference of conspiracy), *and* Edward J. Sweeny & Sons Inc. v. Texaco, Inc., 637 F.2d 105, 110, 116 (3d Cir. 1981) (same).

51. *See, e.g.,* M. GREEN, B. MOORE, JR. & F. WASSERSTEIN, THE CLOSED ENTERPRISE SYSTEM (1971); Austin, *A Priori Mechanical Jurisprudence in Antitrust*, 53 MINN. L. REV. 739 (1969); Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1972); Bork & Bowman, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 377, 401, 417, 422 (1965); Brodley, *Massive Industrial Size, Classical Economics and the Search for Humanistic Value*, 24 STAN. L. REV. 1155 (1972); Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 VA. L. REV. 413 (1964); Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977); Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977); FOX, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Hart, *The Quality of Life and the Antitrust Laws: A View from Capitol Hill*, 40 ANTITRUST L.J. 302 (1971); Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325 (1968); Lande, *The Goals of the Antitrust Laws*, 33 HASTINGS L.J. — (1982) (forthcoming); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977); Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1 (1980); Note, *Antitrust Enforcement Against Organized Crime*, 70 COLUM. L. REV. 307 (1970). *See also, e.g., Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

52. This source of confusion, for example, probably lies behind the split among the circuits on whether an employee discharged or otherwise punished by his employer for refusing to assist in an antitrust violation has standing to challenge the violation. *Compare* Ostrofe v. Crocker Co.,

over, while economic theory has made enormous strides toward understanding business behavior, it still falls far short of enabling us to test many kinds of business conduct against the public interest (whatever its measure).[53] Finally, there is considerable disagreement over the extent to which government intervention in the marketplace can successfully regulate socially undesirable conduct to further the public interest.[54]

As the courts refine antitrust law by incorporating new insights and resolving old confusions, they act much like Congress (at least in principle) when it updates statutory law. But the courts cannot act alone in this process. Unlike Congress, the courts have only limited discretion in fashioning their lawmaking agenda. The Constitution limits the exercise of judicial power to "cases" and "controversies."[55] The courts are not free to render advisory opinions[56] or to reach out and select the issues they wish to hear.[57] The law's course of development is bounded by the nature of the cases brought before the courts.[58]

670 F.2d 1378 (9th Cir. 1982) (recognizing standing), *with In re* Industrial Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982) (denying standing).

53. The law of predatory pricing amply illustrates the inadequacy of current economic theory. Despite the efforts of numerous analysts, there is little agreement about the existence, characteristics, or welfare economics of the putative phenomenon. The inability of current economic theory to resolve this lack of agreement is reflected in the difficulty the courts have in finding a unified framework in which to examine allegations of predatory pricing. *See, e.g.*, Utah Pie v. Continental Baking Co., 386 U.S. 685, 698 (1966); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981); Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); Pacific Eng. & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). *See generally* Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982); Zerbe & Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEXAS L. REV. — (1982) (forthcoming).

54. Compare, for example, the various proposals for regulatory reform contained in S. BREYER, REGULATION AND ITS REFORM (1982); L. LAVE, THE STRATEGY OF SOCIAL REGULATION (1981); P. MACAVOY, THE REGULATED INDUSTRIES AND THE ECONOMY (1979); R. NOLL, REFORMING REGULATION (1971); R. POOLE, INSTEAD OF REGULATION: ALTERNATIVES TO FEDERAL REGULATORY AGENCIES (1981); L. WHITE, REFORMING REGULATION (1981).

55. U.S. CONST. art. III, § 2. The case or controversy requirement serves the dual purpose of limiting the business of federal courts to questions presented in adversary context and in a form historically viewed as capable of resolution to the judicial process and of assuring that federal courts will not intrude into areas committed to other branches of government. Flast v. Cohen, 392 U.S. 83, 95 (1968).

56. United States v. Freuhauf, 365 U.S. 146 (1961); Muskrat v. United States, 219 U.S. 346 (1911). See generally H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64-70 (2d ed. 1973), and materials cited therein.

57. This rule is subject to some qualification. Once a proceeding has been initiated, a court has some leeway to suggest that the litigants raise certain questions or, where appropriate, to raise the questions sua sponte. Even so, the court's ability to consider questions it would like to address is severely constrained since it cannot raise such questions except in rare instances in the proceedings before it.

58. Nor have the courts always decided the issues brought to them for adjudication. A

Moreover, for the most part judges do not play an inquisitorial role in adjudication. They depend instead on the litigants to present relevant evidence and the arguments necessary for an informed decision. Consequently, the agenda of antitrust issues presented to the courts and the evidence and arguments necessary to an informed decision depend upon the litigants, particularly the executive branch in its role as the nation's chief enforcer of the antitrust laws.

B. The Role of the Executive Branch

The Constitution provides that the President, and by implication subordinate officers of the President to whom authority has been properly delegated, "shall take Care that the Laws be faithfully executed."[59] This allocation of power and responsibility empowers the President, through the executive branch and particularly the Office of the Attorney General, to enforce acts of Congress and treaties of the United States and to prosecute offenses against the United States.[60] In enacting the antitrust laws, Congress made violations of antitrust law offenses against the United States[61] as well as quasi-tort offenses against

number of doctrines permit the courts to avoid answering questions presented to them. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972) (standing); Flast v. Cohen, 392 U.S. 83 (1968) (standing); Frothingham v. Mellon, 262 U.S. 447 (1923) (standing); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (ripeness); DeFunis v. Odegaard, 416 U.S. 312 (1974) (mootness); Golden v. Zwickler, 394 U.S. 103 (1969) (mootness); Baker v. Carr, 369 U.S. 186 (1962) (political question); Colegrove v. Green, 328 U.S. 549 (1946) (political question); Luther v. Borden, 48 U.S. (7 How.) 1 (1839) (political question); Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930) (administrative question).

59. U.S. CONST. art. II, § 3.

60. *See* Ponzi v. Fessenden, 258 U.S. 254, 262 (1922); United States v. San Jacinto Tin Co., 125 U.S. 273, 278-79 (1888); The Confiscation Cases, 74 U.S. (7 Wall.) 454, 456-57 (1868). In addition, at least one commentator has found in the faithful execution clause the power to enforce judicial decrees obtained by the government. Comment, *Constitutional Law—Executive Powers—Use of Troops to Enforce Federal Laws*, 56 MICH. L. REV. 249 (1957). The clause has been interpreted more generally to embrace any obligation that can be inferred from the Constitution or is "derived from the general code of his [the President's] duties under the laws of the United States." W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 88-89 (1916). *See* 2 W.C. ANTIEAU, MODERN CONSTITUTIONAL LAW: THE STATES AND THE FEDERAL GOVERNMENT § 13:27 (1969).

The President's power under the faithful execution clause may be supplemented by the executive power clause, which provides that "[t]he executive Power shall be vested in a President of the United States." U.S. CONST. art. II, § 1, cl. 1. However, it is questionable whether this clause confers any substantive power beyond that conferred by the faithful execution clause. *See* Myers v. United States, 272 U.S. 52, 117 (1926) ("The vesting of the executive power in the President was essentially a grant of power to execute the laws.").

61. The statutes authorize the federal government to prosecute antitrust violations by bringing criminal actions for violations of the Sherman Act, 15 U.S.C. §§ 1-3 (1976), or injunctive actions for violations of the Sherman Act, 15 U.S.C. § 4 (1976), and the Clayton Act, 15 U.S.C. § 25 (1976). In addition, whenever the United States itself is injured as a result of an antitrust violation, it may institute a civil proceeding to recover actual damages. Clayton Act § 4A, 15 U.S.C. § 15a (1976).

injured persons.[62]

The faithful execution clause imposes the duty, as well as confers the power, on the executive branch to enforce the law. This duty may be either ministerial or nonministerial, depending in the particular case on whether the executive officer charged with the performance of an act has any discretion in its execution. Where a statute directs an executive officer to perform an act,[63] and where there is no discretion commited to the officer, the act is ministerial and the officer is constitutionally bound to perform it.[64] The law is well settled that subordinate executive officers may be compelled by writ of mandamus to perform their ministerial duties,[65] and perhaps so may the President.[66] However, where discretion is conferred upon the officer, the duty is nonministerial. While the faithful execution clause and oath of office continue to bind the officer to execute the law, the officer may choose the manner in which he will discharge his duty within the bounds of the discretion committed to him and no writ of mandamus will issue to compel any specific performance of the act.[67]

There are at least three different sources which may confer discretion on an executive officer with respect to any particular duty to act.

62. *See infra* note 92.

63. Although the President has the power to appoint executive officers (subject to confirmation by the Senate), the offices themselves are to be "established by Law," that is, by act of Congress. U.S. CONST. art. II, § 2, cl. 2. In creating the offices, Congress may impose specific duties on the officers who occupy them. Shoemaker v. United States, 147 U.S. 282, 301 (1893). *See* Springer v. Phillippine Islands, 277 U.S. 189, 201 (1928).

64. *E.g.,* Roberts v. United States, 176 U.S. 221, 231 (1900).

65. *See, e.g.,* Ballinger v. Frost, 216 U.S. 240 (1910); Garfield v. Goldsby, 211 U.S. 249 (1908); Roberts v. United States, 176 U.S. 221 (1900); United States v. Schurz, 102 U.S. 378 (1880); Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

66. In National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974), plaintiffs brought an action seeking a writ of mandamus requiring the President to grant certain pay adjustments allegedly required under the Federal Pay Comparability Act, 5 U.S.C. § 5301 (1976). While the Court of Appeals for the District of Columbia agreed that the pay adjustments were required and that the court possessed the authority to mandamus the President to implement these adjustments, it declined to issue the writ so as to give the President the opportunity to comply without judicial compulsion, *id.* at 616, which he did by signing Executive Order No., 11,692. *See* National Wildlife Fed'n v. United States, 626 F.2d 917, 923 (D.C. Cir. 1980) (recognizing authority but declining to issue writ against the President).

67. A writ of mandamus "will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable." United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414, 420 (1931). However, mandamus may be used "to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either." Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206, 218 (1930). *See, e.g.,* United States *ex rel.* Louisville Cement Co. v. ICC, 246 U.S. 638, 642-43 (1918); ICC v. United States *ex rel.* Humboldt Steamship Co., 224 U.S. 474, 484 (1912); Commissioner of Patents v. Whiteley, 71 U.S. (4 Wall.) 522 (1866).

First, in areas such as foreign relations and defense, the Constitution confers discretion expressly on the President and implicitly on those subordinate executive officers to whom the President has delegated his powers.[68] Second, the statute which defines the duty in question may itself confer upon the responsible executive officer some degree of discretion in the discharge of this duty.[69] Third, the statute may be ambiguous and require construction in order to ascertain the nature of the duty it imposes; the executive officer charged by the statute has discretion, at least in the first instance, to construe it in order to discharge his responsibilities faithfully to execute the law.[70]

The prosecution of offenses against the United States is not a ministerial duty. Discretion is conferred in varying degrees upon the President and his law enforcement officers by each of the above three sources. I will discuss them in order of the strength of their recognition

68. There is, of course, considerable debate over the extent to which the Constitution confers discretion in the President. Section 2 of article II does contain several specific grants of presidential powers, including the power to control the military services, to grant reprieves and pardons, to appoint certain federal officials, and to make treaties (with the advice and consent of the Senate). U.S. CONST. art. II, § 2. However, in Myers v. United States, 272 U.S. 52 (1926), the Supreme Court adopted the view that the specific powers enumerated in article II did not exhaust the President's constitutionally vested powers:

> The words of section 2, following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the Executive, not all inclusive, or were limitations upon the general grant of the executive power, and as such being limitations, should not be enlarged beyond the words used. The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed . . . .

Id. at 118 (citation omitted). This view accepts Alexander Hamilton's proposition that the "enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government." 7 WORKS OF ALEXANDER HAMILTON 76, 81 (J. Hamilton ed. 1851), *quoted in Myers*, 272 U.S. at 138. However, while the *Myers* Court did not consider the full range of the President's constitutionally vested powers, it clearly regarded these powers as limited. While not establishing the precise limits of these powers, the Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), held that President Truman had exceeded his authority when, in order to avert a strike during the Korean War, he seized the nation's steel mills and operated them under federal control without first obtaining congressional approval.

69. *See, e.g.*, Schilling v. Rogers, 363 U.S. 666 (1960) (return under the Trading with the Enemy Act by the Alien Property Custodian of property vested in the United States during World War II); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (imposition of embargo of weapons sale to countries engaged in conflict in Chaco); Work v. United States *ex rel.* Rives, 267 U.S. 175 (1925) (claims to be recognized by Secretary of the Interior under the Dent Act for losses suffered by persons encouraged by the government to invest in the production of war-related metals or materials upon the cessation of hostilities).

70. *See, e.g.*, Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958); United States *ex rel.* Hall v. Payne, 254 U.S. 343 (1920); United States *ex rel.* Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903). Congress may commit to the responsible executive officer the final discretion to construe an ambiguous legislative scheme. *See, e.g.*, United States *ex rel.* Ness v. Fisher, 223 U.S. 683 (1912); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840).

by precedent—not surprisingly, the reverse order of their constitutional strength.

When viewed as written instructions to the executive branch, the laws passed by Congress are often incomplete and fail to account for contingencies that might be encountered in their enforcement. Moreover, as the antitrust laws well illustrate, statutes can be vague or ambiguous and often conflict with other laws.[71] To deal with these difficulties, the courts have interpreted the faithful execution clause to enable the President to take those steps reasonably necessary to execute the laws.[72] This includes at least in the first instance, the resolution of questions of construction that arise in the course of statutory execution.[73]

71. The antitrust laws often appear to conflict with federal regulatory statutes. While many of these statutes contain provisions expressly exempting regulated conduct from antitrust scrutiny, others are silent on the question and so raise the issue of reconciliation and implied repeal. *See, e.g.,* National Gerimedical Hosp. & Gerontology Center v. Blue Cross, 452 U.S. 378 (1981); Gordon v. New York Stock Exch., 422 U.S. 659 (1975); United States v. National Ass'n of Sec. Dealers, 422 U.S. 694 (1975); Silver v. New York Stock Exch., 373 U.S. 341 (1963).

72. *See In re* Debs, 158 U.S. 564 (1895); *In re* Neagle, 135 U.S. 1 (1890). *Neagle* upheld the power of the President, in the absence of any statutory authority, to order, through the Attorney General, that a United States Marshall be assigned to accompany and protect a Supreme Court Justice whose life had been threatened by a displeased litigant. The Court found that the order constituted "a law of the United States" and afforded the basis of transferring the marshall, who had killed the litigant when he attacked the Justice, from state to federal custody on a writ of habeas corpus. *Id.* at 58-59.

In *Debs*, petitioners who had violated an injunction prohibiting interference with the movement of trains during the Pullman Strike of 1895 and had been imprisoned for criminal contempt sought a writ of habeas corpus. The injunction had been obtained from a federal circuit court by the President, acting through a United States attorney in Chicago, in part on the grounds that the petitioners' interference obstructed interstate commerce and the transmission of the mails. In denying the writ, the Court held that "[because] under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith . . . and may obtain an injunction to this end." 158 U.S. at 581, 583. The Court added that the government could have used other means to assure that the trains would continue to run:

> But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

Id. at 582. Although the issue was not before the Court, this passage seems to validate President Cleveland's use of the army to keep the trains running through the strike. However, the breadth of the President's authority suggested by the *Debs* dictum was seriously undermined in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See supra* note 68.

73. As the Supreme Court observed in Roberts v. United States, 176 U.S. 221 (1900):

> Every statute to some extent requires construction by the public official whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform.

Id. at 231. The writ of mandamus will not issue where the construction or the application of the

Even though Congress cannot write omniscient laws, it is the seat of the lawmaking function[74] and it can control the discretion that arises in the President from the ambiguity of its enactments by making increasingly precise the manner in which a law is to be executed. This can be done by the legislative branch either when the law is enacted or when it is amended. Facial ambiguity in a statute also may be reduced or removed by judicial construction as well as legislative action.[75] But, to the extent the status remain unclear, the executive branch's power to execute the laws necessarily includes the authority to determine how the law is to be executed—within the bounds defined by the ambiguity of the statute—even in the absence of an independent source of discretion.

Discretion in the selection of prosecutions of offenses against the United States also may be conferred by the statutes defining the offenses and providing for their enforcement. Some statutes use permissive language in their provisions enabling federal prosecution and thereby expressly confer discretion in law enforcement officers with respect to their decisions to prosecute.[76] Moreover, even those statutes whose enforcement provisions are couched in terms usually reserved for mandatory obligations when presented to the courts uniformly have been construed to be permissive in nature.[77]

While the antitrust laws, which arguably contain "mandatory" en-

statute is not free from doubt. *See* Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206, 219 (1930); United States *ex rel.* Hall v. Payne, 254 U.S. 343, 347-48 (1920). However, the uncertainties in construction must be genuine and not contrived. *See* Clackamas County, Ore. v. McKay, 219 F.2d 479, 495 (D.C. Cir. 1954)("Executive officers cannot . . . create an area of doubt and dispute which will be outside the established power of the judiciary to compel obedience to a clear mandate of the Congress. They cannot by bootstraps manufactured by them lift themselves out of the jurisdiction of the courts."), *vacated as moot*, 349 U.S. 909 (1955).

74. Congress shall have the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

75. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). Indeed, a duty may become ministerial after a court has examined a disputable legal question and its application to a particular factual situation and rendered its judgment. *See* Haneke v. Secretary of HEW, 535 F.2d 1291, 1296 n.16 (D.C. Cir. 1976); Seaton v. Texas Co., 256 F.2d 718, 723 (D.C. Cir. 1958).

76. For example, § 1964(b) of the Racketeer Influenced and Corrupt Organizations Act (RICO) provides that the Attorney General "*may* institute proceedings" to prevent and restrain violations of the Act. 18 U.S.C. § 1964(b) (1976) (emphasis added). *See* United States v. Aleman, 609 F.2d 298, 305-06 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

77. *See, e.g.,* Sierra Club v. Train, 557 F.2d 485, 488-91 (5th Cir. 1977) (Federal Water Pollution Control Act); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 381 (2d Cir. 1973) (42 U.S.C. § 1987).

forcement provisions,[78] have yet to be definitely construed in this regard by the courts,[79] it is clear that the common-law approach to antitrust law adopted by Congress requires that the executive branch have discretion to select the particular cases it prosecutes. The extent to which the executive branch can act as an independent force in the evolution of antitrust law depends in large part on the cases it prosecutes (or in which it otherwise participates before the courts) and the range of arguments it makes in these cases. If the executive branch is required to prosecute every type of conduct that existing judicial doctrine recognizes as unlawful or for which colorable arguments of illegality can be made, it will be severely constrained in making an independent contribution to the evolution of antitrust law. Acting under such a duty the executive branch would only reinforce past judicial views of the undesirability of conduct once recognized as unlawful, no matter how unfounded these views may appear today. It would be able to urge only expansion, never contraction, of the conduct to be condemned under the antitrust laws. Given that the judicial mistakes of the past are not consistently pro-plaintiff or pro-defendant—nor, presumably, will the errors of the future be so limited—an executive branch always urging expansion of the domain of conduct deemed unlawful, regardless of what theory and experience shows, would hinder the evolution of the law and defeat the intent of Congress in adopting a common-law approach to antitrust development.[80]

Finally, there may exist a constitutionally conferred discretion in the executive branch in the selection of prosecutions of offenses against the United States. The Constitution expressly recognizes a special competence in the executive branch in the selection of prosecution of

78. Section 4 of the Sherman Act, 15 U.S.C. § 4 (1976), and § 15 of the Clayton Act, 15 U.S.C. § 25 (1976), for example, provide in identical language that "it *shall* be the *duty* of the several United States attorneys . . . to institute proceedings in equity to prevent and restrain" violations of these statutes. (emphasis added).

79. However, in United States v. FCC, 652 F.2d 72, 87 (D.C. Cir. 1980), the Court of Appeals for the District of Columbia observed in dictum that the Department of Justice has prosecutorial discretion with respect to the Sherman and Clayton Acts, "despite seemingly mandatory language in those statutes." *Id.* (footnote omitted.).

80. Indeed, the Supreme Court has recognized even in the more "statutory" approach to law that the executive branch has a *duty* to bring to the attention of the judicial branch mistakes made by courts, even when these mistakes favor the ultimate outcome sought by the executive branch:

> The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent . . . . The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed.

Young v. United States, 315 U.S. 257, 258-59 (1942) (confession of error regarding lower court's construction of narcotics statute). *See* Casey v. United States, 343 U.S. 808, 808 (1952) (Douglas, J., dissenting); Gibson v. United States, 329 U.S. 338, 344 n.9 (1946).

offenses in article II which provides that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[81] Just as the executive has the role of prosecuting offenses against the sovereign, it also has the power to pardon those who have committed an offense.[82] The pardon power, like other powers conferred by the Constitution on the President, has been broadly interpreted.[83] In *Ex parte Garland*,[84] one of the cases arising from the grant of general amnesty by President Johnson following the Civil War, the Supreme Court observed that the pardon power of the President "extends to every offense known to the law," with the express exception of impeachment.[85] Subsequent cases have acknowledged the applicability of the pardon power not only to felonies and misdemeanors, but also to criminal contempt[86] and civil prosecutions.[87] The pardon power may be exercised in a variety of forms, including full pardon, pardon to terminate a sentence and restore civil rights, conditional pardon, amnesty or conditional amnesty, reprieve, commutation, commutation on condition, and remission of fines, penalties,

81. U.S. CONST. art II, § 2, cl. 1. Commentary on the pardon clause has been remarkably sparse. The seminal work is W. HUMBERT, THE PARDONING POWER OF THE PRESIDENT (1941).

82. In Anglo-American law, the executive's prerogative not to prosecute is traceable to the laws of the Ine of Wessex (688-725), if not to the first Christian Saxon king, Aethelbirth (560-616). See W. HUMBERT, *supra* note 81, at 9, and sources cited therein.

83. Among the other areas in which the Constitution confers special power and responsibility on the President the most notable are national security and international relations. Although there have been contentions that the capacity to act in war and foreign affairs inheres in the head of a sovereign power, a stronger source of authority is the express recognition in the Constitution of the competence of the executive branch in these areas. The faithful execution clause, read together with the commander-in-chief clause and the foreign affairs provisions in article II, give the President considerable discretion in the exercise of his responsibilities in these areas, as well as the capacity to receive a delegated congressional power that would be impermissible for domestic affairs. *See generally* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

84. 71 U.S. (4 Wall.) 333 (1867).

85. *Id.* at 370. However, by its constitutional terms the pardon power extends only to "offenses against the United States." It has no applicability to offenses against states or to private causes of action. *See In re* Bocchiaro, 49 F. Supp. 37 (W.D.N.Y. 1943) (pardon power not applicable to state law offenses) (dictum). Humbert concludes that the pardon power cannot be used in civil cases between individuals concerning their respective rights and interests; however, in civil cases between the federal government and individuals, the pardon power can be used to release civil liabilities accruing to the government and arising out of an offense against the government, provided that the release does not impair the rights of third parties. W. HUMBERT, *supra* note 81, at 54.

86. *See, e.g.,* United States v. Goldman, 277 U.S. 229, 235 (1928) (dictum); *Ex parte* Grossman, 267 U.S. 87 (1925). *Grossman* did raise in dictum the possibility that the pardon powers may not be applicable to civil contempt. *Id.* at 111.

87. Osborn v. United States, 91 U.S. (1 Otto) 474 (1876). A pardon does not, however, restore property or interests vested in others as a consequence of prosecution. Knote v. United States, 95 U.S. (5 Otto) 149 (1877) (petitioner not entitled to receive proceeds of his property, condemned and sold under the Confiscation Act before the general amnesty in 1868, when proceeds had already been paid into the U.S. treasury). *See Ex parte* Garland, 71 U.S. (4 Wall.) at 381.

and forfeitures.[88] The pardon power may be exercised any time after the commission of an offense, including before legal proceedings are instituted and after judgment.[89]

The vesting of the pardon power in the President indicates that the Framers envisioned that the President would not be under a ministerial duty to prosecute all conduct that violates the law. At a minimum, the President could avoid prosecuting a given case by granting a full pardon to the offenders. But to require a formal pardon in every case in which a decision is made not to prosecute exults form over substance. It also has the disadvantage of unequivocally restraining the executive branch in the future with respect to the pardoned violation, since a pardon once given and accepted cannot be revoked. The better view is not to require a formal pardon in every case where a decision not to prosecute is made, but rather to permit the executive branch to exercise the discretion not to initiate proceedings in the first instance.[90]

The Supreme Court has acknowledged that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[91] In an oft-quoted passage the Court of Appeals for the Fifth Circuit explained:

> The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the

88. *See generally* W. HUMBERT, *supra* note 41, at 22-27, 33-53.

89. *See, e.g., Ex parte* Garland, 71 U.S. (4 Wall.) at 380 (finding that pardon power "may be exercised at any time after its [the offense's] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment").

90. The pardon power as a source of prosecutorial discretion may be subject to the criticism that the power is vested in the President, not in the Attorney General whose responsibility it is to prosecute cases. *See* 28 U.S.C. § 516 (1976). But the Attorney General "is the hand of the President . . . in the prosecution of offenses," Ponzi v. Fessenden, 258 U.S. 254, 262 (1922), and if the President has discretion in the selection of prosecutions, so should the Attorney General as his delegated agent. Otherwise the Attorney General would be under a duty to prosecute in cases in which the President may wish to exercise his discretion not to prosecute. At the same time, that the Attorney General may have derivative discretion under the pardon clause not to initiate prosecutions does *not* require that the power to confer formal pardons be delegable by the President.

91. United States v. Nixon, 418 U.S. 683, 693 (1974) (citing the Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869)). *See* Smith v. United States, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied sub nom.* Cox v. Hauberg, 381 U.S. 935 (1965); Goldberg v. Hoffman, 225 F.2d 463, 465-66 (7th Cir. 1955); Moses v. Kennedy, 219 F. Supp. 762, 764-65 (D.D.C. 1963). While the Court in *Nixon* was speaking to the prosecution of criminal cases, there is no reason why the same result would not hold a fortiori for civil prosecutions on behalf of the United States, at least where the civil prosecution involves the vindication of societal interest rather than the protection of individual rights. Bachowski v. Brennan, 502 F.2d 79, 87 (3d Cir. 1974), *rev'd on other grounds sub nom.* Dunlap v. Bachowski, 421 U.S. 560 (1975). *See* Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868); Nader v. Saxbe, 497 F.2d 676, 679 n.19 (D.C. Cir. 1974).

> court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.[92]

Finding discretion in the executive branch, the courts uniformly have refused to order prosecution of particular individuals.[93] The courts have also recognized that the discretion of the executive branch extends to the selection of the particular charges once a decision to prosecute is made.[94] Whether its source is located in the faithful execution clause alone[95] or also in constitutionally vested authority,[96] it is clear that the Antitrust Division as an organ of the executive branch has considerable discretion in the selection of cases to prosecute and in the exercise of this discretion is not required to prosecute every type of

92. United States v. Cox, 342 F.2d 167, 171 (5th Cir.) (footnotes omitted), *cert. denied sub nom.* Cox v. Hauberg, 381 U.S. 935 (1965). The Court of Appeals for the District of Columbia has made a similar observation:

> An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the Court for the manner of his conduct of a case. *i.e.,* his demeanor, deportment and ethical conduct; but in his second capacity, as agent and attorney for the Executive, he is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment.

Newman v. United States, 382 F. 2d 479, 481 (D.C. Cir. 1967). *See* United States v. Chanen, 549 F.2d 1306, 1313 n.5 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

93. *See, e.g.,* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379-82 (2d Cir. 1973); Peek v. Mitchell, 419 F.2d 575, 577-78 (6th Cir. 1970); Smith v. United States, 375 F.2d 243, 246-48 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). *But cf.* Wren v. Merit Systems Protection Board, 681 F.2d 867, 875 n.9 (D.C. Cir. 1982) (suggesting writ of mandamus may issue to compel the Board to investigate under Civil Service Reform Act a complaint by whistleblower of retaliation). In addition to considerations of discretion conferred upon the executive branch, courts have relied upon the absence of a standard to govern the review of prosecutorial discretion in refusing to order prosecution, *see, e.g.,* Inmates of Attica Correctional Facility, 477 F.2d at 380-81 (2d Cir. 1973), and upon the need for complex policy judgments not suitable for judicial involvement, *see, e.g.,* United States v. Cox, 342 F.2d 167, 193 (5th Cir.) (Wisdom, J., concurring specially), *cert. denied sub nom.* Cox v. Hauberg, 381 U.S. 935 (1965); Moses v. Kennedy, 219 F. Supp. 762, 764-65 (D.D.C. 1963); Pugach v. Klein, 193 F. Supp. 630, 634-35 (S.D.N.Y. 1961).

94. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). *See also* United States v. Batchelder, 442 U.S. 114, 123-24 (1979); United States v. Aleman, 609 F.2d 298, 305-06 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); Newman v. United States, 382 F.2d 479, 481-82 (D.C. Cir. 1967).

95. *See, e.g.,* United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied sub nom.* Cox v. Hauberg, 381 U.S. 935 (1965); Pugach v. Klein, 193 F. Supp. 630, 634 (S.D.N.Y. 1961).

96. *See, e.g.,* Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied sub nom.* Cox v. Hauberg, 381 U.S. 935 (1965).

conduct susceptible to challenge under existing judicial precedents, much less to press in doubtful cases uniformly for a resolution that would lead to a finding of illegality.[97]

C. *The Role of Private Litigants*

Before turning to the implications of the separation of powers and the common-law approach to antitrust law for the exercise of prosecutorial discretion, we must complete our analysis of the major forces in the evolution of antitrust law by considering the contribution of private litigants. Like the executive branch, private litigants may bring antitrust actions.[98] To the extent that suits by private plaintiffs produce an efficient development of antitrust law, it becomes less critical for the executive branch to ensure that the courts have appropriate cases and arguments before them.

While there is no question that private litigants play an important role in this regard, two factors, related both to our adversary system and to the "case or controversy" requirement, undercut reliance on the incentives given private litigants to set a proper agenda for the courts. First, in order to engage the courts in scrutiny of an alleged antitrust violation, private plaintiffs must have the requisite standing.[99] A theoretical interest in a case, no matter how great or prolonged, is insuffi-

97. I have not attempted here to answer the difficult question of whether Congress through appropriate legislation could limit this discretion. If the only sources of discretion are statutory in the first instance or derive under the faithful execution clause from the ambiguities of the relevant statutory schemes, then arguably prosecutorial discretion could be regulated by Congress. *See* Powell v. Katzenback, 359 F.2d 234, 235 (D.C. Cir. 1965) (per curiam), *cert. denied*, 384 U.S. 906 (1966) (assuming without deciding that Congress could withdraw discretion from prosecutor by special legislation). *Cf.* Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974) (intimating but not deciding that an alleged nonenforcement policy would be constitutionally impermissible). But if the source of discretion stems from the pardon clause or the broader penumbra of separation of powers, then prosecution of offenses against the United States is committed to the discretion of the executive branch and could not be regulated by Congress. *See* United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied sub nom.* Cox v. Hauberg, 381 U.S. 935 (1965) (see quotation accompanying note 92); *Id.* at 193 (Wisdom, J., concurring specially). *See also* Pugach v. Klein, 193 F. Supp. 630, 634 (S.D.N.Y. 1961).

98. The antitrust laws create a private right of action for treble damages, Clayton Act § 4, 15 U.S.C. § 15 (1976), and for equitable relief to protect against continuing or threatened injury, *id.* § 16, 15 U.S.C. § 26 (1976). In addition, the statutes award attorneys' fees to the successful private plaintiff in treble damage actions, *id.* § 4, 15 U.S.C. § 15 (1976), and, at least since 1976, to plaintiffs who "substantially prevail" in suits for injunctive relief, *id.* § 16, 15 U.S.C. § 26 (1976).

99. "Private plaintiffs" do not include the United States, but the term does cover other governments suing in federal court. *See, e.g.*, Pfizer Inc. v. Government of India, 434 U.S. 308 (1978); Georgia v. Evans, 316 U.S. 159 (1942); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906). The states as *parens patriae* may institute antitrust actions on behalf of natural persons residing within their boundaries for either injunctive relief, Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945), or money damages, Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1394 (1976) (codified at 15 U.S.C. §§ 15c-15h (1976)).

cient if the plaintiff has not suffered some threatened or actual injury from the putatively illegal conduct of the defendant.[100] Nor is any injury causally related to the defendant's conduct sufficient; it must not be too "remote," either causally[101] or within the chain of distribution.[102] Finally, the injury must be "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."[103]

Regardless of whether these requirements are designed to assure adversity in the proceedings,[104] promote judicial administration,[105] or protect antitrust defendants from being subjected to multiple suits,[106] they work to decrease the number of private antitrust plaintiffs. Even if the standing requirements were neutral with respect to the types of

100. "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action and is 'likely to be redressed by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976)." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (footnote omitted).

101. The courts have applied a variety of tests to determine remoteness, including whether the plaintiff is within the "target area" of the violation, *see, e.g.*, Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 18-19 (1st Cir. 1979); Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131-32 (5th Cir. 1975); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 128-29 (9th Cir. 1973); Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 688-89 (8th Cir. 1966); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362-64 (9th Cir. 1955); or whether the injury is the "direct" result of the defendant's proscribed behavior, *see, e.g.*, Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 867-68 (10th Cir. 1981); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 380 F.2d 383, 394-95 (6th Cir. 1962). The bounds of these various approaches, their differences, and their doctrinal foundations are by no means well established. The trend is to blur distinctions and adopt a case-by-case balancing approach, as has the Third Circuit in Cromar Co. v. Nuclear Materials & Equip. Corp., 542 F.2d 501 (3d Cir. 1976), after its experience with the "direct injury" test, Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), *cert. denied* 434 U.S. 1086 (1978). *See also* Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1382-86 (9th Cir. 1982), where the court of appeals applied a balancing test to permit an employee who allegedly had been discharged for refusing to assist his employer in an on-going price-fixing conspiracy to sue for damages.

102. The courts have used lack of standing to preclude indirect purchasers from seeking damages for injuries caused by competitors more than one step removed in the chain of distribution. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). However, the courts have continued to recognize the standing of indirect purchasers who sue for injunctive relief. *See, e.g., In re* Beef Industry Antitrust Litig., 600 F.2d 1148, 1167 (5th Cir. 1979); Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 589-94 (3d Cir. 1979).

103. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); *see* Blue Shield v. McCready, 102 S. Ct. 2540, 2549 (1982). While most injury questions arise in treble damage actions, the requirement also applies in private actions for injunctive relief. *See* Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210-11 (3d Cir. 1980).

104. *See* United States v. Johnson, 319 U.S. 302, 304 (1943). *See also* Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892).

105. Illinois Brick Co. v. Illinois, 431 U.S. 720, 732-33 (1977).

106. *Id.* at 730-31.

plaintiffs they eliminated, the mere fact that fewer plaintiffs come forward with cases would decrease the diversity of issues and arguments before the courts. But, more importantly, the standing requirements are not neutral in effect; rather, they exclude only certain classes of plaintiffs. For example, the incentives of indirect purchasers to pursue an upstream antitrust conspiracy are diminished because they can seek only injunctive relief and not money damages.[107] Consequently, courts will be less likely in such conspiracy cases (in which the issues may include not only price behavior but also nonprice conduct such as the suppression of product diversity) to have the benefit of the ultimate consumers' views to inform their judgment. Some such cases may never even come before the courts as private actions because the only persons with standing lack the incentives (financial or otherwise) to bring suit.

Second, in our judicial system the parties to the litigation must be true adversaries. We hope that through the clash of evidence and the arguments put forward by each side in its self-interest, the court will receive all the information relevant to an informed decision.[108] However, the adversity requirement also ensures that the interest of the parties will not extend beyond the resolution of the case at hand; whatever their social responsibilities, private litigants have no duty to look beyond their individual cases and the results they hope to obtain for themselves. They have no obligation to consider the possibility that broad rules of law will evolve from their litigation and be applied in quite different contexts. Since private litigants have no duty—or strong, personal incentive—to pick and choose the cases they bring and the arguments they espouse on the basis of their social consequences, we cannot expect them to apprise the courts fully of the consequences of prospective decisions.[109]

107. *See supra* note 102.

108. In the "absence of a genuine adversary issue between the parties, . . . a court may not safely proceed to judgment." United States v. Johnson, 319 U.S. 302, 304 (1943).

109. This problem of significant public policy being made in private cases is not unique to antitrust law. In the *Gold Clause Cases*, for example, the validity of national monetary policy turned on a series of suits by private plaintiffs, one with a stake in the outcome of only $15.60. In 1934, the President, pursuant to congressional authorization, devalued the dollar in gold value by almost 41%. However, in addition to the gold standard fixed by law, many instruments of indebtedness, including certain obligations of the United States, created by contract a private gold standard by providing that the principal and interest would be payable only in gold coin of the quality of the dollar at the time the bond was issued. Estimates placed the amount of such outstanding obligations at approximately $100 billion, $25 billion of which represented federal and state bonds, while total United States gold reserves were only $4 billion. Recognizing this problem, Congress had passed a joint resolution declaring "gold clauses" to be void as against public policy, and that gold obligations were dischargable dollar for dollar in any legal currency. The *Gold Clause Cases* upheld the constitutionality of the joint resolution as applied to private contracts, but held that it was beyond the power of Congress to modify the obligations of instruments of indebtedness by the United States. However, on technical rules of damage it found that the hold-

Neither of these two biases implies that the evolution of the common law through private actions is necessarily bad or even chaotic. Indeed, there is a developing literature which argues that the self-interested adversity approach is a source of efficient law.[110] Whatever the merits of this point of view, I submit that a broader perspective in the initiation and argument of at least some cases would be beneficial to the development of antitrust law through the common-law mechanism. The government, in its obligation to enter the courts on behalf of the public interest, is an essential source of that broader perspective.

II. Prosecutorial Discretion

Thus far I have only located the power to decide whether to bring an antitrust case on behalf of the United States; I have not suggested the standards by which prosecutorial discretion should be exercised. Although in most instances the exercise of prosecutorial discretion presents a nonjusticiable political question,[111] the executive branch is not free to exercise this discretion whimsically.[112] The oath of office

ers of United States bonds had not proved actual damages from being required to accept current dollars for the face value of their bonds thus avoiding an immediate increase in the national debt of some 60%. *See* Perry v. United States, 294 U.S. 330 (1935); Nortz v. United States, 294 U.S. 317 (1935); Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935); United States v. Bankers Trust Co., 294 U.S. 240 (1935). *See generally* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 96-104 (1941).

110. *See, e.g.,* Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977). *But see* Cooter & Kornhauser, *Can Litigation Improve the Law without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980). For a review and criticism of this literature, see Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 259-84 (1979). *See also* Michelman, *Constitutions, Statutes, and the Theory of Efficient Adjudication*, 9 J. LEGAL STUD. 431 (1980).

111. However, notwithstanding the recognition in United States v. Nixon, 418 U.S. 683 (1974), that the executive branch has "exclusive authority and absolute discretion to decide whether to prosecute a case," *id.* at 693, the exercise of this discretion is subject to the protection of the due process and equal protection clauses. For example, an indictment that stems from prosecutorial vindictiveness and threatens, coerces, or punishes a defendant who seeks to exercise his rights to challenge a prior prosecution or conviction runs afoul of the due process clause. Blackledge v. Perry, 417 U.S. 21 (1974). *See* United States v. Hollywood Motor Car Co., 102 S. Ct. 3081 (1982). Likewise, selective prosecution of persons in constitutionally protected classes is contrary to equal protection under the laws. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

112. Judge Cardozo's words regarding discretion of the judge as a "legislator" in the common-law process are equally applicable to the prosecutor in the exercise of prosecutorial discretion:

> The judge [or prosecutor], even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

binds executive officers to support and defend the Constitution[113] and thus establishes the duty to give due regard to the lawmaking function of the legislative branch and the interpretive function of the judicial branch. Therefore, the proper exercise of prosecutorial discretion must be guided by what Congress has ordained the law to be, informed but not dictated by the language of the statutes and their legislative histories as well as by the interpretation of the law by the courts. And, within these constraints, prosecutorial discretion must be exercised so as to promote and protect the public interest.[114]

A. Legal Thresholds for Prosecution

Under any reasonable interpretation, the faithful execution clause must be taken to preclude the executive branch from prosecuting a case unless, after due consideration, the prosecutor finds a threshold reason to believe that the law has been violated. Otherwise, the executive branch would be under no duty to refrain from prosecuting conduct that does not appear to violate the law. To prosecute in the absence of cause neither "executes" the law nor is "faithful" to the protection against arbitrary prosecution accorded by other provisions of the Constitution.[115]

This limitation appears deceptively straightforward. While there is no question that the executive branch must yield to the interpretation of the judicial branch in cases actually before the courts, the same is not

B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921) (quoting Geny, II MÉTHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVÉ POSITIF 180 § 176 (1919), *reprinted in part* in SCIENCE OF LEGAL METHODS 1 (E. Brunchner trans. 1969)).

113. U.S. CONST. art. II, § 1, cl. 8, provides that before taking office the President must take the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." Similarly, U.S. CONST. art. VI, § 2, provides that inferior executive officers "shall be bound by Oath or Affirmation, to support this Constitution."

114. Where the executive branch has discretion to act, "the discretion to be exercised is that of the President in determining the national interest and in directing the action to be taken by his executive subordinates to protect it." Myers v. United States, 272 U.S. 52, 134 (1926).

115. The limitation of prosecution to only those cases for which the executive branch has some threshold reason to believe that the law has been violated may have another source. The case or controversy clause requires that the courts act only when the parties have a legitimate interest in the outcome of the proceedings and will represent their positions with the vigor and acumen required for the adversary system to operate. Consequently, the executive branch in bringing a prosecution must believe that the law has been violated and it must intend (at least as of the time of filing) to use its best efforts to make this violation apparent to the court. *See* United States v. Chanen, 549 F.2d 1306, 1313 n.5 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977) (duty of good faith owed by prosecutor to court, grand jury, and defendant).

It is unnecessary for our purposes to explore precisely what threshold of belief must be attained as a condition precedent to prosecution. However, as a matter of Department of Justice policy, if not by law, the standard at least in criminal cases is "probable cause." U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 5-6 (1980).

true in determining the precise factual predicates of an offense and in deciding whether to prosecute under the antitrust laws. By enacting open-ended statutes to effect a common-law approach to antitrust law, Congress determined that the executive branch would play a role separate from that of the courts in the progress of the law. Even Justice Peckham, speaking in *United States v. Trans-Missouri Freight Association*,[116] recognized that the "public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts *and the constant practice of government officials*."[117] Not only are the courts to inform the executive branch of their interpretations of the law through the opinions they render, but the executive branch is to inform the courts of its interpretation of the law by the cases it brings and the manner in which it argues them.

Of course, each branch of government must give due regard to the constitutional functions of its coordinate branches. Thus, executive agencies must be highly respectful of the views of the courts, the interpretative body in government. But the judiciary must also carefully consider the executive branch's views. The courts must remember that, unlike private litigants, the executive branch is obligated to use its prosecutorial discretion to bring only cases that promote the public interest, not merely cases for which success at trial may be expected. When the executive branch brings a case, it represents not only its belief that the courts should examine the challenged conduct for possible illegality, but also that the rules of law it seeks to apply are in the public interest both for the instant case *and* for subsequent prosecutions. This public interest perspective on the precedential implications of a given approach for future antitrust enforcement is critical to informed judicial interpretation.[118]

Consequently, when the executive branch is convinced that a novel fact situation falls within the proscriptions of the antitrust statutes presents itself, and no close precedent exists or even when precedent suggests a contrary result, the executive branch is within its discretion to prosecute the case. Indeed, if the executive branch determines that the public interest requires prosecution of this colorable violation, it is under a duty—although one not judicially reviewable—to

116. 166 U.S. 290 (1897).

117. *Id.* at 340 (emphasis added). However, Justice Peckham did not need to inquire into the public policy views of the courts or the executive branch since he found that the Sherman Act on its face made every restraint of trade unlawful. *See supra* text accompanying note 17.

118. The regard which the judicial branch gives the views of the executive branch is illustrated by the Supreme Court's practice of requesting the Solicitor General to present the views of the United States in many of the private antitrust actions which it hears.

prosecute. No doubt this would be the position of past Assistant Attorneys General who sought to expand the domain of unlawful mergers by extending the potential competition doctrine under section 7 of the Clayton Act[119] and to widen the interpretation of "contract, combination . . . or conspiracy" to reach unilateral, albeit interdependent behavior in "shared monopolies" under section 1 of the Sherman Act.[120]

But if the executive branch should urge the courts to declare additional types of business conduct illegal on the basis of new insights into business behavior and its implications for competition, it should be equally incumbent upon it to urge the courts to reverse or restrict old doctrine that declares unlawful conduct now recognized as procompetitive, or even neutral, in its competitive effects.[121] As a corollary, if the courts appear to diverge from what Congress intended, the executive branch has an equal duty not to exacerbate this harm by prosecuting conduct that violates the letter, but not the spirit, of the law.

B. Allocation of Resources

The faithful execution clause imposes a duty on the executive branch to utilize its discretion to promote the public interest.[122] Every executive agency, therefore, must allocate its resources to promote the public interest to the maximum possible extent, given the constraints imposed by Congress in authorizing and appropriating funds.[123] This rule applies to the use of resources in law enforcement activities as it does in all other endeavors of the executive branch. Consequently, some selectivity is required in initiating resource-consuming investiga-

119. 15 U.S.C. § 18 (1976).
120. *Id.* § 1.
121. *See supra* note 80.
122. *See supra* note 114.
123. The expenditure of government resources by the executive branch illustrates both the President's discretion in his execution of the laws and the ability of Congress to constrain this discretion. The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7. Pursuant to this provision Congress from time to time passes legislation appropriating funds for designated purposes. This legislation is a classic example of the inability of a written statute to provide complete instructions to the executive branch. No matter how detailed, appropriations legislation never specifies precisely how each dollar is to be spent. The faithful execution clause enables the President to operate the government in the absence of such precise statutory instructions by using his discretion in expending monies within the line items of the congressionally enacted budget. However, while not being able to control the expenditure of each dollar, Congress can limit the discretion of the President to spend funds by narrowly specifying the uses for which particular funds may be spent and by requiring that the executive branch actually spend these monies for these authorized purposes. *See* Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified at 31 U.S.C. §§ 1301 *et seq.* (1976)). As a practical matter, however, the executive branch has considerable discretion over the expenditure of funds within the line items of a congressionally adopted budget. Antitrust law enforcement is no different in this regard than most other government operations.

tions and prosecutions.[124] The Antitrust Division cannot simply prosecute every case that presents itself until it depletes available enforcement resources.

Any allocation of government resources entails social benefits and costs. When properly defined, the difference between these benefits and costs can be used as a measure of success in serving the public interest. If this difference is at its maximum—subject to the constraint upon the degree of discretion available in allocating these resources—the executive branch has fulfilled its obligation faithfully to execute the laws. Although the difficulty of defining and measuring social benefits and costs prevents this from being a precise calculus, it is nonetheless implicit in every allocation of limited resources.

Social benefits result when businesses conform to the operational conception of the public interest underlying the antitrust law. Because law enforcement operates as a stick and not a carrot (as, for example, do subsidies), the principal means through which otherwise unwilling businesses are forced to conform to the norms established by law is through prosecution of violators. Prosecutions serve not only to regulate the conduct of the offender and help restore competitive conditions, but also to signal the willingness of the government to enforce the law, and so to raise the expected costs of all businesses that choose to deviate from the norm. Furthermore, prosecutions serve to refine the operational conception of the public interest underlying the antitrust law through the judicial precedent that is created. However, since enforcement resources are limited and not every violation can be detected and prosecuted, these resources must be allocated to maximize the expected benefits of the investigations and prosecutions that are undertaken. This process requires consideration not only of the probability that a given expenditure of resources will uncover actionable conduct, but also of the social benefits to be derived from successful prosecution.[125]

Social costs also result from each allocation of the Division's limited resources. First are the foregone benefits that could have been created by placing these resources in alternative enforcement schemes. If resources are allocated optimally, the net social benefit will exceed those of any alternative use. But if the allocation is not optimal, it will be possible to put the resources to other uses with a higher net social benefit. The difference is a real loss to society. This can be seen most

124. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962); U.S. DEP'T OF JUSTICE, *supra* note 115, at 6-8.

125. *Cf.* Smith v. United States, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

clearly when resources are used to develop cases, say on novel theories of liability or on poor facts, for which the probability of success at trial is low, while other equally serious but more apparent violations go unprosecuted. The Division can also impose social costs by pursuing violations which, if left unprosecuted, would cause relatively little harm, while permitting other more serious (but perhaps less apparent) violations to continue.

Second, all investigations and prosecutions, even those that result in conviction, create social costs by disrupting ongoing markets and businesses. Antitrust investigation by federal authorities can be unsettling not only to the targets of the investigation, but also to competitors, suppliers, and customers. Management time and other resources will be devoted to economically nonproductive activities such as responses to discovery and the implementation of defense strategy. Moreover, a firm's naturally aggressive inclinations (procompetitive as well as anticompetitive) frequently may be muted during an antitrust investigation. While the disruption of markets and businesses by antitrust enforcement efforts may ultimately result in substantial societal benefits, these benefits must be weighed against their associated costs.

C. Alternatives to Division Prosecution

In formulating prosecutorial policy, the Division must also consider whether avenues of prosecution other than its own exist to promote the public interest in a more efficient and effective manner.[126] For most antitrust violations, three such avenues exist: proceedings before the Federal Trade Commission (FTC), private actions by injured parties, and prosecutions by the states.

Alternative plaintiffs, particularly those who have prior specialized knowledge of the circumstances of the putative antitrust violation or the environment in which it allegedly occurred,[127] may have a comparative advantage over the Division in the cost of and efficiency in prosecuting a given case. But more important, even when no alternative plaintiff has a comparative advantage over the Division, it may

126. The Department of Justice may decline federal prosecution where the putative offender is subject to effective prosecution in an alternative jurisdiction. U.S. DEP'T OF JUSTICE, *supra* note 115, at 6, 11-12.

127. For a law enforcement agency, this knowledge may come from a prior investigation or prosecution or from the routine monitoring of a given industry. For private plaintiffs, this knowledge may come from participation in the market in which the violation allegedly took place, from a vertical relationship (customer or supplier) with the putative offender, or even a member of the challenged arrangement itself. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) (defense of *in pari delicto* not available in private antitrust actions).

still be in the public interest for the Division to decline prosecution where an alternative plaintiff could prosecute and the Division's limited resources could be put to even better use in some other enforcement activity.

The Federal Trade Commission has concurrent jurisdiction with the Antitrust Division to enforce the Clayton Act and, under Section 5 of the Federal Trade Commission Act,[128] has jurisdiction to prosecute conduct that violates the Sherman Act. Although there is much debate over the wisdom of having two separate federal enforcement agencies with general antitrust jurisdiction, the more immediate question is how they can best coordinate their activities to maximize the effectiveness of federal expenditures for antitrust enforcement. The Division and the Commission have had a long-standing, informal "clearance" procedure through which they identify potentially overlapping investigations and assign them to one of the agencies. However, since the FTC has no criminal enforcement jurisdiction, all criminal prosecutions must be brought by the Division. Conversely, the FTC, unlike the Division, is able to seek redress on behalf of persons injured by unlawful antitrust conduct,[129] and so any government attempts at such recovery must be in proceedings prosecuted by the Commission.

Persons actually injured or threatened by antitrust violations also may seek redress, provided they meet standing requirements.[130] Private litigation, particularly in cases in which the injuries resulting from the unlawful conduct are not widespread, is an effective tool both in identifying existing violations and in deterring future violations by the offender or by others similarly situated. When private parties suffer substantial injury, their incentives to seek redress are high, particularly in light of the availability of treble damages and attorneys' fees. In such cases there is little reason for the government to prosecute and spend resources that could otherwise be used against more systemic violations for which no private plaintiff is likely to sue or for which criminal sanctions are desirable.[131]

128. 15 U.S.C. § 45 (1976).

129. Federal Trade Commission Act § 19, 15 U.S.C. § 57b (1976).

130. See supra note 98.

131. Categorical deference to private prosecution for federal offenses has both a long and sometime stormy history. The best known example is the Justice Department's refusal to prosecute criminal libel cases under the laws of the District of Columbia when civil remedies were available and there had been no breach of peace or other public injury. The policy came under intense fire during the hearings of Robert H. Jackson, then Attorney General, for confirmation as an Associate Justice of the Supreme Court. Jackson had declined to prosecute a criminal libel case against Drew Pearson for the alleged libel of Senator Tydings. *See Nomination of Robert H. Jackson to Be an Associate Justice of the Supreme Court: Hearings Before A Subcomm. of the Comm. on the Judiciary,* 77th Cong., 1st Sess. 47-56 (1941).

States may also act as plaintiffs under the antitrust laws, either on their own behalf or on behalf of those located within their jurisdiction.[132] When seeking redress for harm they suffered from antitrust violations, states may be expected to act much like individuals in bringing antitrust suits. In their *parens patriae* capacity, states may act more according to their own conception of the public interest. In either case, they present an alternative to federal prosecution of antitrust violations and should be considered in formulating federal prosecutorial policy. Moreover, many states have enacted their own antitrust laws, and state enforcement may also provide a choice of law or jurisdiction unavailable to federal prosecutors.[133]

III. Applications in Current Division Policy

A central premise of this Article is that the broad legislative goals of competition and free enterprise are insufficiently precise yardsticks in themselves against which to measure business conduct. Since the enactment of the Sherman Act, courts and commentators have engaged in a vigorous debate over the selection of operational objectives that would implement most effectively these legislative goals. The possible objectives for antitrust policy within the broader legislative goals are numerous. Virtually all have been suggested as more precise guides to the statutory construction of the antitrust laws at one time or another, and many have been adopted by the courts, if not always consistently.[134]

The debate over these objectives continues today with a vigor

132. *See supra* note 99. For a review of state antitrust enforcement activity, see Miles, *Current Trends in State Antitrust Enforcement*, 47 ANTITRUST L.J. 1343 (1979).

133. In a now classic article, Professor Schwartz suggested five criteria for allocating enforcement responsibility between federal and state prosecutors who have concurrent jurisdiction over the same unlawful conduct. Under his analysis, federal action is justified in the presence of one or more of the following circumstances:

> (1) when the states are unable or unwilling to act; (2) when the jurisdictional feature, e.g., use of the mails, is not merely incidental or accidental to the offense, but an important ingredient of its success; (3) when, although the particular jurisdictional feature is incidental, another substantial federal interest is protected by the assertion of federal power; (4) when the criminal operation extends into a number of states, transcending the local interests of any one; (5) when it would be inefficient administration to refer to state authorities a complicated case investigated and developed on the theory of federal prosecution.

Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion,* 13 LAW & CONTEMP. PROBS. 64, 73 (1948).

134. Compare Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), and United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323-24 (1897), both of which looked to the protection of small business—"small dealers and worthy men" in Justice Peckham's words, 166 U.S. at 323—and to diffusion of economic power within any given market beyond a single trade or combination (factors going to the distributional effects of antitrust intervention), with Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 7-10, 19-20 (1979), and Continental T.V., Inc.

equal to that of any time in its history.[135] It is clear that the country has reached no unifying consensus on the choice of the proper operational objectives of antitrust law among the conflicting alternatives. Consequently, the executive branch—the political branch of government charged with the faithful execution of the law—must as a first step in forming a coherent antitrust prosecutorial policy select among the alternatives available those objectives that will guide its exercise of discretion.[136]

In my view, the only legitimate objective that can be distilled from the fundamental congressional goals of antitrust law is the enhancement of consumer welfare through increased market and firm efficiency. To the extent that such considerations as the prosperity of small businesses, decreased market concentration, freedom from restraint in the resale of goods, increased information in the marketplace, increased product diversity, or the diversification of wealth promote consumer welfare by improving the efficiency of markets or firms, I support them as well. However, to the extent that they are inconsistent with increased consumer welfare or operate through some manner other than improved market or firm efficiency, I believe they have no part in the objectives of antitrust law. While not universally accepted, this view is by no means unique. The well-known works of Robert Bork,[137] Phillip Areeda and Donald Turner,[138] and Richard Posner [139]

v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19 (1977), which looked primarily at considerations of economic efficiency.

135. *See supra* note 51.

136. On occasion in the past, heads of the Antitrust Division and the FTC have gone on record with their official views of the proper objectives of antitrust law, views which have not been marked by unveering consistency from administration to administration. *See, e.g.*, S. Barnes, The Judge Looks at Antitrust, speech delivered to the Section on Antitrust Law of the American Bar Association (Aug. 27, 1953), *reprinted in* 3 ABA SECT. ANTITRUST L. 13 (1953); Bicks, *Antitrust Goals and Current Enforcement Programs*, 15 U. MIAMI L. REV. 225 (1961); Hansen, *The Current Federal Policy on Antitrust Matters*, 4 ANTITRUST BULL. 541 (1959); T. Kauper, Antitrust Enforcement, speech delivered to the Section on Antitrust law of the American Bar Association (Apr. 9, 1976), *reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,266; R. McLaren, Cases, Enforcement Views, and Legislation, speech delivered to the Section on Antitrust Law of the American Bar Association (Mar. 27, 1969), *reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,102; Pertschuk, *New Directions for the FTC*, remarks before the Eleventh New England Antitrust Conference (Nov. 18, 1977), *reprinted in* 840 ANTITRUST & TRADE REG. REP. (BNA) at F-1 (Nov. 24, 1977); Shenefield, Antitrust and Evolution: New Concepts for New Problems, remarks before the Eleventh New England Antitrust Conference (Nov. 18, 1977), *reprinted in* 840 ANTITRUST & TRADE REG. REP. (BNA) No. 840, at F-4 (Nov. 24, 1977); Shenefield, Antitrust and Evolution: New Concepts for New Problems, remarks before the Eleventh New England Antitrust Conference (Nov. 18, 1977), *reprinted in* 840 ANTITRUST & TRADE REG. REP. (BNA) No. 840, at F-4 (Nov. 24, 1977).

137. R. BORK, THE ANTITRUST PARADOX (1978); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 829-47 (1965).

138. P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 103-13 (1978).

139. R. POSNER, ANTITRUST LAW (1976).

contain compelling arguments in support of this position, and it is unnecessary to repeat them here. Suffice it to say that the consumer welfare objective is clearly within the permissible choices available to the executive branch and the courts to guide antitrust law,[140] and that it is the objective that directs antitrust policy in the Reagan administration.

As one might expect, the pursuit of consumer welfare through enhanced economic efficiency has definite implications for the exercise of prosecutorial discretion, particularly for the allocation of the Division's resources and the identification of the factual predicates of antitrust violations. In the remainder of this Article, I will review some of these implications.

A. Cartel-Type Behavior and Monopolization

The most important areas for current enforcement are horizontal conspiracies and monopolistic practices. Such behavior is particularly damaging because it so clearly distorts the equilibrium of the competitive market. Trade is motivated by the divergence between the value to consumers of goods and services and the costs to producers of supplying these goods and services. The aggregate difference between this value and cost is the gain from trade, sometimes known as economic surplus. A fundamental property of competitive markets is that, in equilibrium, economic surplus is maximized given the initial endowments of wealth.[141]

Achieving this result requires both producers and consumers to attempt to maximize the amount of surplus they receive. Roughly speaking, producers can increase their surplus (i.e., their profit) in two ways. On the one hand, they can invest in new technology to introduce new products or reduce the costs of producing existing products.[142] Either development should improve the efficiency of the firm in particular and the market in general and increase the aggregate economic surplus. On the other hand, rather than seeking to increase the aggregate surplus, producers may merely attempt to shift the distribution of societal income toward themselves and away from consumers.[143] Such a shift requires the exercise of market power, whether in the collective hands of a group of firms or in a single firm. When market power is used to

140. *See, e.g.,* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 8-10 (1979); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52-59 (1977).

141. *See, e.g.,* G. DEBREU, THEORY OF VALUE (1959); E. MALINVAUD, LECTURES ON MICROECONOMIC THEORY 85-86 (1972); H. VARIAN, MICROECONOMIC ANALYSIS 147 (1978).

142. *See generally* E. MALINVAUD, *supra* note 141, at 86-96.

143. *See* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 14-21 (2d ed. 1980).

increase producers' surplus at the expense of consumers, it is well known that the net effect is to decrease the total surplus available and impair the efficiency of the market mechanism.[144] This welfare-reducing use of market power is the prime target of an antitrust policy guided by a consumer-welfare objective.

Consequently, the Department of Justice has—and will continue—to vigorously identify and prosecute welfare-reducing uses of market power. Horizontal minimum price-fixing, horizontal market allocation, bid rigging, and output restriction, all clear examples of welfare-reducing collusion, are the primary focus of this administration's antitrust enforcement efforts.[145] Likewise, when a single firm appears to be engaged in actionable welfare-reducing conduct, the Department will not hesitate to prosecute.[146]

At the same time, however, care must be exercised to ensure that only welfare-reducing, and not welfare-increasing, practices are prosecuted. As the Supreme Court recognized in *Broadcast Music, Inc. v. Columbia Broadcasting System*,[147] determining the competitive effects of a business practice is not always an easy task. If the harmful effects are not apparent on their face, as in the case of horizontal minimum price-fixing, the Department will not initiate prosecution unless it can demonstrate a probability of welfare reduction from the conduct in question, and it will not rely at trial on conclusory presumptions of anticompetitive effect premised on mere labeling.[148] Moreover, the Department will seek injunctive relief, particularly structural relief, only when such relief can be expected to remedy the challenged harm

144. *Id.*

145. In fiscal year 1982 the Division filed 88 criminal cases, naming 92 corporations and 88 individuals, in connection with collusive practices in highway and airport projects in 12 states. By the end of November 1982, 80 of these cases had reached final disposition. Fines totaling approximately $20 million were assessed on the corporate and individual defendants and jail sentences totaling over 5,500 days of actual incarceration were imposed on convicted company executives. Also, at the end of November the Division was conducting investigations before grand juries in 20 states and had expanded to the electrical contracting and water and sewer construction industries. In addition to the construction criminal cases, the Division also filed in fiscal year 1982 six criminal cases, naming 22 companies and 15 individuals, in connection with collusive practices. These 94 criminal cases are by far the largest number of criminal cases filed in any one year by the Division, which in the prior 10 fiscal years had averaged a little over 30 cases per year. Moreover, the Division in fiscal year 1982 filed nine civil cases charging unlawful collusive behavior.

146. The *AT&T* case demonstrates the Division's willingness and ability to litigate complex § 2 cases aggressively when convinced of their merits and importance. United States v. AT&T, No. 74-1698 (D.D.C. complaint filed 1974), settled by consent decree, 1982-2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. 1982). The Division accepted a consent decree only when it was clear that the decree would remedy the competitive problems underlying the suit. Among other things, the decree requires AT&T to divest all 22 of its operating companies providing local exchange telephone service.

147. 441 U.S. 1 (1979).

148. *See id.* at 23.

and increase consumer welfare.[149]

B. Mergers

The relevant inquiry for determining the antitrust legality of a merger or acquisition is whether the proposed transaction threatens significantly to lessen competition in a particular product and geographic market.[150] Interpreted in light of the consumer-welfare criterion, the critical factor in this determination is whether the transaction creates significant potential for adverse horizontal effects in some relevant market.

However, as in the case of some horizontal arrangements and single-firm practices, many mergers may be competitively neutral or even procompetitive. While early case law did not seriously consider the possible procompetitive effects of mergers, the courts have grown increasingly careful to identify the basis for threatened anticompetitive effects before declaring a merger unlawful. The courts have begun to broaden their antitrust analysis beyond market-share data and to include a more realistic assessment of the likely competitive effects of those transactions.[151]

Not surprisingly, the courts have not effected an instantaneous shift in their analysis. Consequently, substantial confusion remains over the standards to which mergers will be held. In order to alleviate some of this confusion, and to express clearly the standards it will apply in analyzing mergers, the Division has revised the *Merger Guidelines* issued in 1968 to reflect the subsequent evolution of antitrust law and new developments in economic theory.[152] We believe that the revised guidelines will help define appropriate relevant markets for assessing the anticompetitive risks posed by mergers. By clearly signaling the Division's enforcement intentions, the *Guidelines* will deter anticompetitive mergers and, at the same time, avoid interference with procompetitive or competitively neutral transactions.[153]

149. The *IBM* case was voluntarily dismissed by the government in part because of the inability to fashion injunctive relief which would redress past alleged competitive harms and increase consumer welfare. Other grounds for dismissing the suit included the limited scope of the complaint (for which effective amendment was time-barred) and the likelihood of ultimate success at trial on the allegations before the court. *See In re* IBM Corp., 1982-2 Trade Cas. (CCH) ¶ 64,899 (2d Cir. 1982) (writ of mandamus issued directing district court judge to dispose promptly of any matters presented by the parties necessary to effectuate the conclusion of the litigation pursuant to a stipulation of dismissal).

150. Brown Shoe v. United States, 370 U.S. 294 (1962).

151. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120-22 (1975); United States v. General Dynamics Corp., 415 U.S. 486, 494-98 (1974).

152. U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (rev. ed. 1982).

153. In fiscal year 1982 the Division filed 8 merger cases, slightly less than the average 9.4

C. *Vertical Practices*

Like merger policy, enforcement policy in the area of vertical arrangements has been the subject of considerable rethinking and analytical refinement over the past two decades. It is clear that some vertical arrangements, such as resale price maintenance, may under some circumstances facilitate collusion and thus adversely affect horizontal competition. However, lawyers, economists, and the courts increasingly have come to recognize that such anticompetitive effects are not always—or even generally—likely to result from supplier-imposed vertical restrictions.[154] Indeed, current economic analysis demonstrates that a firm's choice of distributional arrangements, such as granting franchises or grouping goods and services for sale, may simply reflect the firm's judgment about the efficient and effective way to structure its marketing efforts.[155] Manufacturers, dealers, and consumers may benefit from the resulting strengthening of competition. For example, many products, particularly those incorporating complicated technology, require considerable presale promotion, point-of-sale services, and post-sale assistance in order to gain consumer acceptance or maximize consumer satisfaction. Some manufacturers may determine that their products are most competitive when these services are offered "free" to the consumer, with the cost becoming part of the resale price of the product. However, unless manufacturers are able to ensure that their distributors will be able to recover these costs, distributors offering free services will be undercut by others who offer no services. "Free riding" by discounters diminishes the incentive of other distributors to offer those services in an amount necessary to an efficient distribution system. As a result, fewer such products find their way into the market, to the detriment of consumers as a whole.[156]

cases filed per year over the prior 10 fiscal years. However, 48 of the 94 cases filed over the prior 10 fiscal years were filed in fiscal years 1972 through 1974. The number of merger filings for fiscal years 1975 through 1981 averaged only 6.5 per year.

154. *See, e.g.,* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190 (6th Cir. 1982); Rice Tire Co. v. Michelin Tire Corp., 483 F. Supp. 750 (D. Md. 1980), *aff'd per curiam*, 638 F.2d 15 (4th Cir. 1981); R. BORK, *supra* note 137, at 280-98; Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825 (1955); Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & ECON. 86 (1960).

155. *See supra* note 154.

156. The use of nonprice vertical restraints to solve, or at least mitigate, the "free-rider" was a key factor in the Supreme Court's decision in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977), to reject the earlier per se approach and to subject such restraints instead to rule of reason analysis. The "free-rider" problem has figured significantly in several subsequent decisions by lower courts in upholding the legality of certain challenged nonprice vertical restraints. *See, e.g.,* Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1195, 1199-1201 (6th Cir. 1982); Rice Tire Co. v. Michelin Tire Corp., 483 F. Supp. 750 (D. Md. 1980), *aff'd per*

Recognizing the welfare-increasing potential of many vertical practices, the Division's enforcement actions against vertical restraints have been rare in recent years (under past administrations as well as the present). Very few instances have been found in which such restraints threaten to harm interests protected by the antitrust laws.[157] However, the Division in the Reagan administration will continue to be vigilant in its review of vertical practices in order to identify those rare situations in which anticompetitive effects might result. Where such cases are found, the Division will vigorously prosecute the offenders.[158]

D. Judgment Review

In line with our policy of removing unnecessary impediments to free functioning markets, the Division has begun to review the more than 1300 outstanding judgments still in effect as a result of government antitrust suits. Some of those judgments were obtained after a trial on the merits, but most were entered after consent negotiations

curiam, 638 F.2d 15 (4th Cir. 1981). Since properly designed price-related vertical restraints are economically equivalent in effect to nonprice restraints, and can be more efficient in solving the "free-rider" problem, the same standard of scrutiny should be applied to both when assessing their antitrust legality. In Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982), petition for certiorari filed, No. 82-914 (Dec. 7, 1982), the Department of Justice as amicus curiae has filed a brief urging the Court to grant and consider, among other issues, the proper rule of antitrust scrutiny to be applied to price-related vertical restraints.

157. For example, notwithstanding a substantial number of investigations, the Division has initiated only seven cases involving vertical restraints since fiscal year 1976: United States v. Mack Trucks, Civ. No. 81-0102 (E.D. Pa. filed Jan. 12, 1981, dismissed without prejudice July 8, 1982) (resale price maintanance); United States v. Cuisinarts, Inc., Crim. No. H-80-49 (D. Conn. filed Sept. 17, 1980, nolo contendere plea entered Dec. 19, 1980) (resale price maintenance), and companion civil case Civ. No. H-80-559, 1980-81 Trade Cas. (CCH) ¶ 63,979 (D. Conn. 1981) (consent decree); United States v. Mercedes Benz of America, Inc., No. C-79-2144 (N.D. Ca. filed Aug. 15, 1979, dismissed without prejudice Aug. 10, 1982) (tying arrangement); United States v. Under Sea Indus., Inc., No. 79-2579 (D.D.C. filed Sept. 27, 1979), settled by consent decree, 1982-1 Trade Cas. (CCH) ¶ 64,480 (D.D.C. 1981) (resale price maintenance); United States v. B.F. Goodrich Co., No. C-78-1785 (N.D. Ca. filed Aug. 8, 1978), settled by consent decree, 1981-1 Trade Cas. (CCH) ¶ 63,898 (N.D. Ca. 1981) (resale price maintenance); United States v. Norman Morris Corp., No. 76 Civ. 495 (S.D.N.Y. filed Jan. 30, 1976) (territorial restrictions), settled by consent decree, 1976-1 Trade Cas.(CCH) ¶ 60,894 (S.D.N.Y. 1976); United States v. E.I. du Pont de Nemours & Co., No. C-76-566 (N.D. Ohio filed June 7, 1976) (resale price maintenance), settled by consent decree, 1980-81 Trade Cas. (CCH) ¶ 63,570 (N.D. Ohio 1980).

158. This position applies as much to price-related vertical restraints as to nonprice vertical restraints. Thus, critics who assert that this administration will not prosecute resale price maintenance (RPM) cases are simply in error as to current Division policy. *See, e.g.*, Litvack, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division*, 60 TEXAS L. REV. 649 (1982). Since under appropriate circumstances the Division will prosecute RPM practices, the prosecutorial policy with respect to vertical price restraints does not effect an executive branch "repeal" of the antitrust prohibitions against these restraints. But even if the Division categorically refused to bring any RPM case, regardless of anticompetitive effect, it remains an open question whether such a policy is beyond the bounds of prosecutorial discretion conferred by the Constitution, particularly since private persons who suffer antitrust injury as a result of vertical restraints can seek redress through a private cause of action. *See supra* notes 97, 131.

and therefore the merits of the case were never resolved judicially. These judgments, whether entered after trial or by consent, may have anticompetitive effects today for two reasons.

First, decree provisions that were perfectly sensible and desirable when entered can be unreasonable today if they have been successful in promoting competition where there previously was none. Judgments designed to end unlawful conspiracies or monopolies have often barred behavior that would be perfectly lawful competitive activity if pursued independently of a conspiracy or unlawful monopoly. Where competition has been restored in the relevant market, the continued effectiveness of such provisions serves only to restrain competition, not to promote it.

Second, a decree may unreasonably restrain competition today if its provisions were a mistake from the outset. As I have discussed earlier, our understanding of industrial organization and the dynamics of competition has improved markedly in recent decades. Many older decrees reflect legal positions that were based upon mistaken economic theories. For example, after the Supreme Court's decision in *United States v. Arnold, Schwinn & Co.*,[159] a number of consent decrees were entered that barred the use of exclusive territories. Many defendants simply abandoned any effort to justify this practice in light of the Court's holding that it was per se illegal. Ten years later, in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[160] the Court reversed *Schwinn* and held that nonprice vertical restrictions should be judged under the rule of reason. The *Schwinn* judgment was vacated shortly thereafter,[161] but many other judgments that were entered in 1967-77 and bar behavior that would otherwise be lawful under *GTE Sylvania* remain in effect and thus restrain competition.

Whatever the reason why a judgment is having anticompetitive effects today, the Antitrust Division will urge courts to enter appropriate modifications or to dispense with them entirely. As of the end of October 1982, about 200 judgments have been reviewed at least preliminarily. About seventy-five percent of those reviewed appeared to be possible candidates for termination either because they unreasonably restrain competition or because they serve no purpose.[162] Modifying or terminating judgments that restrain competition, and at least identify-

159. 388 U.S. 365 (1967).

160. 433 U.S. 36 (1977).

161. United States v. Arnold, Schwinn & Co., 1977-2 Trade Cas. (CCH) ¶ 61,776 (N.D. Ill. 1977).

162. Decrees that serve no purpose include those in which all the parties are defunct or dead, and those that add nothing beyond prohibitions already contained in the general antitrust laws.

ing (if not terminating) those that serve no purpose, will enable the Division to withdraw from the patently undesirable role of being responsible for enforcing restraints upon competition, and to focus its judgment monitoring and enforcement efforts upon those decrees that truly promote competition.

E. Private Action Project

The body of antitrust precedent consists of decisions in cases brought by private plaintiffs as well as by the government. Many major Supreme Court antitrust decisions, such as *Broadcast Music, Inc. v. Columbia Broadcasting System*,[163] *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[164] and *Albrecht v. Herald Co.*,[165] stemmed from private actions. Because of the government's responsibility as the nation's chief enforcer of the antitrust laws, it has a strong interest in the precedential implications of these actions. Accordingly, it should appear as amicus curiae in some of these cases in order to influence the approaches used in deciding them. This practice is well accepted in antitrust proceedings before the Supreme Court: the Court frequently requests the government's views on the merits of antitrust cases and on whether certiorari should be granted.

In this administration, the Department has increased its efforts to present its views as amicus not only before the Supreme Court, but before courts of appeal and district courts. The Department will consider involvement as amicus when (1) the issue before the court is one of significance to the development of antitrust jurisprudence; (2) precedent is lacking or raises barriers to the efficient operation of firms or markets; and (3) the essential facts are not in dispute. The Department will support either plaintiffs or defendants. Since the beginning of the Reagan administration through the end of 1982, the Department has filed thirteen amicus briefs before the Supreme Court, eleven amicus briefs before the United States Courts of Appeals, and one brief, by request of the court, before a district court. I expect the number of filings to increase significantly during the coming year.

F. Competition Advocacy

A number of significant industries in our economy are subject to economic regulation by one or more government agencies. Often this

163. 441 U.S. 1 (1979).
164. 433 U.S. 36 (1977).
165. 390 U.S. 145 (1968).

regulation dictates conditions of entry and exit from the market, product characteristics, terms of sale, and requirements of universal service —variables that go to the essence of the competitive process in a free market. When a regulatory approach is adopted, the judgment of the regulators is substituted for market forces in the determination of these variables. While it is sometimes the case that because of irregularities in the product or in the production technology (e.g., public goods or natural monopolies) unfettered competition may not be expected to result in the highest level of consumer welfare, it is all too frequently true that regulation resulted from the political demands of the industries to be regulated for protection against the pressures of competition. Consequently, for many of these regulated industries the restoration of competition would increase consumer welfare. Moreover, even for those industries that in fact are subject to market failures, it is not always the case that the regulatory schemes which have been imposed do better in enhancing consumer welfare than would a less controlled market or an alternative regulatory scheme. In some instances it may even be true that no regulatory scheme could be designed and implemented that would do better than the free market.

Questions of the existence of product characteristics or production technologies which may result in market failures and of the optimal regulatory scheme (if any) to correct these failures are complex both theoretically and empirically. The Antitrust Division has particular expertise in identifying impediments to the efficient operation of markets and the welfare significance of these impediments. In addition, the Division's expertise can be helpful in predicting the efficiency of markets and firms under various regulatory regimes. Because of the importance of the industries subject to economic regulation, the Division has actively participated in regulatory proceedings which seek to institute or modify regulatory controls.[166] We will continue in this administration

166. In fiscal year 1982, the Division made over forty submissions to regulatory agencies analyzing the competitive implications of contemplated agency actions. These comments addressed a wide range of topics before a number of different regulatory agencies. They include, for example, submissions to the Securities and Exchange Commission regarding the "shelf registration" of securities; to the Board of Governors of the Federal Reserve System regarding its proposed bank acquisition policy and its consideration of BankAmerica Corporation's application for approval to acquire the Charles Schwab Corporation and thereby enter the securities brokerage business; to the Federal Deposit Insurance Corporation and to the Federal Home Loan Bank Board regarding their policies on merger applications of entities within their respective jurisdictions; to the Federal Communications Commission regarding the MTS and WATS market structure inquiry, the prohibition of common ownership of cable television systems and national television networks, and transponder sales by domestic fixed satellites; and to the Commodity Futures Trading Commission regarding the application for registration of the National Futures Association as an industry self-policing agency.

to give high priority to participation in such regulatory proceedings.

IV. Conclusion

In creating a mechanism to police the operation of the nation's free markets, Congress recognized that a detailed statutory apparatus would be wholly inadequate to regulate the wide and ever-changing diversity of business conduct. What was needed was a more flexible approach that would enforce existing legal norms and at the same time permit the norms to evolve as new insights were gained into the various types of business behavior under scrutiny.

To create such a mechanism, Congress adopted a common-law approach in the Sherman Act. The Act's basic provisions were simple in their structure and easily susceptible to common-law development. Congress sought to promote competition and free enterprise, but provided very little guidance as to how the statutes were to foster these goals. Instead, Congress relied upon the interaction of the judicial and executive branches to ensure the development of a workable and responsive law of competition.

Consequently, in the exercise of prosecutorial discretion or in other appearances before the courts, the executive branch must consider the overall social consequences of challenged conduct and the precedential effects of the contemplated judgment. Given the broad discretion conferred in the executive branch, it is under no duty to prosecute cases involving conduct that has been found unlawful in the past or for which colorable arguments of illegality can be made unless the prosecution of these cases will promote the public interest. By selecting the cases it prosecutes and the arguments it makes with care, the executive branch will fulfill its potential as an independent force in the evolution of antitrust law.

The distillation of policy objectives from the legislative goals of competition and free enterprise is the first step in the formulation of a policy of sound prosecutorial discretion. In this administration, the central policy objective is the maximization of consumer welfare through increased firm and market efficiency. Consequently, Division resources are allocated and decisions to prosecute are made on the basis of the expected welfare effects of the contemplated actions. The prosecution of unequivocal welfare-reducing practices, such as horizontal minimum price-fixing, bid-rigging, or horizontal market allocations, is the Division's highest priority. We will scrutinize closely conduct whose welfare effects are not as obvious, particularly vertical practices, and initiate prosecutions when likely welfare-reducing effects

can be demonstrated. Mergers will be measured against the same consumer welfare criterion; however, since the Clayton Act sets forth an incipiency standard, we will consider the expected (and if available the actual) welfare effects of the transaction under scrutiny.

The ability of the Antitrust Division to promote consumer welfare is not limited to the prosecution of new cases. The same inadequacies of interpretation and economic theory that have plagued the courts in their application of the antitrust laws have also affected the Division in fashioning proposed relief. Many of the outstanding antitrust decrees also have had their desired effect and no longer serve any useful purpose. Because some of these decrees in their application today are welfare-reducing, or at least not welfare-enhancing, they are being reviewed with an eye toward seeking appropriate modification. In addition, because so much of the body of precedent in antitrust law results from private actions, the Division is actively seeking amicus involvement in appropriate private actions to urge the adoption of rules of law and analytical approaches that will best promote consumer welfare. Finally, the Division will participate in other government activities, particularly regulatory proceedings, to encourage the development of microeconomic policies that would enhance consumer welfare. In exercising prosecutorial discretion and allocating resources as I have described, the Division will discharge its duties in the manner required by the Constitution and the common-law approach to antitrust law. I am convinced that this approach will best serve the public interest.