

EFFICIENCY AND IMAGE: ADVERTISING AS AN ANTITRUST ISSUE

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Advertising ministers to the spiritual side of trade. It is great power that has been entrusted to your keeping which charges you with the high responsibility of inspiring and ennobling the commercial world. It is all part of the greater work of the regeneration and redemption of mankind.

—*Calvin Coolidge*¹

INTRODUCTION

These are stirring times. In the past year we have witnessed the end of the Cold War, followed by the quick, largely peaceful demolition of the political structures that had dominated Eastern Europe for more than forty years. Incontestably, these revolutions were about politics, given the oppressive character of the toppled regimes. Yet they were also about economics—a quest for a competitive free market economy to replace the stagnation of centralized planning by state bureaucracies established in the name of Marxist theory.

As we write these words in our kitchen, we cannot help but notice that the nearby cereal cupboard contains such items as a large box labeled, in big, friendly, blue letters, “Super Golden Crisp.” The lower half of the bright, golden box depicts a jolly brown bear in a blue t-shirt, dispensing honey from a large honey jar onto wheat puffs in an oversized bowl: This bear is a frequent protagonist in Golden Crisp T.V. commercials, lively mini-adventures in which the bear appears as an unfailing, cheery superhero. On the cereal box, next to the huge bowl, appears a printed message: “Solve the Triple Trouble Mystery—Free Action-

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The authors are grateful to Tom Headrick, Frank Munger, Gary Peller, George Priest, Jack Schlegel, Rob Steinfeld, and Gerry Wetlaufer for their helpful comments on our manuscript. We are especially grateful to Bob Pitofsky for reading our manuscript, and for having taught one of us, more than two decades ago, both antitrust law and an abiding respect for context.

1. From a speech to the 1926 convention of the American Association of Advertising Agencies, *quoted in* D. POPE, *THE MAKING OF MODERN ADVERTISING* 112 (1983).

Packed Flip Book Inside." That announcement attracted our four-year old's attention in the store. Placating his demands, we bought the cereal, and are now obliged to search every morning for the Action-Packed Flip Book.

Also in the cereal cabinet is a straightforward box labeled "Wegman's [a local supermarket chain] Vitamin Fortified Raisin Bran Cereal." More than half the box front is devoted to a photograph of a large bowl of raisin bran, accompanied by a spoon. That picture is not unappealing, yet it concededly lacks the brightness of the grinning honeycomb bear. On a long supermarket shelf, no four-year old would choose this box, but of course the price of Wegman's Raisin Bran is lower than that of Kellogg's, for example, with its familiar, smiling sun face.

It may be difficult to imagine that our society would suffer grievous injury if we were deprived of jolly honey bears and instead limited to simply-packaged and unadvertised goods at lower prices, so long as one could count on both quality and availability. Yet, quality and availability were precisely what the failed economies of Eastern Europe could not provide: With their prices pegged to reflect authentic Marxist "use values" instead of the dreaded capitalist "exchange values,"² and their output decisions based on bureaucratic fiat rather than consumer preference, their consumer goods fell woefully short. Thus we wonder: Does the adoption of a market economy, as an antidote to the dismal failure of its absence, lead inevitably to the visual cacophony of the cereal aisle of the American supermarket, with the cloying and competing imagery of "Captain Crunch," "Froot Loops," "Count Chocula," and the like?

The meaning of all this advertising for our economy, and for competition in particular, provides the subject of this Article. Part I offers a doctrinal history of advertising as an antitrust issue over the past twenty-five years.³ For more than fifteen of those years it was intellectually respectable and legally persuasive to characterize advertising as an instrument for the realization of anti-competitive goals. In some cases ads were described with outright scorn and derision. The early 1980s, however, represented a dramatic epistemological break in the legal treatment of advertising. Now, not only are once respectable arguments thoroughly repudiated, but advertising has secured a preferred and even privileged status in contemporary antitrust doctrine.

Part II describes the intellectual context in which that epistemological break occurred.⁴ Although attributable in part to appointments by

2. For some classic accounts of this distinction, see E. MANDEL, AN INTRODUCTION TO MARXIST ECONOMIC THEORY 9-11 (1970); MARX ON ECONOMICS 29-33 (R. Freedman ed. 1961).

3. See *infra* notes 6-86 and accompanying text.

4. See *infra* notes 87-136 and accompanying text.

President Reagan to the federal judiciary and to the Federal Trade Commission (FTC), the break occurred within the context of an active debate among economists about the economic meaning of product differentiation achieved through advertising and the relation of that phenomenon to the economic model of perfect competition. Whereas economists sought to contain that debate within the disciplinary boundaries of economic theory, liberals and conservatives alike were compelled to make assumptions about advertising that were inevitably external to the discipline of economics itself. Thus, although the conservatives seem to have carried the day on this issue in the political and legal arenas, their assumptions remain no more plausible than the liberal ones they successfully displaced.

In order to underscore the difficulty of analyzing advertising by reference to any single definitional category, Part III examines advertising in its social and historical context.⁵ We suggest that advertising is a complex historical phenomenon, one which has both created and been created by American culture as a whole. As such, it cannot be made to fit the neat labeling of either "pro-" or "anti-" competitive. We conclude, therefore, by suggesting that advertising requires a legal analysis that is sensitively contextual in approach, avoiding the pitfalls of both liberal and conservative formalism.

I. THE RISE AND FALL OF ADVERTISING AS AN ANTITRUST ISSUE

The story begins in the heady days of the 1960s, when antitrust enforcement reached its 20th-century peak, especially with respect to mergers and concentration. Taking its cue from the Celler-Kefauver Amendments of 1950,⁶ the Supreme Court applied a rigid per se illegality approach to vertical or horizontal agreements exhibiting any tendency toward concentration. This period in antitrust doctrine was characterized by what may be termed "liberal formalism": Business practices were judged according to their membership in rigidly predefined conceptual/legal categories. Some judgments of illegality that emerged during this formalist period were notoriously indifferent to market context or real competitive consequence.⁷

5. See *infra* notes 137-205 and accompanying text.

6. Chapter 1184, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18 (1988)) (amending Clayton Act, ch. 322, 38 Stat. 730 (1914)).

7. See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (setting a maximum price for newspapers constituted per se violation of § 1 of the Sherman Act), *reh'g denied*, 390 U.S. 1018 (1968); *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972) (system of "exclusive" territorial licenses where no member could sell Topco brand products outside the territory minimized competition at that retail level and was horizontal restraint constituting per se violation of § 1 of the Sherman Act); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) (merger of two of the largest and most

The most militant antitrust enforcers yearned, however, for a doctrine based not on formalist legal categories, but simply and neatly on concentration itself, on the assumption that "big is bad." During this liberal period Congress considered legislation designed to attack concentration directly,⁸ but absent its enactment, both courts and the FTC were generally unwilling to adopt a straight structural analysis of oligopoly power. Instead, without a real framework for analyzing the evils of concentration, they tried to name the supposed anti-competitive effects of concentration by reference to traditional antitrust categories. Thus, for example, courts manipulated the market phenomenon of conscious parallelism to a form that would satisfy the agreement or conspiracy requirement of section 1 of the Sherman Act.⁹ Similarly, the Supreme Court justified condemning vertical mergers by adopting the highly problematic theory of "market foreclosure," thereby finding sufficient "anti-competitive effect" to meet the doctrinal requirement.¹⁰

Meanwhile, already on the horizon in the early 1960s was the growing phenomenon of conglomerate merger, which fit neatly into neither the horizontal nor the vertical merger category. Ironically, that phenomenon, which reached its peak in the late 1960s, probably was due in part to strict enforcement of the Celler-Kefauver Amendments: After Celler-Kefauver, combinations of previously unrelated businesses were the only

profitable grocery stores in market area which showed steady decline in the number of smaller shops, combined with absorption of smaller stores into larger stores, violated § 7 of the Clayton Act); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (merger of shoe manufacturer and retailer would substantially reduce competition in violation of § 7 of the Clayton Act).

8. See, e.g., Industrial Reorganization Act (The Hart Bill, S. 1167, 93d Cong., 1st Sess. (1973)); The Concentrated Industries Act (Neal Report) (1968), reprinted in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 444, 448 (H. Goldschmidt, H. Mann, & J. Weston eds. 1974) [hereinafter *INDUSTRIAL CONCENTRATION*].

9. See, e.g., *Ambook Enters. v. Time Inc.*, 612 F.2d 604, 614-18 (2d Cir. 1979) (defendant denied summary judgment on antitrust charge where there was proof of consciously parallel business behavior between the media and advertisers), *cert. dismissed*, 448 U.S. 914 (1980); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 440, 445-46 (3d Cir. 1977) (complaint alleging defendants engaged in consciously parallel action which enabled them to compel lessee dealers to buy only the defendants gasoline was sufficient to allege an illegal combination), *cert. denied*, 434 U.S. 1086 (1978). For the 1960s spirit that infused these cases, see generally Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962). Compare *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-65 (1984) (current conspiracy standard requires evidence of agreement to engage in concerted conduct to fix prices, that the distributor communicated its acquiescence or agreement and such agreement was sought by the manufacturer), *reh'g denied*, 466 U.S. 994 (1984).

10. E.g., *United States v. E.I. du Pont de Nemours Co.*, 353 U.S. 586 (1957) (*du Pont-General Motors*) (market foreclosure found where General Motors accounted for 40% of annual total sales of automobiles, its requirements for automotive finishes were similarly 40% of the total market, and du Pont supplied 67% of General Motors finishes); *Brown Shoe*, 370 U.S. at 328-34 (trend toward vertical integration in market supports possibility of future market foreclosure, despite aberrant competitive conditions; injunction against merger affirmed).

combinations still considered presumptively immune from legal attack.¹¹ Given doctrinal restraints, enforcers who were wary of ever-growing aggregates of assets assembled under single-firm hierarchical control needed to label the precise anti-competitive effects stemming from conglomerate mergers.

An opportunity for such labeling came in response to Procter & Gamble's acquisition of Clorox Chemical Company in August, 1957. Procter was the nation's single largest advertiser, having spent upwards of \$80 million on advertising in 1957 alone. Its total domestic sales for the same year amounted to \$900 million. Of that amount, \$414 million represented sales of "packaged detergents," in which market Procter accounted for 54.5% of the national total. Clorox, meanwhile, was the leading manufacturer of household liquid bleach, with its 1957 sales of \$40 million accounting for almost 50% of the national total for that product. Its two closest competitors accounted for only 15.7% and 5.9%, respectively.¹²

Both the sheer size of Procter & Gamble and the disproportionate dominance of Clorox in its own market might offer considerable cause for apprehension. Yet, absent a framework for analyzing both concentration and conglomerate size as such, they did not necessarily constitute an antitrust violation, either alone or in combination. Nevertheless, in a clever and sophisticated (albeit facile) opinion, Commissioner Elman of the FTC concluded that Procter's acquisition of Clorox would tend "substantially to lessen competition"¹³ in the market for household liquid bleach in violation of section 7 of the Clayton Act. Elman carefully described the merger as *not* just conglomerate but "of the product extension variety,"¹⁴ (i.e., horizontal), playing on the conceded reality that bleach appears alongside detergent on supermarket shelves and that both are used together in washing clothes. Further underscoring the merger's

11. See J. BROOKS, *THE TAKEOVER GAME* 173 (1987). According to Brooks, this period still represents the greatest conglomerate wave in American history, reaching a peak in 1967-69. In 1969 there were 6,000 acquisitions, and over the decade almost 25,000 firms disappeared through merger. The typical goal, however, was not concentration, but stock promotion in an historic bull market. *Id.*

12. These facts are set forth in the Report of more than 120 pages in *The Procter & Gamble Co.*, 63 F.T.C. 1465 (1963), which includes, in the manner of F.T.C. Reports, the complaint, initial decision, and the opinion of the Commission.

13. *Id.* at 1560.

14. *Id.* at 1543. As Elman pointed out, all mergers were technically within the reach of amended section 7, and in theory the legal test for any merger was the same—"whether its effect may be substantially to lessen competition, or tend to create a monopoly." *Id.* at 1547. Nevertheless, there was an established basis for dealing with horizontal and vertical mergers as anti-competitive that was lacking in the case of conglomerate mergers. Mergers that could be likened to horizontal or vertical would seem more appropriately described as anti-competitive.

supposed horizontal character, Elman also stressed the possibility that as an alternative to acquiring Clorox, Procter might instead have entered the liquid bleach market in competition with Clorox.¹⁵ Therefore, the merger resulted in loss of potential competition.

In addition to this exercise in categorization, Elman also drew on the fact that the key to the successful marketing of products in the general cleanser line—soaps, bleaches, detergents—lies in advertising. Both Clorox and Procter (given the latter's well-established brands like Ivory, Comet, Crest, and Charmin) relied on the advantages of strong mass advertising and sales promotion. Elman implicitly adopted the theory that such advertising constitutes a barrier to new entry. He pointed to the obstacles to new competition that he assumed would tend to prevail in "industries strongly marked by mass advertising and sales promotions."¹⁶ He specified the brand loyalty achieved through Clorox's past advertising, its ability as a nationally marketed product to respond quickly to any new competitive foray, the volume discounts available to large advertisers like Procter, along with the opportunity to sponsor whole television programs, as well as its advantages in mail, sales, and store display promotions.¹⁷ Indeed, he asserted, the principal gain to be realized by Procter through the acquisition would be the efficient deployment of advertising on behalf of its new product. Elman's opinion indicated that those economies could be considered anti-competitive for purposes of antitrust law:

[T]here does come a point "at which product differentiation ceases to promote welfare and becomes wasteful, or mass advertising loses its informative aspect and merely entrenches market leaders." We think that point has been reached in the liquid bleach industry. In short, the kind of "efficiency" and "economy" produced by this merger is precisely the kind that . . . hurts, not helps, a competitive economy and burdens, not benefits, the consuming public. . . . Advertising . . . should stimulate competition and, by increasing sales of the advertised product, lower the unit cost of that product. But this process is distorted in the case of a homogeneous product, such as household liquid bleach, produced under conditions of oligopoly, such as obtain in the liquid bleach industry. Since there is no reason (save cheapness and availability) for a consumer to prefer one brand of liquid bleach over another, there is no real need for the various manufacturers to incur as heavy advertising expenses as they do—except to protect their market shares. Moreover, since oligopolists typically refrain from price competition, large advertising expenditures in the liquid bleach industry have not resulted in a lower unit price. . . . Thus we have a situation in

15. *Id.* at 1577-78.

16. *Id.* at 1568.

17. *Id.* at 1562-69.

which heavy advertising benefits the consumer, who pays for such advertising in the form of a higher price for the product, not at all.¹⁸

The Elman opinion in *Clorox* was followed in 1965 by the highly influential article, *Conglomerate Mergers and Section 7 of the Clayton Act*,¹⁹ by Donald Turner, who was head of the Antitrust Division of the Department of Justice from 1965 through 1968. Turner offered an analysis of advertising and promotional "economies" that closely fit, but did not stray beyond, the context of the *Clorox* case. After extensive discussion Turner concluded that the advantages in promotional economies secured through merger should not, by themselves, be treated as sufficient basis for invalidating a merger, absent other demonstrable, anti-competitive effects.²⁰ Thus, Turner rejected the most extreme anti-advertising interpretation of *Clorox*. Yet, later in the article, citing *Clorox* with specific approval, Turner argued that once some anti-competitive effect had been demonstrated (such as the loss of a potential competitor, as found in *Clorox*), then promotional economies could not be invoked to defend the merger, so long as those economies were "'clearly' promotional, wholly or in all but a small part," as opposed to "true" distributional economies.²¹ For Turner, that classification of the advertising economies in *Clorox* was easy, given the fact that had been emphasized by Elman: "[All] household liquid bleaches are chemically identical."²²

Implicit in Turner's analysis was the assumption that successful product differentiation through advertising, at least in the case of identical products, must be "false." Yet Turner's cautious, balanced treatment of advertising was ultimately paradoxical: If, in fact, advertising economies are "offensive to at least the spirit, if not the letter, of antitrust laws, 'wasteful,' " and the sort of "efficiency" that "merely entrenches market leaders"²³ (to use Elman's words), should not a merger that maximizes a firm's power to deploy advertising be considered anti-competitive for antitrust purposes?

Neither Turner, at least in 1965, nor Elman seemed ready to go that far. Nevertheless, in March, 1966, the FTC ordered General Foods Corporation to divest itself of the S.O.S. Company, which it had acquired in 1957, and the issue of advertising was central to the FTC's decision. By 1957 General Foods had yearly advertising and promotion expenses of \$69 million. By 1961 it was the nation's third largest advertiser, with

18. *Id.* at 1581-82.

19. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965).

20. *Id.* at 1391.

21. *Id.* at 1361. Turner's approach was cautious, and he called his position "far from clear."

22. *Id.* at 1361 n.67.

23. The Procter & Gamble Co., 63 F.T.C. 1465, 1581 (1963).

most of that advertising going to national TV. Prior to the acquisition, there had been two dominant firms manufacturing steel wool pads for household use—S.O.S. with 51% of the market (\$14.6 million in sales) and Brillo with 47.6% (\$13.6 million in sales). Under the control of General Foods, the amount S.O.S. spent for television advertising rose from \$1.39 million to a high of \$2.52 million per year—an 80% increase. In the immediate post-acquisition years S.O.S. lost ground to Brillo, but starting in 1960, S.O.S.'s market share rose steadily as a result of General Food's expensive advertising campaign. In particular, S.O.S. made substantial inroads into the New York City metropolitan market, where Brillo previously had dominated with a 77% share. By 1962 S.O.S. had increased its market share in that area to 56%. Brillo tried to fight back with its own advertising and promotion campaign, but could not afford to compete with General Foods, and in 1963 Brillo merged with Purex.²⁴

In the majority opinion ordering the divestiture of S.O.S., the FTC defined the anti-competitive effect of the merger to be the entry barriers created by mass advertising:

In this case, as in *Clorox*, the barriers to entry were high prior to acquisition. In each case, the product of the acquired company was functionally identical to that produced by smaller companies but was differentiated through extensive advertising and a long history of dominance in the field The entry of General Foods into the household steel wool market substantially heightened the factual and psychological barriers to entry to that market just as the entry of Procter in the liquid bleach market raised the barriers surrounding that market.²⁵

In *S.O.S.* there was no evidence to support even an inference that General Foods was a "potential competitor" in the steel wool market, as Procter had been in *Clorox*. Thus, the sole basis for finding a violation had to be the fact that General Foods was able to use its resources to advertise S.O.S. more effectively than could S.O.S. alone. According to the FTC, integration of S.O.S. into General Foods' intensive overall promotion and marketing scheme meant that the merger was of a "product extension" variety²⁶ (hence horizontal); and the success of the resultant integrated advertising constituted the anti-competitive effects necessary to justify the order for divestiture.²⁷

24. The facts are detailed in the Report. General Foods Corp., 69 F.T.C. 380, 385, 429-49 (1966).

25. *Id.* at 423.

26. *Id.* at 422.

27. For example, General Foods broke Brillo's virtual monopoly in the New York City area with an advertising campaign featuring Molly Goldberg, a well-known actress, appealing to the Jewish population of the city. *Id.* at 401 (initial decision).

Despite his anti-advertising rhetorical flourishes in *Clorox*, Elman dissented from the FTC's opinion in *S.O.S.*, relying heavily upon the cautionary message of Turner's article and stressing the fact that General Foods would not have entered the steel wool market except through acquisition of *S.O.S.*²⁸ Consequently, despite implications to the contrary in *Clorox*, Elman was unwilling to punish a conglomerate merger solely because it achieved advertising economies of scale.

Turner, however, apparently took inspiration from the FTC's willingness to go beyond the confines of *Clorox*. In a much-cited speech of June, 1966, Turner suggested that advertising itself appropriately might be considered an antitrust culprit, responsible for perpetuating or increasing industrial concentration:

To an extent, the increased barrier to entry created by advertising is a price we have to pay for providing consumers with information. But when heavy advertising and other promotional expenditures create durable preferences going beyond the relative superiority of the product, resistant to anything but major countervailing promotional campaigns, we may well question whether the price has not become too high. If heavy advertising expenditures thus serve to raise the barriers to entry, adverse competitive consequences are important not only because new firms are kept out, but also because frequently it is the prospect of new entry which serves as a major competitive restraint upon the actions of existing firms. Moreover, where the numbers of firms in an industry are few, this potentiality may be the most significant competitive factor that inhibits firms from setting high prices and achieving extensive monopoly rewards.²⁹

By implication, Turner's speech suggested attacking entire oligopolistic industries on the basis of successful promotional practices alone. First, however, one needed to know whether the FTC had stayed within appropriate legal boundaries in *Clorox* and *S.O.S.* The Supreme Court gave an initial affirmative response in 1967 when it reversed a Sixth Circuit Court of Appeals decision and reinstated the FTC's order in *Clorox*.³⁰ Justice Douglas, joined by five others on the Court, relied on the fact that Procter "with its huge assets and advertising advantages" would dissuade new entry with the ever-present implicit threat of predatory advertising and would "discourage active competition from firms already in the industry."³¹ However, Douglas also relied on the Commission's finding that the acquisition of *Clorox* by Procter eliminated Procter as a poten-

28. *Id.* at 452 (Elman, Comm'r, dissenting); see generally *id.* at 449-59.

29. Turner, Advertising and Competition (an address delivered in Washington, D.C., before the Briefing Conference on Federal Controls of Advertising and Promotion) (June 2, 1966), reprinted in M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, TRADE REGULATION: CASES AND MATERIALS 971-74 (3d ed. 1990).

30. *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

31. *Id.* at 575.

tial competitor. The opinion left unresolved whether advertising advantages alone, with their assumed entry barriers, would be sufficient basis for invalidating a conglomerate merger.³²

Justice Douglas' opinion attracted no dissenters, but in a prophetic concurring opinion Justice Harlan reluctantly agreed with the result, yet carefully limited his agreement to the precise facts of the case. Harlan then took sharp exception to Elman's negative characterization of advertising, including Elman's snide dismissal of the possibility that advertising efficiencies might ever be a positive reason for *validating* a merger. Harlan (like Elman and Turner as well) took the view that economies in general could be used to defend a merger—"a merger that results in increased efficiency of production, distribution, or marketing may, in certain cases, increase the vigor of competition in the relevant market."³³ For that reason Harlan vigorously disagreed with Elman's refusal to consider advertising efficiencies as equivalent to other efficiencies:

[A]dvertising economies were placed [by the Commission, in Elman's opinion] in a different classification since they were said "only to increase the barriers to new entry," and to be "offensive to at least the spirit, if not the letter, of the antitrust laws." Advertising was thought to benefit only the seller by entrenching his market position, and to be of no use to the consumer.

I find the Commission's view overstated and oversimplified. Proper advertising serves a legitimate and important purpose in the market by educating the consumer as to available alternatives. This process contributes to consumer demand being developed to the point at which economies of scale can be realized in production. The advertiser's brand name may also be an assurance of quality, and the value of this benefit is demonstrated by the general willingness of consumers to pay a premium for the advertised brands. Undeniably advertising may sometimes be used to create irrational brand preferences and mislead consumers as to the actual differences between products, but it is very difficult to discover at what point advertising ceases to be an aspect of healthy competition.³⁴

As Harlan correctly perceived, Elman's decision to place advertising and promotional activities in a distinct and negative category for anti-trust purposes inevitably compelled antitrust law to make a normative judgment about the social value of advertising. As Harlan explained: "It is not the Commission's function to decide which lawful elements of the 'product' offered the consumer should be considered useful and which should be considered the symptoms of industrial 'sickness.' It is the con-

32. Douglas had not reached this issue since his approach consistently ruled irrelevant *any* claims of productive or marketing efficiency, once an anti-competitive effect had been found.

33. *Procter & Gamble*, 386 U.S. at 603 (Harlan, J., concurring).

34. *Id.* at 603-04 (footnote omitted).

sumer who must make that election, through the exercise of his purchasing power."³⁵

Despite Harlan's concern, in June 1967, the Court of Appeals for the Third Circuit specifically interpreted the Supreme Court's *Clorox* decision to justify upholding the FTC's order in the *S.O.S.* case.³⁶ The Third Circuit adopted the Commission's theory that General Foods' advertising and promotional advantages would heighten both "factual and psychological barriers to entry" and "disable and render less competitive" other firms already in the industry.³⁷

Having made an initial foray into the realm of advertising and conglomerate mergers with *Clorox*, the Supreme Court declined to re-enter immediately and denied certiorari in *S.O.S.* Advertising was left occupying a distinctly negative category for antitrust purposes, and under *S.O.S.* might even be the basis for a finding of illegality. The stage was set for determining exactly how far those implications would extend.

Shortly thereafter, on June 4, 1969, Rufus Wilson, then Chief of the Division of General Trade Restraints at the FTC, requested authorization to investigate the breakfast cereal industry. In a memorandum to the Commission,³⁸ Wilson noted that the Office of Program Review had been recommending for some time that the Restraint of Trade Bureau shift its focus away from anti-competitive "conduct"—the "inail-bag," or letters of complaint approach—toward a more "structural" analysis of highly concentrated industries. The goal should be to examine the non-competitive *character* of those industries, not their specific anti-competitive practices.³⁹

Although Wilson endorsed this structural approach, he was careful to point out that it represented a clear departure from existing antitrust precedent:

So far as I know, no decision has ever been handed down declaring that the members of any industry have a *legal duty to "compete"* or, to put it another way, that consumers have a legal *"right" to buy at competitive prices*. The law has simply not been focused on these "performance" characteristics—high prices, high costs, retarded innovation records, etc.—but on various "conduct," or behavior patterns considered particularly offensive for one reason or another.⁴⁰

35. *Id.* at 604.

36. *General Foods Corp. v. FTC*, 386 F.2d 936 (3d Cir. 1967).

37. *Id.* at 945.

38. This memo is reprinted as Wilson, *The FTC's Deconcentration Case Against the Breakfast-Cereal Industry: A New "Ballgame" in Antitrust*, 4 ANTITRUST L. & ECON. REV. 57 (1971). The populist *Antitrust Law and Economics Review* heralded the memo, suggesting that the case could "easily be the most important antitrust action in the nation's history." *Id.* at 58.

39. *Id.* at 60.

40. *Id.* at 63.

In urging a structural analysis of the cereal industry, Wilson emphasized that the only anti-competitive "conduct" the Commission would be able to point to would be advertising. In the cereal industry, which had a three-firm market share of 83% (Kellogg, 43%; General Mills, 22%; General Foods, 18%),⁴¹ the Commission was unlikely to find, for example, predatory conduct of the kind clearly proscribed by law. Oligopolists, said Wilson,

don't need to engage in such crudities as these. The only kind of "conduct" needed to maintain their noncompetitive industry structure and the super-competitive price and cost levels it generates (Kellogg had a 10-year average profit rate of more than 20% after taxes on stockholder equity) is a very large "ad" budget, one that bombards millions of children daily with TV commercials extolling the (largely imaginary, we're told) superiority of their cereals. . . . The *moving cause* of the high concentration (and thus of the high costs and prices) is simply the "product differentiation" created and maintained by the advertising itself.⁴²

Thus, although Wilson described "structure/performance" as the central orientation of any potential FTC proceeding against the cereal industry, he emphasized that structural analysis would be supplemented by a single conduct component, specifically, advertising:

There can no longer be any serious doubt about the capacity of certain kinds of advertising, pursued with sufficient intensity, to bring about a massive restructuring of an industry, to "concentrate" its sales volume in the hands of two or three firms. . . . In a situation when advertising has *in fact* been used to achieve this level of result, it should enjoy no more immunity from the antitrust laws than any other kind of concentration-increasing behavior. If the law will not allow three or four firms to gather the bulk of industry's sales into their hands by means of, say, mergers, it is far from clear as to why they should be allowed to achieve the same *result*—concentration . . . —by another technique that is equally unrelated to genuine competitive rivalry in terms of price or quality.⁴³

On April 26, 1972, the FTC filed the complaint Wilson had suggested. The complaint charged that the big three (along with Quaker Oats, the fourth largest producer) "have maintained and now maintain a highly concentrated and noncompetitive market structure,"⁴⁴ and that they maintained high entry barriers by practices of "proliferating brands, differentiating similar products, and promoting trademarks through in-

41. *Id.* at 64.

42. *Id.* at 65.

43. *Id.* at 73.

44. Complaint, Kellogg Co., 99 F.T.C. 8, 11 (1982).

tensive advertising."⁴⁵ They also were charged with unfair competition in the form of excessive and misleading claims on behalf of their cereals, especially in ads directed toward children. According to the complaint, those ads have "the capacity and tendency to mislead consumers, particularly children, into the mistaken belief that respondents' *Ready-To-Eat* cereals are different from other RTE cereals, thereby facilitating artificial differentiation and brand proliferations."⁴⁶ At the heart of the FTC's structure and entry-barrier theory was the explicit assumption that to delude consumers into believing that similar products are in fact substantially different is an illegitimate form of competition. To believe in the particularized virtues of Froot Loops, Lucky Charms, and Count Chocula is to surrender to an inauthenticity of taste carefully engineered by profit-seeking oligopolists.

The case offered no small challenge to basic traditions of American consumerism. It was not likely to be decided lightly or overnight. In fact, the case did not even come to trial until 1976, and complaint counsel did not conclude its case-in-chief until January 1978.⁴⁷ The final decision by the FTC would not come until 1982.⁴⁸

While the *Cereal Case* was pending, the FTC—not content to let the advertising issue rest with the *Cereal Case* alone—filed three additional complaints premised, in whole or in part, on the anti-competitive effects of advertising. In November 1972 (amended November 1976) the FTC challenged the acquisition of United Vintners, one of the two dominant American wine sellers (second only to Gallo) by Heublein, Inc., the fifth largest seller of alcoholic beverages in the United States. Part of the FTC's theory in challenging this product extension form of conglomerate merger was that the advertising advantages and brand loyalty enjoyed by both firms would serve to accentuate entry barriers.⁴⁹

Then, in July 1974, the FTC issued a complaint charging that Borden, Inc. had monopolized the market in reconstituted lemon juice by marketing its ReaLemon Brand in a manner that could best be characterized as predatory advertising. When faced with competition from re-

45. *Id.* at 12. Between 1950 and 1970 approximately 150 brands were introduced, over half of those after 1960.

46. *Id.* at 13-14.

47. See Schmalensee, *Entry Deterrence In the Ready-To-Eat Breakfast Cereal Industry*, 9 BELL J. ECON. 305 (1978). Robert Pitofsky, however, denied that the case represented a "widespread challenge to the general role of advertising." Pitofsky had been Director of the Bureau of Consumer Protection, FTC, from November 1970 to January 1973. Perhaps he was being protective of the case's theory by denying its most extreme implications. See Pitofsky, *Changing Focus in the Regulation of Advertising*, in ADVERTISING AND SOCIETY 134 (Y. Brozen ed. 1974).

48. *Kellogg*, 99 F.T.C. at 8.

49. Heublein, Inc., 96 F.T.C. 385 (1980) (amended complaint).

gional sellers, ReaLemon's practice was simultaneously to increase the intensity of its regional advertising campaigns while also reducing prices. Given the established brand preference for ReaLemon, all the firm needed to do was to match a competitor's price in order to effectively underprice it.⁵⁰

Finally, in July 1976, the FTC charged that the Maxwell House division of General Foods was using its dominant position, size, and economic power to frustrate the growth of small competitors and to deter entry. Again, the basic charge was a form of predatory advertising, especially as directed against Folgers, then a western brand which had tried to compete in the eastern market dominated by Maxwell House.⁵¹

By the mid-1970s, advertising also was regarded by mainstream legal academics as a serious and important, albeit difficult, antitrust issue. For example, in a then-influential 1977 hornbook on antitrust, Professor Sullivan explained that "the competitive effects of advertising . . . are complex."⁵² And he noted that "where markets are oligopolistic, advertising may raise entry barriers because heavy advertising expenditures increase the capital needed for entry."⁵³ He pointed out, citing the *Clorox* case, that a "long continued advertising program may solidify brand loyalty so that a new producer may have to expend substantially more to make the same impact."⁵⁴ Then, describing without citing the then-pending *Cereal Case*, Sullivan added, "Furthermore, in oligopolistic industries advertising may serve as an outlet for the impulse for rivalry, thus helping to preserve interdependent pricing; firms hoping to improve their share of the market may prefer to attempt this through advertising, which does not threaten super-competitive prices beneficial to all in the industry."⁵⁵ For Sullivan, the result was that "[w]e must conclude overall that to the extent non-informational advertising succeeds, it often disaggregates markets—it reduces cross-elasticity of demand between products—and by doing so has the effect of increasing concentration."⁵⁶

In November 1978, the FTC decided the *ReaLemon* case. It agreed that Borden had been guilty of unlawfully maintaining monopoly power

50. *Borden, Inc.*, 92 F.T.C. 669 (1978) (complaint). On the pricing advantage gained through advertising, see portion of opinion labeled "Initial Decision." *Id.* at 716-17.

51. *General Foods Corp.*, 103 F.T.C. 204 (1984) (complaint). Folgers, however, was owned by Procter and Gamble, which apparently launched a "March to the Sea" to capture 50% of the eastern market from Maxwell. Reportedly, small firms were caught in the advertising and pricing war between the two giants. See Smith, *The Rape of Small Business: Advertising and the Conglomerates*, 11 ANTITRUST L. & ECON. REV., 27, 27-29 (1979).

52. L. SULLIVAN, ANTITRUST 307 (1977).

53. *Id.*

54. *Id.* at 308.

55. *Id.*

56. *Id.* at 309.

in the promotion and sale of reconstituted lemon juice. The heart of that monopoly power, in the eyes of the FTC, was the dominance of the ReaLemon brand, which had gained the loyalty of consumers despite the fact that processed lemon juice was not difficult to manufacture and there was nothing physically unique about the ReaLemon product.⁵⁷ Thus, the FTC concluded, the product differentiation achieved through advertising ReaLemon was "spurious" in the sense that it could not be attributed to any superior qualities of ReaLemon.⁵⁸ Citing the economist F.M. Scherer for the proposition that Borden simply was exploiting an "image advantage," the FTC also adopted Professor Scherer's "value judgment" that temporary price cutting to eliminate producers handicapped only by an inferior brand image was "socially undesirable."⁵⁹

Commissioner Pitofsky, in a concurring opinion, sought to establish a narrower basis for the decision, stressing that only in this unusual kind of predatory pricing case should the Commission depart from requiring proof of sales by the predator at below-average variable cost. What distinguished this case for Pitofsky, however, was the same fact that had been persuasive for the majority of the Commission—ReaLemon's image advantage—and Pitofsky, like the FTC majority, cited the same passage from Professor Scherer.⁶⁰

In 1980, the FTC decided the *Heublein* case, rejecting the administrative law judge's decision in 1979 (issued with a 180 page opinion) to order divestiture.⁶¹ The F.T.C. simply found unpersuasive the evidence presented in *Heublein* to demonstrate anti-competitive effects. In the wine market there were "competing products varying significantly in price, quality and use,"⁶² a fact which distinguished *Heublein* from *Clorox* or *S.O.S.*, where the markets were "composed of low-priced, high turn-over items lacking significant distinguishing characteristics."⁶³ Nevertheless, Pitofsky, writing for the majority, was at pains to reaffirm the validity of the "entrenchment" theory of *Clorox*, referring to the case as a "seminal" decision,⁶⁴ and he respectfully cited both *Clorox* and

57. *Borden, Inc.*, 92 F.T.C. 669, 779 (1978) (summarizing and affirming the decision of the administrative law judge),

58. *Id.* at 805.

59. *Id.* at 804.

60. *Id.* at 827-28.

61. *Heublein, Inc.*, 96 F.T.C. 385, 393 (1980) (initial decision). The decision, by Judge Berman, concluded that "[a]dvertising and other forms of non-price competition such as merchandising, packaging and label design significantly contribute to brand recognition," and that established firms doing a substantial business enjoy "absolute cost advantages" in advertising, to the detriment of new entrants. *Id.* at 539.

62. *Id.* at 596.

63. *Id.* (addressing the question of advertising efficiencies).

64. *Id.* at 592.

S.O.S. as the "decisions pioneering the concept that significant advertising advantages could violate § 7."⁶⁵ By carefully distinguishing the facts in *Heublein* from both *Clorox* and *S.O.S.*, Pitofsky apparently sought to preserve the validity of the advertising entrenchment theory by confining its scope to markets where advertising really did make all the difference.

Alas, it was too late. There would be only one more victory for regulation, an ambiguous one that followed massive and overwhelming defeat. That defeat came with the long-awaited decision in the *Cereal Case*.⁶⁶ In part, the FTC's treatment of the case was a heavy-handed political rebuke, reflecting the ideological sea change that came in with the Reagan Administration. The case was tried before an administrative law judge, Judge Berinan, whose decision in *Heublein* had been rejected by the Commission.⁶⁷ In a 250-page opinion Judge Berinan, after drawing the narrowest possible negative inferences from the evidence, stressed the FTC's failure of proof and decided in favor of the cereal companies. Given the importance of the case, the director of the FTC's Bureau of Competition filed a notice of intent to appeal.

Then administrations changed. President Reagan appointed James C. Miller, III who was known to be hostile to the case, as Chairman of the FTC. Miller in turn appointed Thomas Campbell (now a Congressman from California) to head the Bureau of Competition. Campbell withdrew the notice of intent to appeal, and the full Commission not only declined to hear further appeal, but also vacated the lengthy initial decision and ordered that "the Commission's complaint in this matter be, and hereby is, dismissed with prejudice."⁶⁸

As initially outlined by Wilson, the basic theory of the *Cereal Case* had combined a structural analysis of the industry with advertising as a crucial conduct component. The industry was highly concentrated, highly profitable, and rapidly growing, yet there had been no new entrants between 1950 and 1972. This lack of competition, it was charged, was not due to fortuity but rather to parallel behavior on the part of dominant firms, which effectively maintained costly barriers to entry through the incessant proliferation of new cereal brands that were accompanied in each instance by heavy advertising and promotional expenses. Although other issues were raised, the case stood or fell on the question of product differentiation through brand proliferation. Implicit in the charge against the industry was a notion of "excess"—of social

65. *Id.* at 595.

66. *Kellogg Co.*, 99 F.T.C. 8 (1982).

67. *Id.* at 16.

68. *Id.* at 269. For a summary of this history, see E. FOX & L. SULLIVAN, *CASES AND MATERIALS ON ANTITRUST* 510-11 (1989).

waste in the form of money spent to purchase mere images—leading to high profits derived from imagery manipulation rather than “real” quality or price competition.⁶⁹

Judge Berman, with his conservative view of the evidence (perhaps a response to having been overturned in *Heublein*), was not persuaded that industry profit levels were as high as the complainants alleged, or that there had been any deliberate conspiracy or agreement to deter entry or limit competition. Yet, he did concede that brand proliferation was virtually the only form of competition in the industry. Accordingly, the entire case necessarily turned on the characterization of competition based on product differentiation through advertising. In a crucial passage, Berman refused to label that form of competition any more negative than price or quality competition:

Brand proliferation is nothing more than the introduction of new brands which is a legitimate means of competition. Respondents' brand proliferation is vigorously competitive and . . . not in itself unlawful. Respondents engaged in intense, unrestrained and uncoordinated competition in the introduction of new products. . . . Consumers' desire for variety for breakfast is responsible, in large measure, for the differentiation of RTE cereals. A firm in the [Ready to Eat] cereal industry must introduce new products in order to remain profitable and compete for market share.⁷⁰

In effect, Berman had adopted the position Justice Harlan had argued: There is no way to distinguish qualities of a product attributable to image alone (hence misleading and wasteful) from qualities attributable to “real” difference—for example, lower price, better quality, or easier availability. Given the impossibility of making that distinction—one which necessarily entailed a normative judgment about the social value of advertising—consumer “preference” as registered on the existing market must prevail.

The defeat in the *Cereal Case* still left standing the decisions in *Clorox* and *ReaLemon*. In other words, inexplicable consumer preference for Clorox or ReaLemon over chemically identical bleaches or lemon juices still was consigned, theoretically, to the realm of false imagery, whereas the variety in breakfast cereals was a manifestation of authentic preference and objective reality. That line would not hold. The Sixth Circuit did affirm the FTC's decision in *ReaLemon*, accepting the argument of “unique situation” based on brand identification.⁷¹ Nev-

69. *Kellogg*, 99 F.T.C. at 240-41 (Judge Berman rejecting the “waste” notion, and refusing to mandate a “socially optimal level” of advertising).

70. *Id.* at 256.

71. *Borden, Inc. v. FTC*, 674 F.2d 498 (6th Cir. 1982), *vacated*, 461 U.S. 940 (1983) (settlement rendered the case moot).

ertheless, Judge Cornelia Kennedy, dissenting, argued that the price premium available to ReaLemon was not a function of monopoly, but rather was evidence of consumer preference for ReaLemon. She concluded that "it is not a violation of the antitrust laws for a monopolist to take advantage of a consumer preference at the expense of its competitors."⁷²

Confirming Judge Kennedy's perspective with a vengeance, the FTC, in April, 1984, affirmed a decision by an administrative law judge to dismiss the complaint against Maxwell House. The opinion by Chairman Miller, writing for the majority, refused to equate the fact that "real or perceived differences among products can build a loyal following" with "an acknowledgment of entry barriers."⁷³

There is no dispute that the effective use of every element of the "marketing mix"—including the maintenance of consistently desirable product quality as well as the selection of a proper balance of the various types of advertising and promotion—contributes to the identity and success of a brand. Indeed, a company may reap the benefits of both marketing as well as superior quality by charging retailers a higher price than its less successful competitors. . . . But, in and of itself, this fact is no more a barrier to entry than that the requirement every coffee producer must make an efficient investment in plant and equipment.⁷⁴

Since *ReaLemon*, no cases even have suggested that promotional or advertising advantages can be characterized as anti-competitive for purpose of antitrust law. Moreover, no basis exists for supposing such advantages would be treated any differently from other production or distribution efficiencies. Ironically, in fact, the negation of the earlier, pejorative characterization of advertising set the stage, under current law, for citing advertising as a positive benefit to claim exemption from antitrust violation.

Since the mid-1970s the Supreme Court has been steadily contracting the scope of the per se illegality that was so fashionable in the heyday of liberal formalism. It has done so by calling explicitly for a balance of efficiencies, by allowing threshold characterization defenses to kick cases out of the per se category, or by a combination of both. For example, in the *BMI* case,⁷⁵ the most sacred of all per se categories, price

72. *Id.* at 520. She rejected the view that the FTC could possibly distinguish "rational" from "irrational" brand preferences, also noting, however, that brand names in some instances serve to insure quality. *Id.* at 520 nn.4 & 5.

73. General Foods Corp., 103 F.T.C. 204, 354 (1984).

74. *Id.*

75. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) (issuance of "blanket" license to copyrighted musical compositions); see also *NCAA v. Board of Regents*, 468 U.S. 85 (1984). In the *NCAA* case, the Court found it inappropriate to apply a per se rule because "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at

fixing, was upheld in order to accommodate the positive efficiency associated with the introduction of a "new product." BMI did represent new product efficiencies of a dramatic nature, but implicit in the *BMI* analysis is the possibility that product differentiation like that involved in the *Cereal Case* may become regarded as a positive efficiency to be balanced against otherwise anti-competitive behavior and effects.

In the area of vertical non-price restraints, territorial restrictions may now be upheld,⁷⁶ and competitors may be disciplined,⁷⁷ largely to prevent those demons of contemporary antitrust drama—the free riders⁷⁸—from unjustly trading on the positivity created by virtuous, hardworking retailers. Usually, the specific positivity that courts are eager to protect is promotional, a function of advertising. Restraints that otherwise would be considered anti-competitive are justified for the sole purpose of nurturing and insulating promotional activity. Manufacturers are effectively allowed to remove price from the arena of retailer intra-brand competition; they can confine competition to service and promotion exclusively.

In the area of tie-ins, a per se rule of illegality is giving way to a more complex test under *Jefferson Parish Hospital*,⁷⁹ where Justice O'Connor's concurring opinion laid out a threshold test for treating tie-ins under a rule-of-reason analysis. Her test included "a coherent economic basis for treating the products as distinct"⁸⁰ and some kind of anti-competitive effect in the tied product market. While rightly rejecting some of the fallacious assumptions of liberal formalism,⁸¹ the new approach to tie-ins is calculated to give support to advertising. For example, variable proportion tie-ins of the kind once condemned under

all." *Id.* at 100. The "product" in question was college football. The key point, for our argument, is that the Court was willing to listen to claims (which it ended up rejecting in that case) that otherwise anti-competitive practices might be justified to preserve the "integrity" of the "product." *See id.* at 101.

The tradition of allowing a threshold characterization defense, even in a price-fixing case, dates back to an opinion by Justice Brandeis in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); yet, the refusal to balance efficiencies in price-fixing cases had been well established prior to *BMI*, since Justice Douglas' opinion in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

76. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

77. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (agreement to terminate a price-cutter).

78. For a discussion of the "free rider" problem in the specific context of advertising expenditures, see H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 114-16 (1985).

79. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

80. *Id.* at 41 (O'Connor, J., concurring).

81. For a good discussion of the "leverage" fallacy, see H. HOVENKAMP, *supra* note 78, at 222-24.

*Chicken Delight*⁸² allow for maximum return, through discriminatory prices, on the costs sunk in developing and promoting a brand name. If the brand name imagery is successful, then there is no coherent way to separate trademark "image" from "real" ingredients, and since sales are increased through such a scheme, efficiency has been promoted.

Under the reign of liberal formalism, horizontal mergers were condemned explicitly because they created efficiencies and thereby hampered local small-firm competition. The Celler-Kefauver Amendments were read as stating a clear preference for decentralization, even at the cost of higher prices or lower quality. According to that analysis, national advertising was treated as one of the economies of scale that threaten small business: For example, the district court in *Brown Shoe* stated:

[I]ndependent retailers of shoes are having a harder and harder time in competing with company-owned and company-controlled retail outlets. National advertising by large concerns has increased their brand name acceptability and retail stores handling the brand named shoes have a definite advertising advantage. Company-owned and company-controlled retail stores have definite advantages in buying and credit; they have further advantages in advertising, insurance, inventory control⁸³

Thus, while advertising advantages were in effect recognized by the Supreme Court as "efficiencies," they were treated nevertheless as a negativity; the Court "resolved these competing considerations in favor of decentralization."⁸⁴

The rule that mergers should be condemned because they produce efficiencies clearly has been abandoned. The harder question now is the extent to which efficiency can be used as a *defense* in a horizontal merger suit. The 1984 Department of Justice (DOJ) guidelines announce that the DOJ will not recognize a general efficiency defense, but will consider "clear and convincing evidence that a merger will achieve efficiencies."⁸⁵ Nothing in the guidelines suggests that advertising would not be included in such a "consideration."⁸⁶

82. *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). *Chicken Delight* required its franchisees, as a condition of using its name, symbols, and system of operation, to purchase essential cooking equipment, dry-mix food items, and trademark-bearing packaging, exclusively from *Chicken Delight*, and at higher-than-market prices for such items.

83. *United States v. Brown Shoe Co.*, 179 F. Supp. 721, 738 (E.D. Mo. 1959), *aff'd*, 370 U.S. 294 (1962).

84. *Brown Shoe*, 370 U.S. at 344.

85. Department of Justice Merger Guidelines, §§ 3.5, 4.24 (June 14, 1984), 49 Fed. Reg. 26,823, 26,834 (1984).

86. *Id.* at 26,834, 26,837.

II. THE ECONOMICS OF THE RISE AND FALL OF ADVERTISING AS AN ANTITRUST ISSUE

The legal history related above developed within a context of economic theory. Predictably, the legal theorists on both sides borrowed their positions from economists who had debated the relationship between advertising, competition, and consumer welfare.⁸⁷

The basic structure of the debate was set in 1933 by Joan Robinson's influential work, *The Economics of Imperfect Competition*.⁸⁸ Central to market theory and to the model of pure competition is the notion that a knowledgeable consumer will choose to pay less rather than more for the same item. As Robinson recognized, however, to state that self-evident proposition is to introduce a glitch: No concept is more problematic in our experiential world than the concept "same." As a result, profit-seeking sellers of consumer goods will try to distinguish their products from ostensibly similar ones in order to build around themselves a protective wall of cross-inelasticity, thereby gaining some control over price and hence increasing their profits. In situations in which producers can gain nothing more through cost-cutting (traditional productive efficiencies) or objective qualitative improvement (the proverbial better mousetrap), the obvious basis for differentiation lies in advertising.

Basic to the Robinson description of imperfect competition was the notion of market break-up, or fragmentation. A firm could alter the demand curve for its own product, thereby increasing sales at each output level, through "expenditure on advertisement" in the same manner as through a reduction in price. The effect of the advertising is that it "ensures that not all the customers, who are attached in varying degrees to a particular firm by the advantages which it offers them, will immediately forsake it for a rival who offers similar goods at an infinitesimally smaller price,"⁸⁹ as they would under conditions of perfect competition, where goods are presumed to be identical. As Robinson noted, "In the real world when a firm finds that the market is becoming uncomfortably per-

87. This debate has been going on for a long time, and has continued right up to the present. For a sampling of the literature, see M. ALBION & P. FARRIS, *THE ADVERTISING CONTROVERSY: EVIDENCE ON THE ECONOMIC EFFECTS OF ADVERTISING* (1981); J. BACKMAN, *ADVERTISING AND COMPETITION* (1967); P. BLOOM, *ADVERTISING, COMPETITION, AND PUBLIC POLICY: A SIMULATION STUDY* (1976); J. FERGUSON, *ADVERTISING AND COMPETITION: THEORY, MEASUREMENT, FACT* (1974); E. LEVER, *ADVERTISING AND ECONOMIC THEORY* (1947); R. MCAULIFFE, *ADVERTISING, COMPETITION, AND PUBLIC POLICY: THEORIES AND NEW EVIDENCE* (1987); W. D. REEKIE, *THE ECONOMICS OF ADVERTISING* (1981); Thomas, *Advertising in Consumer Goods Industries: Durability, Economies of Scale, and Heterogeneity*, 32 J. L. & ECON. 163 (1989). The McAuliffe volume, *supra*, contains a comprehensive bibliography at 107-12.

88. J. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* (1933). See generally M. TURNER, *JOAN ROBINSON AND THE AMERICANS* (1989).

89. J. ROBINSON, *supra* note 88, at 90; see also *id.* at 21.

fect it can resort to advertisement and other devices which attach particular customers more firmly to itself."⁹⁰

This analysis suggested that advertising and other related promotional activities amount to a peculiar form of competitive activity, given their capacity to transform similarity into difference and, in so doing, to segregate product markets. From an antitrust perspective, the narrowest issue raised is whether such practices produce—in efficiency terms—an anti-competitive effect. More specifically, the question is whether and how advertising can enhance a firm's capacity to restrict output and raise prices. One indication of such a problem would be an industry characterized by consistently high profits over time, since according to normal economic assumptions, high profits would draw new entrants. Thus, the issue of advertising quickly became one of entry barriers.

On this topic, the guru of subsequent liberal economists was Joe Bain, whose *Barriers to New Competition*⁹¹ was first published in 1956. Bain began with the assumption of "free or easy entry" so central to conventional price theory, the assumption that in "markets with many small sellers, easy entry in the long run will force price to equality with minimal average costs and will bring output to a level sufficient for supplying all demands at this price."⁹² When confronted with "conditions of entry [that were] other than easy," he noted, conventional price theory became "inexplicit, cryptic or silent."⁹³ Accordingly, Bain set out to investigate the conditions that would inhibit new entry and thereby contradict the logic of competitive price theory. In his crucial initial definition,

90. *Id.* at 101. There exists a parallel line of economic thought, dating back to Hotelling's famous spatial model for a product-differentiated market, see Hotelling, *Stability in Competition*, 39 *ECON. J.* 41 (1929), as refined by Lancaster, see Lancaster, *A New Approach to Consumer Theory*, 74 *J. POL. ECON.* 132 (1966). This approach was refined and applied by economist Richard Schmalensee to support the case against the cereal industry, and, especially, to support the remedy of mandatory trademark licensing in that case. See Schmalensee, *supra* note 47; see also F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 258-60 & n.116 (2d ed. 1980).

Ironically, the most recent attempt to deploy the theory in a legal setting appears in an article by the same Thomas Campbell who played such a key role in terminating the *Cereal Case* (for a discussion, see *supra* text accompanying note 68), later became a law professor at Stanford, and is now a Member of Congress. Relying on the spatial model of product differentiation, Campbell argues for a limited exception to the presumption against predation that is so prevalent in current literature. Yet, his unwillingness to question the social value of product differentiation, thereby positing it as utility-enhancing, along with his insistence on the narrowest definition of entry barrier, renders the argument paradoxical. See Campbell, *Predation and Competition in Antitrust: The Case of Nonfungible Goods*, 87 *COLUM. L. REV.* 1625 (1987). Contrast Rasmusen & Wiley, *Antitrust and Spatial Predation: A Response to Thomas J. Campbell*, 89 *COLUM. L. REV.* 1015, 1017 (1989) (claiming that "judges will err if they take Campbell's advice").

91. J. BAIN, *BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES* (2d ed. 1962).

92. *Id.* at 3.

93. *Id.*

Bain stated that he would evaluate "condition of entry," which he also called "state of potential competition," by assessing "the advantages of established sellers in an industry over potential entrant sellers, these advantages being reflected in the extent to which established sellers can persistently raise their prices above a competitive level without attracting new firms to enter the industry."⁹⁴

Among the barriers to entry identified by Bain were those erected by successful advertising, which produces extreme product differentiation. In fact, Bain concluded that "the main culprit in establishing excessive or very high barriers to entry would appear to be product differentiation."⁹⁵ He found this conclusion true in the five industries he studied: automobiles, typewriters, quality fountain pens, liquor, and cigarettes. Nevertheless, having identified an anti-competitive "problem," Bain readily conceded the difficulty of finding an easy solution:

[A] feasible type of policy to deal with the problem is not easily apparent. There is an evident propensity of the profit-seeking enterprise to attempt to enhance profits through product differentiation, via the advantages it gives it over both established rivals and potential rivals. Moreover, the enterprise tends to pursue a product-differentiation policy unilaterally, and without the necessity of any sort of consensual action that might run counter to laws against collusion or concert of action by competitors. Furthermore, the psychology of consumers is very evidently such that they are frequently susceptible to the blandishments of product-differentiating sellers, so that we come at last to a presumably fairly stable characteristic of human nature as the root of the trouble. For all of these reasons, it is difficult to attack this sort of barrier to entry under laws in the anti-monopoly or anti-collusion tradition, or to legislate it away. Then too, it is difficult to organize any substantial political support for measures designed to attack extremes of product differentiation.⁹⁶

Bain's own policy proposals were thus tentative. First, where product differentiation advantages rested on integration, Bain suggested disintegration and prohibition of further integration as long as there were no resulting "real" diseconomies. Second, he proposed restrictions or taxes on advertising; and third, he proposed objective product information to counteract the effects of advertising.

Picking up on the pioneering work of Bain, liberal economists of the 1970s translated his concerns into the specific antitrust agenda described in Part I. Central to their agenda was the removal or reduction of entry barriers, as defined by Bain, that were achieved through advertising and product differentiation. Perhaps the most influential was Professor

94. *Id.* at 2-3 (emphasis omitted).

95. *Id.* at 204.

96. *Id.* at 216.

Scherer, whose *Industrial Market Structure and Economic Performance*⁹⁷ first appeared in 1970 and was reissued in 1980. Scherer not only elaborated the theory of "entry deterrence through product differentiation," but also included an entire chapter called "Product Differentiation, Market Structure, and Competition,"⁹⁸ in which he affirmed with a vengeance the result in *Clorox*, citing his own small empirical survey of bleach prices in Chicago. Knowing that bleaches are chemically identical, he was incredulous to discover that consumers really *did* pay far more for the Clorox brand. Similarly, Scherer praised the result in the *ReaLemon* case, quoting a passage from the initial decision elaborating ReaLemon's "almost imaginary superiority . . . in the mind of the consumer."⁹⁹ He also noted with approval the work of economist and FTC consultant Richard Schmalensee, who was developing the economic theory of the *Cereal Case* and basing it explicitly on the work of Bain and of Scherer himself.¹⁰⁰

Conservative economists, predictably enough, responded by taking a contrary position on the question of advertising. This debate was the topic of an historic (in retrospect, for antitrust literature, a cross-roads) conference sponsored by Columbia Law School in 1974, later published as *Industrial Concentration and the New Learning*.¹⁰¹ The authors and participants included leading liberal and conservative antitrust theorists from the disciplines of both law and economics.¹⁰² On the liberal side, for example, were Scherer, Pitofsky, Turner, and Michael Mann. On the conservative side were Yale Brozen, Ronald Coase, Harold Demsetz, Robert Bork, and Richard Posner. The conference addressed five substantive issues related to industrial concentration, one of which was "Advertising as an Impediment to Competition."¹⁰³

Taking the liberal position on advertising, Michael Mann, following the work of Bain, argued that "advertising and concentration may interact, feeding upon one another, with the result that advertising and concentration will be positively related." He asserted that "advertising may contribute to the perpetuation of an oligopoly market structure" because

97. F. SCHERER, *supra* note 90.

98. *See id.* at 258-60, 375-404.

99. *Id.* at 382 & n.25 (quoting Borden, Inc., 92 F.T.C. 669, 709 (1978)).

100. *Id.* at 258-60 & n.116; *see* Schmalensee, *supra* note 47.

101. INDUSTRIAL CONCENTRATION, *supra* note 8.

102. For a list of conference authors and participants, *see id.* at 457-64.

103. *Advertising as an Impediment to Competition*, in *id.* at 114-61 (a chapter comprised of essays by Brozen and Mann, as well as a panel discussion).

it "stabilizes consumer purchasing habits" and thus serves to retard entry.¹⁰⁴

Yale Brozen, however, in his persuasive presentation, challenged all the received liberal wisdom on the question of advertising.¹⁰⁵ In particular, he refuted the basic entry barrier theory, arguing that in the imperfect markets that exist in the real world, the introduction of advertising actually increases competition. This position represented a dramatic and brilliant reversal of the Robinson sequence. Robinson had taken the model of perfect competition as a presumed analytic starting point and had then described advertising as an (implicitly subsequent) distortion of that model.¹⁰⁶ That basic framework had provided the structure for the whole liberal critique of advertising. Brozen pointed out, however, that the relevant starting point should be the real world, not an abstract model of unrealistically "perfect" competition.

Brozen's argument might be ultimately self-destructive: What, exactly, is allocative efficiency itself, absent a model of perfect competition as reference point? Nevertheless, Brozen effectively pointed out that in the real world the possibility of entry may depend upon the availability of advertising to introduce new products. Rather than deterring entry, advertising may be a necessary precondition for entry. Furthermore, Brozen was able to cite instances when the introduction of advertising actually had increased competition and thereby lowered prices, or, conversely, where the abolition of advertising had reduced competition.¹⁰⁷ He also responded to the charge that high profits correlate with high advertising expenditures by contending that such profit measurement was based on fallacious accounting methods.

Two of the issues raised by the Brozen/Mann debate and subsequent scholarly literature seem intractable. The first is whether advertising can, in some final, universal sense, be labeled either pro- or anti-competitive. Brozen, for example, correctly had chided the other side for the "mistaking of association or correlation with causation."¹⁰⁸ He nevertheless indulged in some shoddy empiricism of his own, drawing grand generalizations from the facts of peculiar limiting cases.¹⁰⁹ Given an absolute absence (or prohibition) of advertising at time T_0 , its introduction at time T_1 is likely to have a dramatic effect on the industry. This seems

104. Mann, *Advertising, Concentration, and Profitability: The State of Knowledge and Directions for Public Policy*, in *id.* at 137, 140-41.

105. Brozen, *Entry Barriers: Advertising and Product Differentiation*, in *id.* at 115-37.

106. J. ROBINSON, *supra* note 88, at 90; see *supra* text accompanying note 89.

107. Brozen, *supra* note 105, at 120-23.

108. *Id.* at 119.

109. *Id.* at 120-23.

to be the case with the eyeglass study, cited repeatedly by Brozen and other conservative economists, in which introduction of advertising lowered prices. The same may be said for Brozen's citation of a similar sequence in the toy industry, when national advertising by manufacturers, during a period of rapid transition, increased price competition among retailers, displacing the monopoly position of local sellers and thereby reducing prices paid by consumers.¹¹⁰ Yet, the beneficial effect of advertising in reducing prices in the early time interval in no way speaks to whether it is pro- or anti-competitive in later intervals when price competition has ceased and advertising itself has become the principal means of competition. Antitrust liberals like Pitofsky, Elman, and Turner always had been willing to concede the benefits of advertising in the first interval, questioning only its competitive effects in later intervals.¹¹¹

That advertising, when originally introduced, can bring vigor and benefits to a market might apply to the current situation in Eastern Europe, where there is a need for markets to develop some brand identification through advertising so as to help give competitive life to otherwise stagnant economies.¹¹² That fact, however true, does not necessarily entail blanket endorsement of *all* American advertising practices. The real question, which Brozen's studies cannot answer, is whether a coherent line can be drawn between pro-competitive and anti-competitive advertising. To assess the long-run competitive effects of advertising we must look to criteria other than occasional short-run price reductions.

A second issue which both sides agree is intractable is whether advertising causes concentration, concentration causes advertising, or both, or neither.¹¹³ It may well be that numerous forces or behaviors, including antitrust law itself, led to the oligopolistic character of many American industries.¹¹⁴ Once oligopoly was established, advertising may simply have been the mode of competition most suited to the price stability associated with such structures. Any resulting association between oligopoly and high advertising budgets may tell us nothing about causation. On the other hand, given the national scope of so many consumer product markets, it still may be true that a threshold advertising budget

110. See *id.* at 122. Ironically, the vertical restraints conservative economists now say should be permitted (see sources cited *supra* notes 77-78) lessen the price-reducing effects those economists have so often celebrated in the toy study.

111. See, e.g., Pitofsky, *supra* note 47.

112. This need had been acknowledged well before the recent changes in Eastern Europe. See L. BOGART, STRATEGY IN ADVERTISING 4-5 (1984).

113. E.g., M. ALBION & P. FARRIS, *supra* note 87 at 56-68 (discussing the competitive effects of advertising); see also W. REEKIE, *supra* note 87, at 97-115.

114. For this point, and a number of other useful insights, see Dewey, *Introduction*, in INDUSTRIAL COMPETITION, *supra* note 8, at 1-14.

serves, at the very least, to increase the minimum optimal size in many industries, to the disadvantage of small firms or potential entrants (given the real-world constraints of a less than perfect market for capital).

In other words, to concede the ultimate intractability of causation at a general level does not resolve whether or not, in a particular context, the costs specifically associated with product differentiation should be regarded as barriers to entry (in the precise sense of being anti-competitive). Recognizing that fact, economists now avoid the abstract question of causation but treat the correct definition of entry barrier as central to the whole economic debate about advertising. Whereas Brozen had side-stepped the question, modern conservatives like Stigler have, no less than the liberals, understood its centrality; but few liberals or conservatives have conceded the extent to which the question of entry barrier is in fact a question about the social and psychological meaning of advertising itself.

The *Cereal Case* provides a dramatic illustration of the theoretical dilemma. Between 1950 and 1972, despite extraordinarily rapid growth, no new firms entered the cereal industry, while existing firms dramatically increased the number of brands they made available to consumers and consistently earned high profits. Common sense would suggest that capital, attracted by the smell of profit, should have rushed into the market unless some "artificial" barrier kept them out. Joe Bain certainly would have regarded the extensive brand proliferation by industry leaders as that "barrier." In the sense that advertising served to increase the actual (and also psychological) cost of entry, the point is indisputable. But whether those costs of entry are to be regarded economically as barriers is more problematic. It is almost too trite to say that "[s]uperior efficiency is the world's greatest entry barrier,"¹¹⁵ but the point made by that phrase is sound. Unless we return to the *Brown Shoe* view that *all* increased economies of scale enjoyed by large firms are anti-competitive because they put small firms at a disadvantage,¹¹⁶ we have to ask whether economies achieved through advertising are in some sense different from other production or distribution economies.

First, though, we must address the particularity of cost increases to determine whether they should qualify as entry barriers, or whether Bain's definition should be rejected altogether. Rejecting Bain's definition is exactly what Stigler has done, by using a definition of entry barrier that finds no unfairness in requiring entrants to bear all costs previously

115. H. HOVENKAMP, *supra* note 78, at 306 (1985).

116. *See supra* text accompanying notes 7-10.

borne by incumbents—including advertising costs.¹¹⁷ A true entry barrier, in these terms, is a “cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry.”¹¹⁸ For Stigler, there may be short-run “time-lag” impediments to entry, but there are no long-term barriers to entry unless incumbents possess an advantage (such as control over a resource) that will never be available to entrants. Such impediments as market size limitations or economies of scale are thus not regarded as entry barriers since they are just neutral consequences of market conditions or cost/output relationships.

Even without accepting Stigler’s critique, one must concede that Bain’s entry barrier definition creates the problem of requiring a comparison between the price charged by incumbents and a competitive price.¹¹⁹ But if the basic purpose of advertising is to persuade consumers that they are buying something “different,” then with what do we compare the price of the advertised brand? While it may be possible to find a reference for some products, such as liquid bleach, most do not lend themselves to such ready comparison. In other words, are there generic Froot Loops? The Robinson-Bain approach almost requires a Platonic form of Froot Loops that pre-exists and serves as a pricing reference point for the Kellogg’s version of Froot Loops. Bain’s analysis suffers because there is no such thing—as the conservatives have correctly pointed out.

Moreover, we cannot conclude that an additional cost is an inappropriate barrier to entry unless we assume it is not matched by an at least equal enhancement of value; in short, we must deny that product differentiation is a productive efficiency before we can call it a barrier to entry. The FTC did exactly that with advertising economies of scale in *Clorox* and with brand preference in *ReaLemon*. Yet, the basis upon which the liberals denied that value enhancement remains elusive. Since consumers do register a preference for brand names in their purchases, we must have some independent basis for judging their preference “false” if we are to distinguish advertising efficiencies from other efficiencies for purposes of defining entry barriers.

On the other hand, treating all costs borne by successful incumbents as fungible, as does Stigler, simply assimilates advertising to the general-

117. For a good presentation of the theoretical debate, see R. MCAULIFFE, *supra* note 87, at 2-27. See also Demsetz, *Barriers to Entry*, 72 AM. ECON. REV. 47 (1982) (discussing Bain’s, Stigler’s, and Ferguson’s definitions of entry barriers). The FTC has recently adopted the Stigler definition on the basis of its having been “widely accepted in the legal and economic communities.” See *Echlin Mfg. Co.*, 105 F.T.C. 410, 485 (1985).

118. G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 67 (1983).

119. See J. BAIN, *supra* note 91, at 3.

ity of production costs, thereby denying its particularity altogether. Stigler, in effect, uses his definition of entry barriers to avoid discussion of the real issue, which is the extent to which one can characterize advertising as similar to or different from other production costs, and what implications can be drawn from that characterization. This point has been made by conservative economist Harold Demsetz, in his discussion of the effort to define entry barriers generally. As Demsetz shrewdly argues, *any* legal entitlement is an entry barrier in the sense that it confers a secured advantage on the one who owns the entitlement. Demsetz' argument effectively demolishes the category "entry barrier," as such, as a tool of analysis, and thereby highlights the important question, which is whether or not a particular entitlement serves some valuable social goal—a decision which cannot be reached by quibbling over the logically correct definition of "barrier" in the abstract. As Demsetz states, "The issue faced by the attempt to implement a policy toward barriers is that of defining which costs of undertaking activities are socially desirable and which are not. . . . The valuation process must necessarily be one that is rich in intuition and faith, and poor in discernable measurements."¹²⁰

At this point, one must ask what advertising is and how it works. Curiously, that issue is implicit in the accounting problem noted by Brozen,¹²¹ which also figured significantly in the *Cereal Case*.¹²² Those who claimed the most excessive profit levels for Kellogg did so by computing annual profits as a percentage of assets, with advertising treated as an annual expense. At the other extreme were those who claimed that advertising created capital value that should be added to the base against which profit rate is computed, thereby reducing the profit ratio.¹²³

Buried in this accounting debate is the basic question of how advertising works. The current-expense model presumes short consumer retention spans, rapid dissipation of effects, and the need for frequent and regular reinforcement. If such is the case, even short-run entry should not be a great problem, since entrants can deploy their own advertising

120. Demsetz, *supra* note 117, at 56.

121. Brozen, *Entry Barriers: Advertising and Product Differentiation*, in *INDUSTRIAL COMPETITION*, *supra* note 8, at 123-26; see R. MCAULIFFE, *supra* note 87, at 47-50 (discusses measuring profitability); see also Demsetz, *Accounting for Advertising as a Barrier to Entry*, 52 *J. BUS.* 345, 357 (1979) ("the evidence reported in this study supports the existence of an accounting artifact that yields a positive correlation between profit rates and advertising intensity and fails to support the belief that advertising investments derive their value from the creation of barriers to entry"); Fisher & McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, 73 *AM. ECON. REV.* 82, 90 (1983) ("there is no way in which one can look at accounting rates of return and infer anything about relative economic profitability").

122. Kellogg Co., 99 F.T.C. 8, 198-227, 259-61 (1982).

123. Ironically, the issue flips around when the question is the deductibility of advertising expenditures as a current expense, as opposed to long-term amortization as capital.

as effectively as incumbents. The capital asset model, on the other hand, presumes long-term effect and accounts for attitudes like brand loyalty.

Both models may be correct, depending on the context. In some cases, perhaps, long-term effects *could* be sustained, as when brand names become generic names (practically or legally)—such as Kleenex, Thermos bottles, cellophane, or even Clorox. Yet heavy advertising by one firm begets heavy advertising by a competitor, dissipating the long-term effects of the first ad campaign and leading to constant, retaliatory defensive advertising. At that point the long-term/short-term distinction is a hard one to draw, and a seemingly dry debate about accounting becomes a debate about what goes on in people's heads. Inevitably, too, we circle back to the underlying question: Is competition in the arena of advertising—image competition—as “real” as price and quality competition, or is it somehow different?

To answer that question economists are pushed reluctantly beyond the borders of their discipline, since they are forced to appeal to non-economic criteria to characterize advertising.¹²⁴ These criteria, too often unacknowledged, have affected both the accounting and the entry barrier debate, and inevitably affect our definition of competition itself.

The liberal economists, seeking to use advertising as the handle by which to attack concentration, allowed their basic contempt for the whole enterprise to show through.¹²⁵ Bain was somewhat restrained in describing the “blandishments of product-differentiating sellers” to

124. Nevertheless, economists continue to try to produce conclusions about, for example, the socially optimal level of advertising, from within their own discipline. See, e.g., Dixit & Norman, *Advertising and Welfare*, 9 BELL J. ECON. 1 (1978); Dixit & Norman, *Advertising and Welfare: Reply*, 10 BELL J. ECON. 728 (1979); Dixit & Norman, *Advertising and Welfare: Another Reply*, 11 BELL J. ECON. 753 (1980). The authors concede that “[t]he real point at issue is, therefore, whether advertising is itself an object of preferences, or whether it merely shifts preferences over goods.” Dixit & Norman, *Advertising and Welfare: Reply, supra*, at 729. To the extent that this issue is empirical rather than definitional, it seems hardly answerable without appealing to criteria outside the domain of economics.

125. The tradition goes all the way back to Arthur Pigou, who firmly believed in the distinction between “informative” and “competitive” advertising, with the latter, the “persuasive” category, serving to do no more than move demand from one firm to another. He therefore regarded persuasive advertising as wasteful, and thought that the waste might be avoided through prohibition or taxation. See A. PIGOU, *THE ECONOMICS OF WELFARE* 196-200 (1932).

Another good illustration is John Kenneth Galbraith, when he turns his rabid eloquence to the topic of advertising:

In economics wants are held to emerge from deep within the human psyche.

....

... So long as wants are original with the consumer, their satisfaction serves the highest of human purposes. Specifically, an original, inherent need is being satisfied. And economics as a subject matter or science thus becomes basic to the highest human service.

But the foregoing holds only if wants cannot be created, cultivated, shaped, deepened or otherwise induced. Heaven forbid that wants should have their source in the producer of the product or service as aided and guided by his advertising agency.

which consumers were "susceptible"; consumer "psychology" and "human nature" were thus the "root of the trouble."¹²⁶ Scherer was even more extreme in his (elitist) contempt for American consumerism. For example, responding to the argument that advertising is a positivity because it has subsidized news media and television broadcasting, Scherer notes:

Consumer goods advertisers generally favor media that will transmit their message to the largest relevant audience, and the media respond by attempting to maximize audience size through an appeal to the lowest common denominator. The result is the scandal sheet and television's "vast wasteland" Indeed, many TV programs are of such low intellectual caliber that the commercials stand out as a refreshingly sophisticated interlude.¹²⁷

Both Bain and Scherer also start with an assumed distinction between information and persuasion and between reality and image. While conceding that, because of regulation, ads rarely contain outright lies, Scherer describes the "new and more subtle ways of 'puffing'" by which consumers are "gulled," noting that "advertisers would not try to mislead if they thought they were convincing no one."¹²⁸ Scherer's position, of course, depends on an essentialist conception of reality as separate from the market image.¹²⁹ The liberal's quest for economic "reality" is like the Marxist quest for use value instead of exchange value, or like the scientific positivist's belief in the fact/value distinction. The genius of advertising is that it occupies a space somewhere between fact and value, all-too-obviously collapsing them into each other.

On the other hand, conservative economists are equally guilty of invoking extra-disciplinary presuppositions. At their critical best they carry on the realist tradition by undermining the formalist positivism of the liberals. Having done so, however, they then display all-too-quickly their own phobic avoidance of messy social context: Seeking to justify *all*

From the standpoint of strict economic orthodoxy, advertising verges dangerously on the subversive.

Galbraith, *Economics and Advertising: Exercise in Denial*, ADVERTISING AGE, Nov. 9, 1988, at 81.

126. J. BAIN, *supra* note 91, at 216.

127. F. SCHERER, *supra* note 90, at 379.

128. *Id.* at 380.

129. He is in good company on this issue. He shared the belief with the revered Alfred Marshall, founder of neoclassical economics. Marshall distinguished between "constructive," or "informative," advertisements, and those that were "combative," that is, "competitive," "persuasive," or "manipulative." While he saw as constructive those advertisements that were designed to "draw the attention of people to opportunities for buying or selling of which they may be willing to avail themselves," especially those that were needed for explaining to people generally the claims of some new thing which is capable of supplying a great but latent want, he concluded that the "mainly combative" ads "generally involved social waste." This account is taken from E. LEVER, *supra* note 87, at 47 (a spirited defense of advertising).

advertising, they retreat into their own presupposed formalist categories. One conservative ploy has been to treat all advertising as information, which enhances consumer satisfaction by reducing search costs, especially in the case of so-called experience goods, which would otherwise require consumers to waste valuable time appraising the merits of competing goods. For example, Richard Posner at the Columbia conference invoked the legendary "law of excluded middle"¹³⁰ associated with logical positivism, demanding to know whether advertising was "false" or "truthful,"¹³¹ in an apparent refusal to acknowledge that advertising lies somewhere between, or perhaps outside, either category. Some conservatives actually concede that there is no clear line between the categories, but then proceed to treat advertising as information in an effort to avoid the issue.¹³²

More sophisticated conservative economists recognize that the information ploy is shaky at best, and focus instead on what consumers are buying when they buy goods differentiated by advertising. A conventional liberal analysis, for example, would argue that successful advertising shifts the demand curve for the product, thereby persuading consumers to pay higher prices at each output level. The sophisticated conservative critique is to challenge that notion of product, suggesting that the second demand curve is the undistorted and accurate one *for the advertised commodity* and bears no necessary comparative relationship to any other hypothetical demand curve.¹³³

This point, however, leads the conservatives to the extreme position that "taste" is exogenous to the market—that advertisers are diligent, yet ultimately passive, caterers to pre-existing wants. "Want" cannot be critically examined as a social phenomenon, but can only be traced, mechanistically, in the self-referencing "facts" of market purchase data. In other words, rejecting the essentialist reality of value, they then resort

130. See C. ALLENDOERFER & C. OAKLEY, *PRINCIPLES OF MATHEMATICS* 20 (1955); B. RUSSELL, *PRINCIPLES OF MATHEMATICS* 18 (Norton paperback ed. 1964).

131. See *INDUSTRIAL CONCENTRATION*, *supra* note 8, at 156.

132. See, e.g., Nagle, *Do Advertising-Profitability Studies Really Show That Advertising Creates a Barrier to Entry?*, 24 *J. L. & ECON.* 333 (1981) ("Opinions diverge, in part, over advertising's truthfulness, its informativeness, and the optimality of its supply."); Nelson, *Advertising as Information*, 82 *J. POL. ECON.* 729, 730 (1974) (discussing the impact of advertising's information on "search qualities" and "experience qualities" of products). See also R. MCAULIFFE, *supra* note 87, at 33-45.

133. See, e.g., Nichols, *Advertising and Economic Welfare*, 75 *AM. ECON. REV.* 213, 214 (1985) ("The Stigler-Becker framework enables us to interpret an apparent *shift* in the product demand curve as a movement *along* a characteristic demand curve induced by increased advertising's reduction in the shadow price of the characteristic."); see also R. MCAULIFFE, *supra* note 87, at 77-78 (discussing how the model in which the commodity demand curve is not shifted clarifies some important issues).

to an essentialist definition of taste as ahistorical, acultural reality.¹³⁴ The fact that consumers flock to buy advertised goods thus is simply evidence that advertisers have appealed successfully to a pre-existing preference for the images conveyed in the advertisements. If consumers choose to buy images, then it is their sovereign autonomous right to do so. That position, of course, is a mere tautology:¹³⁵ Because advertising works, there is no basis upon which to evaluate it in relation to the supposed goal of competition. The terms of the debate simply are abandoned in complete and abject deference to the existing order.¹³⁶

134. See Stigler & Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76 (1977). In this article, Stigler and Becker, relying for their choice on "comparative analytical productivities," choose a model that posits "taste" as universal and invariant between people. The messiness of cultural reality creeps back in, however, when the authors concede that consumer behavior is affected by "knowledge," and that "knowledge, whether real or fancied, is produced by the advertising of producers." *Id.* at 84. Our position is that one cannot say anything meaningful about the particularity of advertising without addressing, rather than holding constant, the very complicated, and perhaps non-dichotomous, category of "real or fancied."

135. See Leibenstein, *Microeconomics and X-Efficiency Theory*, in THE CRISIS IN ECONOMIC THEORY 97, 100 (D. Bell & I. Kristol eds. 1981); see also Kristol, *Rationalism in Economics*, in *id.* at 201, 214-15 (discussing singularity and plurality of preferences in consumerism). Consider the approach of an influential textbook:

Perhaps the most important technique of non-price competition is advertising. In the United States, and increasingly in European countries, advertising is the uniformly most accepted and acceptable method of attracting customers, at least to entrepreneurs if not to economists. The "pros and cons" of advertising expenditure have been argued at length; the argument is likely to continue because the question at stake is a moot one. But for good or not, advertising is an established practice that is presumably considered worthwhile by entrepreneurs; otherwise they would not continue to spend billions of dollars annually on this type of non-price competition.

J. GOULD & E. LAZEAR, MICROECONOMIC THEORY 405 (6th ed. 1989).

136. Some economists, including Lester Thurow, acknowledge the seriousness of the issue: "As things now stand, the price-auction model is silent about how preferences are formed. In theory they simply exist—fully developed and immutable. . . . So some real theory of preference formation has to lie at the heart of the rebuilding effort in economics." L. THUROW, DANGEROUS CURRENTS: THE STATE OF ECONOMICS 219-20 (1983).

Consider a deliberate and pervasive effort to alter preferences—advertising. Not wanting to recognize what is happening, the economics profession has a very ambivalent attitude toward it. Advertising is divided into good advertising (information) and bad advertising (persuasive), but most advertising is clearly designed to persuade, not to inform. Some economists see advertising as a pernicious attempt to distort perfectly good "home-grown" preferences, while others consider it a not very successful attempt to alter those same perfectly good "home-grown" preferences and therefore not anything worth worrying about. In either case, if true preferences are being "distorted," advertising is a market imperfection that must be eliminated.

Neither view of advertising confronts the real problem. Preferences are not being distorted by advertising, but are instead being formed endogenously in the market by a wide variety of *social* forces that include deliberate advertising. There is no such thing as "true" independent individual preferences. Human preferences are like an onion, because when the layers of social influence are peeled away, nothing is left. So the rock of stable preferences on which equilibrium price-auction markets are founded is in fact little more than quicksand. *Id.*

As Schmalensee noted: "If the source of ReaLemon's premium brand status lay in consumer perceptions that it tasted better than other brands, it could be argued that the problem was irrationality, not ignorance. If consumers are irrational in any deep sense, the welfare-economics case for

III. ADVERTISING AS CULTURAL REALITY

The static assumptions of both liberals and conservative collapse when viewed in light of the social history of advertising. We cannot offer a complete account of that history, but we do want to draw upon it to suggest the complexity of the normative judgments that must be made, a complexity missed if one fails to see advertising as a social phenomenon. History suggests that the dichotomous categories now used by economists simply do not capture the dialectical reality of advertising. For example, advertising is *neither* an all-powerful instrument of social control nor a pure, democratic expression of consumer autonomy: Advertising has been, simultaneously, both controlling and liberating. Similarly, taste cannot be wholly engineered, yet it also does not exist in splendid, ahistoric exogenism. The "value" created by advertising is neither pure "image" nor simple "fact"; and, to use Stigler's delicately elided distinction, the knowledge it produces is neither "real" nor "fancied." Instead, advertising shimmers somewhere between all such categories, which is why it cannot, in some final, ultimate sense, be labeled either pro- or anti-competitive.

Consider, for example, the emergence of Montgomery Ward and Sears, Roebuck, both pioneers in creating the American consumerist culture. To some extent, Wards and Sears represented a competitive antidote to the local monopolies of the rural or small-town general stores. Those stores had become notorious for high prices, shoddy or misrepresented goods, and oppressive credit policies.¹³⁷ On the other hand, local merchants had often been community leaders, forming associations to help promote, ironically, the very progress and economic growth which made mail order distribution possible, e.g., settlement, road building, train depots, post offices. They also had attacked the more sleazy retailing practices of peddlers, for the sake of promoting the respectability of Main Street merchandising.¹³⁸ Thus, while the Ward's catalogue charged that "the farmers of today are tyrannized over by the country merchants to a far worse extent than they realize,"¹³⁹ the local merchants' campaign against mail order sale (precursor to the perhaps

competition breaks down." Schmalensee, *On the Use of Economic Models in Antitrust: The ReaLemon Case*, 127 U. PA. L. REV. 994, 1041 n.203 (1979); see also Schmalensee, *supra* note 47, at 321 & n.34. Schmalensee is currently a member of the President's Council of Economic Advisors.

137. See S. EWEN & E. EWEN, *CHANNELS OF DESIRE: MASS IMAGES AND THE SHAPING OF AMERICAN CONSCIOUSNESS* 63 (1982).

138. S. STRASSER, *SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET* 221 (1989).

139. *Id.* at 216.

misplaced populism of cases like *Brown Shoe*¹⁴⁰ and *Von's Grocery*¹⁴¹) charged that goods "not bought at home, of men who befriended you, of men to whom you owe a living, are 'tainted' because they come unfairly."¹⁴²

Wards and Sears represented vertical integration of a dramatic kind, uniting manufacturers, jobbers, wholesale and retail in a single firm. The scheme worked only because it could operate on a mass scale, with a predictable consumer demand: Both Sears and Wards adapted "flow principles" to distribution, which required buyers who could be counted on to absorb the "flow" of goods.¹⁴³ The mass distribution of catalogues was an ingenious method for achieving this flow. Using an advertising technique later refined in radio ads,¹⁴⁴ both catalogues effectively displaced the buyer's desire for personal contact, a desire which was projected onto the impersonal firm through the imagery of friendliness. Sears, for example, called his catalogue the "Farmer's Friend"¹⁴⁵ and introduced each one with a personal letter. Similarly, Ward wrote the catalogue copy himself, using a folksy vernacular, and claimed to be a "personal friend" to his millions of customers.¹⁴⁶

Ward's catalogue came to be called the "Great Wish Book,"¹⁴⁷ for it opened up a world of goods hitherto unavailable in rural areas. At one level those goods were liberating. Women confined to farms, for example, found in the catalogues not only devices to ease the drudgery of their work, but also the mass-produced fashions that were becoming a symbol of female independence. Fashion had once been available only to the wealthy; ready-made garments democratized it.¹⁴⁸ And risqué decora-

140. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). The Court specifically referred to the congressional goal of retaining "local control" over industry and promoting small business. *Id.* at 316.

141. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). Justice Stewart, in dissent, describes the majority opinion as "hardly more than a requiem for the so-called 'Mom and Pops' grocery stores . . . that are now economically and technologically obsolete in many parts of the country." *Id.* at 288.

142. S. STRASSER, *supra* note 138, at 216 (quoting William Allen White, editor of the *Emporia, Kansas Gazette*).

143. *Id.* at 77.

144. R. MARCHAND, *ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920-1940*, at 357 (1985).

145. S. EWEN & E. EWEN, *supra* note 137, at 65.

146. *Id.* at 64.

147. *Id.*

148. *Id.* at 178. Democratization of goods became a dominant theme in American advertising, as in the repeated use of phrases like "Everyone (or anyone, or every home) can have one." (Or "Now you too . . ."). Marchand calls this theme the "Parable of the Democracy of Goods." As he comments,

Incessantly and enticingly repeated, advertising visions of fellowship in a Democracy of Goods encouraged Americans to look to similarities in consumption styles rather than to

tions, like cosmetics, which upper-class women had borrowed from courtesans to proclaim their independence from Victorian moral constraints, were now available through catalogues to women on isolated farms and to working girls trying to break away from the authority of immigrant parents.¹⁴⁹

At another level, however, catalogues represented control as well as liberation. The goods offered for sale in the Wish Books, filled with enticing pictures and descriptions, became vehicles through which freedom was expressed and longing satisfied. The catalogues opened up possibilities never before imagined and simultaneously portrayed a bountiful supply of commodities as essential to the fulfillment of that unleashed desire. Self-identity became linked inexorably to the consumption of mass-produced goods, which in turn became the standard of what it meant to be an American. In 1946, in fact, the Grolier Club Book Society listed Ward's catalogue as one of the most influential books in American life, a catechism of "the standard of American middle-class living."¹⁵⁰

The period between 1920 and 1940 marked the full emergence of advertising as a crucial part of mass marketing. During this period advertising took on its distinctly modern character and established itself as part of our culture.¹⁵¹ This was American advertising's formative period, and, therefore, probably its most culturally significant. From the modern perspective ads from the 1920s and 1930s seem whimsically distant, yet at the same time peculiarly familiar, for the techniques which emerged then are with us still, although often in more sophisticated form.

This was also a time when advertising's contradictory goals of control and responsiveness stood out in stark relief. The articulated concern of merchants at the time was to ensure a predictable consumer demand, offsetting the potential for overproduction. With no small amount of self-importance advertisers described themselves as spokespersons for

political power or control of wealth for evidence of significant equality. . . . Freedom of choice came to be perceived as a freedom more significantly exercised in the market place than in the political arena. This process . . . gained maturity in the 1950s as a sense of class differences was nearly eclipsed by a fascination with the equalities suggested by shared consumption patterns and "freely chosen" consumer "lifestyles."

R. MARCHAND, *supra* note 144, at 222.

149. Thus by 1905 Sears sold rouge throughout the country, labeling it "Rouge de Theatre" to emphasize its slightly sinful allure. S. EWEN & E. EWEN, *supra* note 137, at 179-80.

150. *Id.* at 65 (quoting R. HENDRICKSON, *THE GRAND EMPORIUMS* 223 (1979)). For an emphasis on the extent to which new "consumption communities" replaced older traditional communities, see D. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 109-16 (1973). Catalogues played a key role in this process. See R. BERMAN, *ADVERTISING AND SOCIAL CHANGE* 76 (1981) (catalogues replaced the old salesman).

151. See R. MARCHAND, *supra* note 144, at 9-13. Marchand's book is a towering work of historical scholarship, encyclopedic in coverage and brilliant in interpretation.

modernity and guardians of unimpeded progress. An economy that was understood in terms of economies of scale, rationalization, specialization, and an integrated flow of materials seemed to require a high "velocity of flow" in the demand for goods. Advertisers proclaimed themselves ready to ensure and rationalize that velocity: By rendering consumer demand dependable and predictable, advertisers promised to remove the "waste and lost motion in the channels of trade."¹⁵² They claimed that the maturing of the American industrial structure apparently had left consumers as the least rationalized part of the economy, and the most potentially disruptive. In response to that problem, advertisers promised to "enhance the rationality and dynamism of the modern business system" by educating consumers to a "predictable and enthusiastic demand for new products."¹⁵³

It is easy to overinterpret the emphasis on controlling consumer demand.¹⁵⁴ This was a period when the imagery of progress, rationalization, and efficiency (in flow chart terms) also dominated most other fields.¹⁵⁵ It is probably impossible, now, to separate the *perceived* requirement for a dependably consumerist public from actual marketing need. Any distinction between them tends to unravel. Also, despite the rhetoric of grand social control that was invoked to justify the advertising profession and sell it to industrialists, individual advertising campaigns were geared only toward selling particular products—broader effects on the culture were necessarily incidental. And most significantly, while the stated goal of advertisers was discipline, it was a discipline that could only be achieved by studied attention to the actual desires, anxieties, values, and goals of the consuming public. In that sense advertising could "control" only by being obsessively, responsively "democratic."

In the effort to appeal to consumers, advertisers sought out areas of experience otherwise ignored by the rationalism of the dominant culture. For example, they emphasized touch, smell, and taste, drawing on modern psychology for the notion that these sensations were culturally repressed but could be unleashed—and then, of course, channeled into an

152. *Id.* at 2.

153. *Id.*

154. Stuart Ewen probably makes this mistake in S. EWEN, *CAPTAINS OF CONSCIOUSNESS* (1976). See M. SCHUDSON, *ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY* (1984). As Schudson says,

But advertising agents were not only men of confidence; they were confidence men. Their livelihood depended on selling to business the idea that advertising was an effective marketing tool. It would be naive to read their sales pitches to the business community as honest accounts of the power of advertising.

Id. at 175. Yet, Ewen is nevertheless an excellent cultural critic.

155. See, e.g., M. ADAS, *MACHINES AS THE MEASURE OF MEN* 410 (1989).

association with commodities.¹⁵⁶ For advertisers, who saw themselves as members of the educated, rational elite, this incessant preoccupation with the irrationality of the public was disquieting, certainly at odds with the older, republican ideal of democracy as rooted in rational public discourse. As Marchand has written:

If we believe that the voice of the people is the voice of God . . . we address them very differently than if we believe them to be fools, children or beasts. But copywriters of the 1920s and 1930s could not select their content and choose their tone . . . with such an exact distinction. The consumer voice seemed at once to be a foolish beast and the voice of God.

From one standpoint, much of the advertising elite looked down upon the throng of consumers with bemused contempt: these masses were ignorant, tasteless, emotionally foolish, and essentially "feminine." . . . Yet from another vantage point, still envisioned as located symbolically "above" the consumer masses, they assessed with awe the economic power of these millions. Just like a mob, . . . "Mrs. Consumer in the mass has an ominous, ruthless power." From this perspective advertising agents might well wish to view themselves as ambassadors from these consumer citizens . . . [who formed] the voice of God whose commandments had to be followed if the economic system were to prosper.¹⁵⁷

Inevitably, of course, advertisers both responded to and shaped consumer desire; they simultaneously reflected and reinforced ideologies of gender role, personal responsibility, success, social value, and the American Dream. Advertisements proved all the more powerful because they were received passively—often in a state of inattention.¹⁵⁸ Ads subtly established broad frames of reference, identified boundaries of discourse, determined relevant criteria.

The Listerine campaign, perhaps the single greatest advertising campaign in American history, provides an excellent illustration. For years Listerine had been sold unimaginatively as a general antiseptic, but between 1922 and 1927 its sales rose from \$100,000 to over \$4 million yearly because copywriters hit upon a wonderfully novel approach.¹⁵⁹ Lifting the word "halitosis" from the inner pages of medical dictionaries, they warned of "The Hidden Wells of Poison"¹⁶⁰ that lurk in the mouth,

156. Advertisers as early as the 1930s were adopting a strategy designed for promoting "the exploitation of the 'sublimated sense.'" R. SHELDON & E. ARENS, *CONSUMER ENGINEERING* 100 (1932), quoted in *ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE* 49 (S. Ewen ed. 1988).

157. R. MARCHAND, *supra* note 144, at 84.

158. See M. MILLER, *BOXED IN: THE CULTURE OF T.V.* 11 (1988) ("[A]dvertising must thus pervade the atmosphere; for it wants, paradoxically, to startle its beholders without really being noticed by them.").

159. R. MARCHAND, *supra* note 144, at 20.

160. S. EWEN, *supra* note 154, at 38.

endangering one's dreams of happiness and success. Ads took the form of little sociodramas of despair, drawing the reader in to identify with the plight of unwary victims of halitosis: The hero or heroine would possess all the variables necessary for success except sweet breath. Thus one ad pictured a beautiful young woman gazing into a mirror, and asked forebodingly, "What secret is your mirror holding back?" The woman pictured in the ad was described as having talent, beauty, education, better clothes than most "in her set," culture, and "the poise that travel brings." Nevertheless, "in the one pursuit that stands foremost in the mind of every girl and woman—marriage—she was a failure." Fortunately, readers were assured, the solution was easy, for "the systematic use of Listerine puts you on the safe and polite side."¹⁶¹ Another ad pictured a man troubled because he "was conscious that something stood between him and greater business success. . . . Some subtle something he couldn't lay his hands on. . . . Finally, one day, it dawned on him . . . the truth that his friends had been too delicate to mention."¹⁶²

Listerine ads obviously reinforced gender roles. They also conveyed a stern, universalized message of personal responsibility for consumerist failure ("Suspect yourself first" Listerine commanded),¹⁶³ while at the same time offering up their product as the solution to deeply-felt anxieties about personal inadequacy. The ads were so successful, and have been continued and copied to such an extent, that 63% of the American adult population now uses antiseptic mouthwash—a personal habit that was virtually created by the Listerine ads. That particular brand has been used at one time or another by 90% of mouthwash users, and in any given month it is currently used by 23% of all American adults, a statistic that translates to 40 million people.¹⁶⁴

Women were the target of ads more often than were men. Gender roles became absolutely central to the culture of advertising, in large part because advertisers dealt with ambivalence about their own social role by feminizing the consumer—irrationality and preoccupation with smells and textures could be associated more comfortably with women than with men. As *Printers Ink*—a trade publication during the 1920s and 30s for the advertising industry—stated, "The proper study of mankind

161. R. MARCHAND, *supra* note 144, at 18-19.

162. S. EWEN, *supra* note 154, at 46.

163. *Id.* at 102.

164. J. JONES, DOES IT PAY TO ADVERTISE? 69, 75-76 (1989). In the 1970s Listerine was challenged by the FTC on its claim that Listerine reduced the incidence of colds and sore throats. Warner-Lambert was forced to withdraw its claims and also insert a *mea culpa* disclaimer in all of its ads between September 1978 and February 1980. This led to a marked decline in consumer quality ratings for Listerine, and it was during this period that Listerine's market share dropped, stabilizing around 30%.

is man . . . but the proper study of markets is woman."¹⁶⁵ And "woman," it was assumed, lived not by logic but rather by "raw and crude emotions."¹⁶⁶

Women emerged from the ads designed for them in a complex role. They were even more subject to public scrutiny and the First Impression than were men ("You will be amazed to find how many times in one day people glance at your nails. At each glance a judgment is made . . .").¹⁶⁷ They were also assumed to crave romance and glamour as the only escape from their "monotonous and humdrum lives." Therefore, ads, according to *Printers Ink*, should provide images of romance so that housewives and women workers could "daily see themselves as *femme fatales*, as Cleopatra or Helen of Troy."¹⁶⁸

At the same time, women were portrayed not just as sex objects, but also as consumers charged with new female responsibilities. The old definition of women as autonomous within the family sphere¹⁶⁹ took on modern dimension as that autonomy came to be defined as the authority to direct consumer choices for the family—as a sort of quartermaster of the household. Traditional homecraft was transformed into consumer management, and women were charged with the task of planning so that family "resources are utilized to buy the best possible combination of satisfactions for today, and the best sequence of satisfactions for the future."¹⁷⁰

There was a good deal of independence suggested by that role, but deference as well, deference both to family needs and to industry authority. An early Wonder Bread ad told the story of a marriage imperiled by low-quality bread ("People Whispered. Husband always ate in town. Tasteless 'bargain bread' was to blame").¹⁷¹ Consistently, women were told of the dire consequences that followed consumerist failure. Lysol, for example, divided the house into separate arenas of minutely described danger: Mothers were warned that even "the doorknobs threaten [children] . . . with disease."¹⁷² One especially grim tale opened with the

165. R. Marchand, *supra* note 144, at 66.

166. *Id.* at 69.

167. S. EWEN, *supra* note 154, at 38.

168. R. MARCHAND, *supra* note 144, at 67.

169. See, e.g., L. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTION AMERICA* (1980) (women in pre-Revolutionary America lived in a woman's domain; women formed a tradition-bound, underdeveloped nation within a larger, more politically sophisticated one).

170. S. EWEN, *supra* note 154, at 168 (quoting Benjamin Andrews, *The Home Woman as Buyer and Controller of Consumption*, *ANNALS*, May 1929, at 41, 42); see also R. MARCHAND, *supra* note 144, at 167-71.

171. R. MARCHAND, *supra* note 144, at 113.

172. S. EWEN, *supra* note 154, at 170.

banner headline, "Wife Takes Full Blame: Entire Family Had *Dull-White Teeth*—All Using *Soggy Toothbrushes* That Failed to Clean." Her two sons had paid the "full penalty" of dull-white, unattractive teeth, until fortunately her husband discovered the importance of a good toothbrush (Dr. West's).¹⁷³

Resonating with surprisingly modern themes, ads of this period spelled out the contradictions of the modern woman's life: Women were described as liberated and progressive yet, at the same time, attentive to husband, home, and family. One of the most successful ad campaigns informed women of Kotex, a product of real convenience that gained quick and widespread use partly as a result of effective advertising, despite the delicacy of the subject. Kotex ads depicted the modern, busy woman as a role model, a woman who "lives *every day* of her life."¹⁷⁴ (As the tempo increased, by 1923 this theme became, "you need never lose a single precious *hour*," and by 1925, "you never lose a single *moment's* precious charm").¹⁷⁵ At the same time, women were still assumed to be dependent on industry advice: Kotex ads provided them with a personalized yet scientific and professional figure, Nurse Buckland, to whom they could refer for advice.¹⁷⁶

Ads encouraged women to liberate themselves from housework by using modern goods and services, but largely for the sake of husbands and children. In a laundry service ad, women were asked the troubling question: "Just what is it to be a Good Wife in this Modern Age?" They were then told, in effect, that liberation was itself a wifely duty:

Deep down in your heart—in the heart of every woman—is that eager, wistful wish to be a *good wife*—a partner in your husband's plans; his cheery companion in leisure hours.

You realize that in this advanced age your husband needs a mate as modern-minded as himself; a wife whose tastes and temperament are attuned to the present-day pace. He is moving forever forward. *You* cannot afford to lag behind.¹⁷⁷

Lest new liberation lead them to forget their primary responsibility, women were still reminded that "Men are judged by what they accom-

173. R. MARCHAND, *supra* note 144, at 303. Other ads resorted to real scare tactics. A soap company asked readers to learn the lesson provided by a dancer who had collapsed and died on stage from "clogged pores." Even more terrifying was a campaign launched by the Scott Paper Company: "Now doctors ask you: Is your bathroom paper safe?" One ad pictured masked doctors and nurses looking down on a patient, hidden from view, while the copy ominously informs us, "and the trouble began with harsh toilet tissue," for, as we are told, "A single contact with inferior toilet tissue may start the way for serious infection—and a long, painful illness." *Id.* at 102-03.

174. *Id.* at 22.

175. *Id.*

176. *Id.* at 21-22.

177. *Id.* at 174.

plish—women by the homes they keep.”¹⁷⁸ In an ad entitled, “When lovely women vote,” Listerine daringly introduced the theme of women’s suffrage, but only by asking “thousands of women of this type—charming, educated, well-to-do, prominent in the social and civic life of her city . . . : What tooth paste do you use?”¹⁷⁹ The consistent message was that liberation did nothing to relieve women of the responsibility to consume wisely, for the sake of pleasing others: As Camay reminded women, “For life is a Beauty Contest for every woman” and “The Eyes of Men . . . the Eyes of Women Judge your Loveliness every day.”¹⁸⁰

Roles were no less rigidly restricted for other ad actors. Men portrayed as consumer/husbands were virtually always businessmen in suits, never blue-collar workers. Professionals like doctors and scientists appeared as authority figures to whom women should be attentive, but not as real model consumers, and minorities appeared only in servile supporting roles.¹⁸¹ The obvious message was that male success meant being a white, middle class businessman, and ads stressed the startling ease with which men could blunder in their climb up the ladder of business success by failures in product choices related to bathing, dressing, shaving, or oral hygiene. During the Depression, ads (especially by insurance companies) urged fathers to provide for their sons’ future. One poignant Depression-era ad for Ethyl gasoline pictured a father who was an apparent failure, with his son sitting next to him in the car; the son is leaning forward, one fist clenched and he is saying, “Gee, Pop—They’re All Passing You.”¹⁸²

The grand promise of advertising, however, was that even in the face of the greatest of challenges, solutions were available to all, democratically. It was the old promise of Sears and Wards, and it remained a pervasive theme even throughout the Depression. Concentrated wealth at the top of a social hierarchy in no way prevented everyone from enjoying the benefits of any single featured product. Mothers were told that no wealth provided her child with better nourishment than Cream of Wheat; Chase and Sanborn insisted that no “king, prince, statesman or capitalist” could enjoy better coffee; Ivory Soap assured “nice hands” even for those who could not afford maids. Indeed, Absorbine Jr. took some care to document the rapid advance of athlete’s foot among the

178. *Id.* at 188.

179. *Id.* at 187.

180. *Id.* at 178.

181. *E.g.*, “Yes, suh, Boss, I keeps ‘em moving with Drano.” *Id.* at 193.

182. *Id.* at 327.

upper classes, thereby assuring more modestly situated readers that cures for such afflictions were available equally to all.¹⁸³

The democratization of goods heralded by the ads of the 1920s and 1930s became a kind of consumerist frenzy during the post-war period of the 1950s. Then, the inevitable tension between rigid, vaguely moralistic role definition and democratization began to show itself. Gender roles as portrayed on TV remained firmly in place, with women still playing the role of household consumers, but emphasis on style and color was more common, even in durable goods, and women were frequently portrayed as childish, impulsive spenders. Men, in contrast, played the heartier role of producer and rational saver. As a result, those two dimensions of a capitalist economy, consumption and productive investment, were reconciled through gender-differentiated role playing. As a *McCalls'* ad stated, "categorically, . . . man is always the producer . . . woman, the consumer."¹⁸⁴

Nevertheless, by the 1950s style completely had taken over even the automobile, thereby "feminizing" (despite the inasculine imagery employed) one of the few products traditionally reserved for male consumer choice. Henry Ford, who disliked advertising, had tried to retain functionalism as his goal. Ford offered simple, sensible cars ("In any color so long as it's black") and could not sell them.¹⁸⁵ General Motors, in contrast, had led the way with frequent and advertised style changes, eventually providing what was in effect an "assembly-line 'custom' car, an oxymoron on wheels,"¹⁸⁶ and Ford was forced to follow suit: The productive efficiencies Ford achieved through uniformity were not enough to offset the loss in sales to those who wanted style.¹⁸⁷

By the 1950s, when General Motors was clearly market leader among the Big Three, in theory buyers could choose any combination of style options that suited them, creating their own individualized car as the ultimate form of male (later female) self-identification. Automobiles were designed and advertised to suggest sexual fantasy, power, and wish-

183. *Id.* at 217-19.

184. *Id.* at 162. It has been noted that the Reagans provided a symbolic representation of that division. She was the lavish spender, while he always presented himself as a person of plain taste, oblivious to style. S. EWEN, *supra* note 154, at 149. Notably, this same dichotomy has been played out at the extreme edges of American Protestantism, with Jerry Falwell's fundamentalism representing the "masculine" value of self-discipline, while the Bakkers represented "feminine" impulsiveness in spending. See Fitzgerald, *Reflections: Jim and Tammy*, NEW YORKER, Apr. 23, 1990, at 45.

185. R. MARCHAND, *supra* note 144, at 156-57.

186. D. POPE, *supra* note 1, at 261.

187. J. BAIN, *supra* note 91, at 298.

fulfillment, with styles that were more suggestive of rockets than automobiles—swept-wing appearance, cockpits, and tailfins.¹⁸⁸

All of these possibilities for style variation, however, still were offered within a carefully structured set of “price classes”—from “low” to “low-middle” to “high-middle” to “high”—representing, respectively, 54%, 28%, 13%, and 5% of the new car market in 1951. (Many people, of course, bought used cars.) Price classes corresponded closely to power, length, and weight, with the higher price classes representing more of all three.¹⁸⁹ Thus, consumers could in a sense design their own cars, but always within a hierarchy in which the most exciting options were in fact unavailable to most people. Despite advertising imagery that held out style and power as available to all and despite *consumer* rejection of the inexpensive, straightforward Ford in favor of extravagant style, it is unclear how many consumers actually bought all the options they wanted.

Here is a case in which the liberal’s model of the pre-existing functional product, without the “wasteful” imagery of style and advertising, actually existed in the form of the old Ford approach to design and marketing. Consumer response rejected it. Yet, ironically, the “waste” of highly advertised style changes during the 1950s, while more “democratically” responsive to American cultural preference, proved to be a factor in creating conditions of failure for the American automobile industry. Volkswagens, for example, with their simple and functional style, became one of the great marketing successes of the 1960s,¹⁹⁰ setting the stage for the triumph of the Japanese manufacturers in the 1980s.

Japanese competition now arouses American resentment. Its success, however, is a testament to the stagnation and complacency that had characterized the American automobile industry, an industry that depended upon imagery more than price or quality competition. Could it not be said that this oligopolistic overreliance on imagery, with little or no entrepreneurial deviation from industry norms, amounted in economic terms to a market failure? Indeed, Japanese competition is now producing the salutary effects a free, competitive market provides. In

188. S. EWEN, *supra* note 154, at 210.

189. J. BAIN, *supra* note 91, at 297. For product differentiation in the automobile industry, see also F. SCHERER, *supra* note 90, at 258, 398-401.

190. See L. DOBROW, *WHEN ADVERTISING TRIED HARDER: THE SIXTIES: THE GOLDEN AGE OF AMERICAN ADVERTISING* 9 (1984). Experts have considered the Volkswagen campaign one of the best in the history of advertising. “Gone were the lush settings, the artfully elongated automobiles, the beautiful models. In their place stood the ‘Beetle,’ unadorned and unretouched, and almost always in black and white. . . . Simplicity was proving to be a virtue” For a measured but critical analysis of style changes in the automobile industry during the 1950s period, see F. SCHERER, *supra* note 90, at 398-401.

1980, Japanese-made cars had an average of two defects, whereas GM averaged 5.4, Chrysler 8.1, and Ford 6.7. Today the figures are 1.7, 1.8, and 1.5 respectively for the Big Three, and the Japanese figure is 1.2. With respect to price, in 1980 the average American car cost \$2000 more than its Japanese counterpart. Now the gap is between \$500 and \$600.¹⁹¹

No single commodity captures the paradoxical extremes of control and liberation through image so fully as the story of blue jeans.¹⁹² In the 19th century demims were among the earliest mass-produced garments, built for laborers in California who were removed from the customary household production of clothes. In 1850 it would have been unimaginable for anyone in the upper classes to wear "dungarees." In movies, however, jeans began to take on a new meaning, albeit one still related to the garments' actual origins. Cowboys became heroes, representing a nobler, simpler, mythological American past of rugged uncorrupted individualism; and this imagery became associated with the jeans they often wore. Meanwhile, jeans started to appear as a symbol of rebellion—for example, in *Rebel Without a Cause*¹⁹³ or *The Wild One*.¹⁹⁴ They were then adopted as a symbol of contempt for post-war suburban society. For adolescent girls, jeans represented rejection of crinolines and high-heels; for boys, they meant rejection of a future of the notorious gray flannel suit and all it symbolized.

By the mid-1960s, of course, blue jeans were also part of the costume of commitment to social justice—part of the civil rights movement and the antiwar movement: "The garb of toil was sanctified by the dignity of struggle," in the minds of student activists.¹⁹⁵ Finally, it seemed, fashion was democratized, not by filtering from the top "down" (as by the Sears and Wards catalogues) but rather by being lifted, so to speak, from the bottom up. For women of the 1960s, jeans were especially liberating; wearing them meant rejecting restrictive fashion, sexual objectification, and passivity: "This was the cloth of action, a challenge to the social fabric of sexuality. The cloth of labor became the emblem of liberation."¹⁹⁶

Ironically, however, by the 1980s jeans were part of the mainstay of fashion, having made their way from practical worker's clothing to symbol of revolt, and finally to status symbol. By 1980 jeans represented a \$5

191. Miller & Washington, *Japanese Cars: Born in the USA*, NEWSWEEK, Apr. 9, 1990, at 36, 37.

192. This is described in S. EWEN & E. EWEN, *supra* note 137, at 109-16.

193. *Rebel Without a Cause* (Warner Bros. 1955).

194. *The Wild One* (The Stanley Kramer Co. 1953).

195. S. EWEN & E. EWEN, *supra* note 137, at 113.

196. *Id.* at 114.

billion industry, and in ads everywhere they were displayed in modern, designer form, infused with a "surrealistic, new-wave flavor."¹⁹⁷ As the advertising director of Bon Jour Jean explained, "We try to make advertising artistic."¹⁹⁸ Another marketing director commented: "Jeans are sold purely on image. The make of jeans is a cult."¹⁹⁹

As one example of that image-making, a poster ad running the whole length of a bus shows an assembly line of backsides unmistakably female, given their rakish posture, even though the figures are visible only from waist to mid-thigh; all are pressed into their variously colored designer jeans. The motto reads, "The *Ends* Justify the Jeans. . . ."²⁰⁰ Brooke Shields, it turns out, was only fifteen when she made the striking Calvin Klein jeans ad: Legs apart, she asked, "You want to know what comes between me and my Calvins? Nothing."²⁰¹ In 1987 a commercial showed a young girl tearful at her boyfriend's departure. She opens a parcel he has left for her, and dressed in T-shirt and underpants, she ecstatically lies on the bed to pull on the jeans he has left behind. The girl who played the role was fourteen.²⁰²

While peculiarly American in origin, jeans are now an international symbol. For example, a Soviet student writes that the key to social popularity in Russia lies in wearing jeans. Of course their production is also international.²⁰³ As capital moves abroad to take advantage of non-union labor, weavers and dyers and cutters and sewers and finishers work in foreign factories to produce that most "egalitarian" and "American" of products.²⁰⁴ As always, advertising obscures the reality of manufacture—the images with which advertisers surround a product are never the images of their production. As the Ewens comment:

The contradiction between promise and production resides in the image itself. . . . In blue jeans, the most functional and least ritualistic of clothes, fashion reveals itself as a complex world of history, promise and change; as a capturing of continual "truths". . . . Resistance and conformity coexist within "the mirror of fashion."²⁰⁵

197. *Id.*

198. *Id.* (quoting Thomas, *The Jeans of Summer*, BACKSTAGE, July 18, 1980, at 1).

199. E. CLARK, *THE WANT MAKERS* 112 (1988) (quoting Derek Mottershead, marketing director of Lee Cooper jeans company).

200. S. EWEN & E. EWEN, *supra* note 137, at 109.

201. E. CLARK, *supra* note 199, at 115.

202. *Id.* at 115-16.

203. S. EWEN & E. EWEN, *supra* note 137, at 115.

204. *Id.* at 114.

205. *Id.* at 114-15. For the continuing simultaneous appeal to elegance and social equality in jeans ads, see S. EWEN, *supra* note 154, at 17-18.

CONCLUSION

In the American experience, advertising has served, self-consciously at times, to bridge or mediate the relationship between tradition and modernity. The advertising of the 1920s, which saw its cultural realization in the 1950s, served in its aggregate efforts to sell the abundance, convenience and variety made possible by modern production, thereby creating a culture of consumption. Yet those same ads, through their rigid depiction of social roles, sought to preserve a terrain of reassuring tradition even for modernist consumers. The relationship between modernism and tradition was unstable, as was the underlying relation between the supposed rationalization of production and a marketing strategy geared to the concededly irrational. The result is a contemporary world of advertising, first unleashed in the 1960s, which is as thoroughgoing an instance of post-modernism as exists in our culture today. Along with the liberation implicit in the demolition of roles lies a chaotic and incessant preoccupation with immediate gratification, rampant eroticism, and a "democratization" of culture that in its utter fragmentation may belie the notion of culture altogether.²⁰⁶

This ever-increasing blare of images has become the principal form of inter-firm competition in the sale of consumer products.²⁰⁷ If antitrust law is to play a responsible role in response to this competition, it must, in the best of the realist tradition, develop a vocabulary for making difficult normative judgments about the scope and mode of its deployment in particular market settings.

206. This is *not* to say that consumer tastes or perceptual experiences are universal or invariant, i.e., exogenous. For example, Japanese ads often appear mysterious to Americans; the Japanese want ads to be "beautiful," a quality they apparently find lacking in American commercials. In one Japanese ad a toy fireman painstakingly climbs a ladder to the top of a skyscraper where he extinguishes a cigarette. The ad is for batteries. Another ad, for whiskey, shows a puppy's small adventures as it wanders about the city in the rain. A voice says, "There are all kinds of ways of living. Take care. Anyhow, take care. Everyone take care." E. CLARK, *supra* note 199, at 48. (Notably, Tokyo is the home of the world's most powerful advertising agency, Dentsu, but the United States still absorbs almost half the world's advertising expenditure, and spends the greatest percentage of GNP on it, 2.4%. *Id.* at 45.)

Conversely, Western ads have sometimes been a disaster in Japan. One shampoo ad showed a man's hand caressing a woman's hair. A sample of thirty Japanese men and women were asked to imagine what happened next, and all but one said that the man produced a sword and severed the woman's head. The ad was promptly withdrawn. In Taiwan, Pepsi's "Come Alive with the Pepsi Generation" suggested to alarmed Taiwanese that Pepsi would cause their ancestors to rise from the dead. *Id.* at 43-44. Nevertheless, globalization of markets is clearly the direction of the future, given the power of cable and satellite TV. What is the nature of the "universal reality" global ads will draw upon and convey? Will those ads be "efficient"?

207. For a wealth of data, see the special issue of *ADVERTISING AGE*, Sept. 28, 1988, describing in detail the 100 top U.S. advertising spenders (Philip Morris became number one in 1988, displacing Procter & Gamble's 24-year reign) and how they spend their \$28.4 billion annual advertising budgets.

If economics is helpful in this regard, it must climb down from its perch of ahistoric universality²⁰⁸ to confront the messy particularity of real markets. As we have suggested, it is no answer, in the case of advertising, to say simply that antitrust must promote efficiency—nor is it an answer just to proclaim, as do some wistful liberals, that, “We believe in the competitive ethic.”²⁰⁹

One source of inspiration for a serious realist approach to advertising might be the approach taken in the recent *Aspen Skiing Company*²¹⁰ case, one bright spot in the otherwise bleak landscape of the law-and-economics neo-formalism of modern Supreme Court antitrust jurisprudence. Justice Stevens, who seems uniquely skilled in antitrust analysis, wrote a careful, contextual opinion in a case that could have been answered the opposite way by simply invoking an abstract principle—the principle that no firm, even a monopolist, has a legal duty to help its competitors. As Stevens conceded, “even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor.”²¹¹ On the other hand, in the best tradition of Cardozian realist jurisprudence,²¹² Justice Stevens seized upon a single, limited exception to that principle—*Lorain Journal*—to argue that the “high value that we have placed on that right to refuse to deal with other firms does not mean that the right is unqualified.”²¹³

Justice Stevens then carefully told the story of the owners of downhill Aspen skiing facilities who were parties to the case.²¹⁴ He focused on the experience of both competitors and consumers, and on the specific

208. See C. GEERTZ, *THE INTERPRETATION OF CULTURES* 33-54 (1973). Geertz' relentless demolition of presumptuous cultural universals serves as an apt rejoinder to the grandiose claim of all too many economists. See also R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 90-108 (1983).

209. See Fox & Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 963-64 (1987).

210. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). In 1974, Robert Pitofsky urged a careful contextual approach to the regulation of advertising, including consideration of its relation to competition and antitrust issues generally. Unfortunately, he was ignored. See Pitofsky, *supra* note 47.

211. *Aspen Skiing*, 472 U.S. at 600.

212. See, e.g., *McPherson v. Buick Motors Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); see also E. LEVI, *INTRODUCTION TO LEGAL REASONING* (1948).

213. *Aspen Skiing*, 472 U.S. at 601 (citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951)). A publisher of a newspaper, once the only news and advertising disseminating business in town, tried to destroy a small radio station which had dared to start operating in a nearby community. The publisher's refusal to sell advertising to persons who patronized the radio station was treated by the Court as an antitrust violation.

214. Originally three companies had offered an interchangeable all-Aspen skiing ticket, making a variety of mountains available to consumers on Aspen skiing vacations. The largest company bought the second largest, becoming the dominant firm in the area, and eventually excluded the third from the interchangeable ticket agreement.

details of the local market in ski-lift tickets. Ultimately, he was able to characterize the decision to opt out of the pre-existing cooperative arrangement as a “decision by a monopolist to make an important change in the character of the market.”²¹⁵ Then, having reached that threshold characterization decision—that the monopolist had altered the market structure in ski-lift tickets—Justice Stevens narrowed the issue to whether or not that change was exclusionary in the sense that it “tends to impair the opportunities of rivals” and “does not further competition *on the merits*.”²¹⁶ He thus faced the precise question: Whether, in the particular context, the behavior in question was anti-competitive or pro-competitive *in a normative sense*. In order to answer that question, he then cited detailed anecdotal and expert evidence about actual consumer preference and convenience.

The *Aspen Ski* case is suggestive, not for its results, but for the careful contextual approach it employed. As applied to advertising, a contextual approach would at least mean *not* automatically counting advertising gains as a positive efficiency, and therefore a defense to charges of anti-competitive behavior. We should instead be entitled to ask, as did Justice Stevens, whether particular advertising campaigns promote competition “on the merits”—just as we should be able to ask whether they “impair the opportunities of rivals”—without quibbling over abstract definitions of entry barrier.

The refusal to treat advertising as automatically within a single category of fungible business expenses might carry with it broad policy implications. We could start, for example, by reevaluating the tax deductibility of advertising expenses. Such a reevaluation could take into account the social desirability of particular products: Senator Bill Bradley has already proposed denying tax deductions for cigarette advertising (\$2.5 billion annually), given the health risks of smoking.²¹⁷ It might be possible, in the same manner, to refashion tax deductions according to some assessment of the true social desirability of image production itself. Deductibility might be allowed up to a certain amount to encourage new entrants, but disallowed beyond that point in order to cool the advertising frenzy that characterizes oligopolistic competition. Such tax changes might be the single most effective method of redirecting non-price competition toward improvements in quality, safety, and design innovation.

215. *Aspen Skiing*, 472 U.S. at 604.

216. *Id.* at 605 n.32 (quoting 3 P. AREEDA & D. TURNER, ANTITRUST LAW 78 (1978)) (emphasis added).

217. S. 776, 101st Cong., 1st Sess. (1989). See also Will, *As You're Reading This, Three Smokers Will Die*, Buffalo News, Feb. 27, 1990, at B3, col. 1.

As related more directly to conventional antitrust law, perhaps it is time openly to confront the gap between the traditional model of price competition and a real world characterized by competition in the production of imagery. Stigler and others pretend that gap away by, in effect, positing advertising as the commodity consumers choose to purchase. Unless one retreats into that tautological ploy, however, the ubiquity of oligopoly, with its tendency to substitute advertising for price competition, calls into question the very meaning of competition, and therefore, the real goals of antitrust law.

Once confronted, the analytic implications of the gap between traditional models and oligopolistic reality might flip conventional antitrust assumptions on their head. Implicit in antitrust doctrine, for example, is the assumption that oligopoly is preferable to monopoly. Should that assumption be reexamined in light of the fact that oligopolists, achieving price stability, are under competitive pressure chiefly to do more advertising? For example, when Maxwell House alone dominated the Eastern United States market in coffee, its advertising budget was apparently sufficiently limited that small firms could continue to offer their own, locally popular brands of coffee. It was the competitive entry of another nationally advertised brand, Folgers, which led advertising costs to skyrocket and local companies to drop out of the market. The zeal of FTC liberals to attack Maxwell House and protect Folgers in that context may have been misguided. So too with the "potential competition" rationale of *Clorox*. If Procter and Gamble had, in fact, introduced a new brand of bleach and advertised it heavily, consumers would have been subjected to an advertising war between giants. Advertising battles are not necessarily a good thing, especially in light of the tendency of such wars to drive out local firms which could otherwise coexist with a monopolist under no advertising pressure. On the other hand, the predatory deployment of monopolist advertising advantages to drive out local, fledgling firms, as in *ReaLemon*, is at least as pernicious in effect as oligopolist advertising wars. The point here is that "competition" might not be an unqualified social goal if all it means is competition in expensive advertising and higher costs of production: Judgments must be made about the nature and effects of that competition "on the merits."

The current market in beer lies somewhere between *Maxwell House* and *ReaLemon*, providing an illustration of the complexity of the normative judgments that might be made. In 1980, Anheuser-Busch controlled 28% of the market;²¹⁸ by the end of 1989, it controlled 42%, and is expected by experts to control at least 50% by the mid-1990s. Its closest

218. Smith, *America's Most Admired Corporations*, FORTUNE, Jan. 29, 1990, at 58.

competition comes from Miller (22%). Coors has 9% and may buy Stroh's (10%) in the near future.²¹⁹ Many once-familiar brands already have dropped out of the market. In order to compete with Anheuser other beer makers began to lower prices; in retaliation, Anheuser was able to cut its own prices and anticipate an increase in market share, given its own competitive edge based on successful advertising. "So price as a tool for our competition is no longer there anymore," Mr. Busch was quoted as explaining, "it is no longer effective."²²⁰ In a market that does not anticipate an overall increase in beer consumption, Anheuser strives to increase sales through advertising designed to woo consumers from other brands. The famous Clydesdales, the St. Louis Cardinals, and an expanding group of family theme parks help maintain the corporate image. In addition, Anheuser spends about \$400 million a year in media ads, more than Miller and Coors combined. Roughly two-thirds goes to sports advertising; Anheuser is a sponsor, usually the exclusive beer sponsor, for 23 of the 26 Major League Baseball teams and over 300 college sports teams.²²¹

If it reaches its goal of 50%, Anheuser will still, of course, not be a "monopolist." Does its position combined with advertising advantages nevertheless present an antitrust problem? As with *ReaLemon*, it has the clout to inhibit price competition by price cuts combined with deployment of a well established imagery advantage. At this point, however, with most local breweries already driven out of the market, protecting Miller, Stroh's, and Coors from domination might only protect their option to engage in competitive national advertising. Uncontested Anheuser domination might be less socially destructive, especially given the problem of teenage drinking, which is no doubt encouraged by macho beer ad imagery during sporting events.

In terms of traditional antitrust criteria—pro-competitive vs. anti-competitive, gain or loss in consumer welfare—the beer market simply evades analysis. It does seem plausible, however, to suggest that the vast sums spent on advertising amount to economic waste of resources that cannot and will not be redirected toward more value-enhancing activities through market forces alone. In this sense, then, one might conclude that "competition" is not working in the beer industry—that the market in a sense, has become stuck. More broadly, in a case like the *Cereal Case*, in which three powerful firms engage in the endless proliferation of brands, all marketed with frenetic advertising appeals, perhaps courts

219. Kleinfield, *The King of Beers Raises the Ante*, N.Y. Times, Dec. 24, 1989, § 3, at 1, col. 2 (late ed.).

220. *Id.*

221. *Id.*

and the FTC should ask whether the practice requires affirmation as competition (by definition), or whether it might be challenged as having little to do with responsible capitalist production.²²² Is there some remedy, other than Japanese competition?

By way of example illustrating the converse, reflect on how antitrust law might deal with a voluntary agreement by cereal manufacturers to limit advertising expenses and refrain from introducing new brands absent new entry, with the possible effect of stabilizing market shares. Antitrust as abstraction would condemn the arrangement as tantamount to cartel. To uphold the agreement, however, would be to make a particular judgment about advertising as competition, a judgment that might see the agreement as an example of responsible capitalism rather than as anti-competitive. Similarly, what of an agreement to engage in joint product advertising rather than competitive brand advertising, at least beyond a certain level? In fact, might such a plan be *imposed*, as ultimately less anti-competitive than heavily advertised brand proliferation?

Antitrust law is premised on the assumption that we are not socially ill-served by capitalism, but rather by capitalism run rampant. This assumption means that hard contextual judgments necessarily are required, and whatever its strength as a critique of liberal formalism, the neo-formalism of law-and-economics is ill suited to making these judgments.²²³ The liberals who challenged advertising during the 1960s and 1970s made some mistakes: To the core, they were rationalists and positivists who could not quite believe that image and desire could be more real, even for economics, than the thing itself.²²⁴ (Conservatives in America

222. Even Patrick Buchanan, in a recent column about a different issue (take-overs), suggested the normative category of "vulture capitalist." In a similar spirit, could not the FTC have legitimately concluded that the cereal market in the 1960s, like its takeover counterpart in the 1980s, had reached a level of unacceptable and wasteful frenzy? See Buchanan, *Vulture Capitalists Have Left The Nation's Economy At Its Knees*, Buffalo News, Feb. 22, 1990, at C3, col. 1. Another conservative, George Will, recently wrote a scathing attack on our "flaccid" policy with respect to cigarette advertising, citing especially the efforts to target the young and the least educated. Under pressure, R.J. Reynolds recently withdrew plans to market an "Uptown" brand to blacks in inner cities, but it also acknowledged plans to market a new "Dakota" brand to "virile" females, by which it largely means uneducated. Senator Bill Bradley has proposed denying tax deductions (\$2.5 billion annually) for tobacco advertising. The companies spend \$6.9 million a day on advertising and promotion, which manipulatively "plays upon teenagers' desire for autonomy and anxiety about social acceptance and sexual allure." Will, *supra* note 217.

223. For a good, brief but critical summary of the inherent limitations of the currently fashionable "Chicago" school of economic thought, see R. BACKHOUSE, *A HISTORY OF MODERN ECONOMIC ANALYSIS* 393-96 (paperback ed. 1987).

224. In 1859, Oliver Wendell Holmes, Sr., in contrast, understood that photography meant a new release of image from time and space. "Form," he said "is henceforth divorced from matter." See S. EWEN, *supra* note 154, at 24-25. Given modern physics, the image is in a sense *more* real, since it is released from the particular constraints of how humans perceive the world—that is, in fixed terms of matter, linear time, and physical space.

have understood that fact, which is why they have been winning presidential elections.)²²⁵ Yet, the liberals are to be celebrated because they did understand that antitrust law is about the willingness to make responsible choices, choices about markets and, therefore, also about power and the shaping of our culture.²²⁶

It has become something of a cliché to describe the 1980s as the decade of spend-thrift greed, yet, the economic figures (even leaving aside morality) are, in fact, sobering: environmental destruction, savings and loan bailout costs, nuclear waste clean-up costs, a low savings rate, mounting burdens of public and private debt, and dismal failure to invest in the basic resources of a sound economy, like education, public health, and the welfare of our children.²²⁷ Advertising is not to blame for all of those economic mistakes, but it does reflect and reinforce the culture that produced them,²²⁸ and it has been complicit in effectively ruling them out of the bounds of consumer choice. If antitrust law is really about assuming responsibility for the shape of our economic life, advertising should be on the agenda for reconsideration.

225. Of course the use of advertising in political campaigns raises hard questions about the relation between image and substance, control and consent. It has now become commonplace to point out that politics in America has become a politics of media images, with voters reduced to consumers choosing a packaged product. "The chasm between surface and reality widens." See S. EWEN, *supra* note 154, at 267-71.

226. While Eastern Europe is learning from us about such notions as market pricing, we might learn from some of them about the meaning of responsibility. Consider, for example, President Vaclav Havel's recent speech before Congress. Rejecting the traditional Marxist position that being precedes consciousness, he then said,

For this reason, the salvation of this human world lies nowhere else than in the human heart, in the human power to reflect, in human meekness and in human responsibility. . . . We are still incapable of understanding that the only genuine backbone of all our actions, if they are to be moral, is responsibility. Responsibility to something higher than my family, my country, my company, my success—responsibility to the order of being where all our actions are indelibly recorded and where and only where they will be properly judged.

TIME, Mar. 5, 1990, at 14, 15 (publishing the text of Havel's speech).

227. See, e.g., REPORT BY THE CHAIRMAN OF THE JOINT ECONOMIC COMMITTEE OF THE CONGRESS, 101st Cong., 1st Sess. (Dec. 28, 1989).

228. Ironically, as we celebrate the seeming world triumph of capitalism, we may be compelled to confront the serious defects in our own culture-specific form of economic activity. See, e.g., Fal-lows, "Wake Up, America!, N.Y. REV. OF BOOKS, Mar. 1, 1990, at 14.

