THE STREETCAR DILEMMA: PREVENTING INCURABLE HARM THROUGH TIMELY ENFORCEMENT OF THE ANTITRUST LAWS

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I. INTRODUCTION

In the United States, free market competition and consumer choice are uniquely safeguarded through the antitrust laws contained in the Sherman and Clayton Acts. The antitrust laws enable prosecutors (at the Department of Justice and the Federal Trade Commission) and private citizens to prevent and punish anticompetitive activities. As legal tools, they are only as good as the prosecutors that wield them. These laws are capable of reversing anticompetitive conduct, and, in many cases, preventing the negative effects which emanate from that conduct. When it comes to preventing those effects, the timing of legal action is often paramount. There is one cautionary tale that vividly illustrates this proposition, particularly because it continues to cast a shadow today. This Commentary will revisit *United States v. National City Lines*, in which the government successfully prosecuted a notorious conspiracy among the nation's largest corporations—but not before the conspiracy had taken its intended toll by destroying dozens of urban rail systems.

This Commentary will start by setting forth the law (the Sherman Act) and policy underlying the antitrust enforcement in *National City*. It will then tell the tale of *National City*, a case which led to the conviction of nine corporations for violating section 2 of the Sherman Act. Finally, it will analyze the outcomes of *National City*, assessing to what extent the government's prosecution accomplished the underlying purposes of the antitrust laws. This section will begin to illustrate the incurable effects of the *National City* conspiracy. Those effects erode at the ideals promoted by the antitrust laws as

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much as the underlying conspiracy itself. Yet only swift enforcement at an early stage of the conspiracy would have properly safeguarded those ideals and prevented *National City's* scars.

II. INTRODUCTION TO PERTINENT LAW

A. *The Sherman Act*

Under Sherman Act section 1, any agreement (any "contract, combination in the form of a trust or otherwise, or conspiracy") that restrains interstate trade or commerce is illegal, and the parties to such an agreement may be prosecuted as felons and subjected to fines and imprisonment.[1]

Under Sherman Act section 2, all monopolizing behavior, attempts to monopolize, and agreements or conspiracies to monopolize any part of interstate trade or commerce is illegal, and may similarly be punished as a felony.[2]

Thus, proof of an agreement between two or more parties with the intent to violate the law forms the basis of a section 1 violation; it is irrelevant whether the parties were actually able to violate the law.[3] While section 1 hinges on the existence of an agreement, section 2 hinges on proof of monopolization by an actor, or actors, possessing market power (a predicate to the ability to monopolize). A section 2 violation may involve multiple parties (who may or may not have an agreement) or may be committed by a single actor.[4]

Conduct that violates section 1 includes: fixing prices (or controlling price by some other means),[5] exchanging price data or other information,[6] splitting up a market (geographically or by product),[7] vertically controlling price[8] or supply,[9] boycotting as a group,[10] bundling (or 'tying') products,[11] and forming exclusive

1. 15 U.S.C. § 1 (2006).

2. *See id.* § 2.

3. *See id.* § 1; KEITH N. HYLTON, ANTITRUST LAW 28 (Cambridge 2003). Further, direct proof of an agreement may not be required; "conscious parallelism" or other circumstantial, conduct-based evidence may often suffice. *See, e.g.*, Theatre Entrs. v. Paramount Film Dist. Corp., 346 U.S. 537 (1954); Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

4. 15 U.S.C. § 2; HYLTON, *supra* note 3, at 28-29.

5. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

6. *See, e.g.*, United States v. Container Corp. of Am., 393 U.S. 333 (1969).

7. *See, e.g.*, United States v. Topco, 405 U.S. 596 (1972).

8. *See, e.g.*, Leegin Creative Leather v. PSKS, Inc. 551 U.S. 877 (2007).

9. *See, e.g.*, Cont'l T.V. v. GTE Sylvania, 433 U.S. 36 (1977).

10. *See, e.g.*, Klor's v. Broadway-Hale, 359 U.S. 207 (1959).

11. *See, e.g.*, Eastman Kodak Co. v. Imagine Technical Servs., 504 U.S. 451 (1992).

dealing and/or requirements contracts.[12] Whether such agreements are illegal depends on the courts' application of the judicially developed test for the particular type of agreement.[13] Built into each test is the recognition that the conduct sub judice may raise prices, restrict output, decrease consumer choice, block out future competition (new entrants), stifle innovation and the incentives for vigorous competition, and/or facilitate further collusion and/or monopolization, but may also offer myriad potential benefits by creating a market, providing a product that may not otherwise exist, or providing coordination that is uniquely warranted in a particular industry.[14]

Meanwhile, section 2 violations occur when a firm with market power[15] engages in monopolizing,[16] exclusionary,[17] or predatory[18] conduct. Generally speaking, this occurs when large firms use their size (or their combined size with other firms) in order to increase their market share or otherwise shun competition. One of the most basic and brute ways is through predatory pricing;[19] another equally basic way is to deny competitors the use of an essential facility for market participation. A firm may also run afoul of Sherman Act section 2 if it refuses to do business with certain firms (i.e. a supplier) in order to keep them out of a market. The common thread is that the monopolizer's conduct goes beyond good, clean, meritorious competition and becomes unreasonable and buccaneering in the

12. *See, e.g.*, Standard Oil Co. of Cal. v. United States, 337 U.S. 293 (1949). Conduct may potentially violate multiple sections of the Sherman Act, and other statutes; most commonly, an agreement that would violate section 1 is transformed into a section 2 violation when it is between or among parties with market power, the danger being that the conduct will be especially potent and will easily beget further market power.

13. *See* 15 U.S.C. § 2; Theatre Entrs. v. Paramount Film Dist. Corp., 346 U.S. 537 (1954); Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752; Nat'l Collegiate Athletic Ass'nb v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); United States v. Container Corp. of Am., 393 U.S. 333 (1969); United States v. Topco, 405 U.S. 596 (1972); *Leegin*, 551 U.S. 877; *Cont'l T.V.*, 433 U.S. 36; *Klor's*, 359 U.S. 207.

14. *See, e.g.*, *Leegin*, 551 U.S. 877.

15. *See* United States v. E.I. DuPont, 351 U.S. 377 (1956); United States v. Grinnell, 384 U.S. 563 (1966).

16. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001) (en banc).

17. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

18. The most notable type of this behavior is predatory pricing, where a firm with market power prices below cost, enduring short-term losses in exchange for the long-term gain of a market free from a once-dangerous competitor who simply could not endure such low prices. *See* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

19. *See id.*

course of constructing barriers or pushing out competition. Such restrictive tactics depart from rationality in all but the fact that the ultimate goal is larger long-term profits for the firm.[20]

In *National City*, the government charged the defendants with violating both sections of the Sherman Act, but the jury found only a section 2 violation, finding that the contracts among the defendant firms were monopolizing.[21]

B. The government's ability to enjoin a violation

Critically, Sherman Act section 4 provides that:

> The several district courts of the United States are invested with jurisdiction **to prevent and restrain violations** of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys in their respective districts, under the direction of the Attorney General, to institute proceedings in equity **to prevent and restrain such violations**. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited.[22]

The Supreme Court has stated that "[t]he sole function of an action for injunction is to forestall future violations."[23] An injunction cannot undo past wrongs. While an injunction is capable of preserving the status quo, it is incapable of restoring the status quo ante.[24] This distinction is critical for understanding the reason that *National City* had so many "incurable effects."[25]

This remedy is powerful in light of leniency with which it may be granted[26] and the fact that "when the Government is the civil plaintiff, the scope of the interests to be protected by an injunction is as broad as the national economy," and bounded only by the issues raised by the pleadings.[27] Ultimately, a court must "steer [the] narrow course between the hazards of a failure to cure the evil on one side and unwarranted and oppressive control on the other."[28]

C. Policies advanced by antitrust law

Scholars and practitioners debate what policy interests justify

20. *See, e.g., Microsoft Corp.*, 253 F.3d at 58-59.

21. *See infra* Part II. The Clayton Act, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53, was not applied in *National City*.

22. 15 U.S.C. § 4 (emphasis added).

23. United States v. Or. State Med. Soc'y*,* 343 U.S. 326, 333 (1952) (quoted in United States v. Nat'l City Lines, 134 F. Supp. 350, 356 (1955)).

24. *Nat'l City Lines,* 134 F. Supp. at 356.

25. *See infra* Part III.

26. HYLTON, *supra* note 3, at 56.

27. *Nat'l City Lines*, 134 F. Supp. at 356.

28. *Id.* at 355.

antitrust law and guide its enforcement.[29] This Commentary takes a limited stance in arguing that each justification may be more or less applicable depending on the circumstance, and that there is more harmony among the justifications than some of the debaters will admit.

Maximizing consumer welfare is the foremost goal of antitrust law. Lately, this has been equated to maximizing efficiency—a view based on economic theory that is growing in prominence.[30] Efficiency-focused justifications have spurred criticism as being too basic to encompass the spirit and potential usage of the law.[31] Indeed, other policy goals have been present since the beginnings of the antitrust laws, including "the political and social values of dispersed control over economic resources, multiple choices for producers and consumers free of the arbitrary dictates of monopolies or cartels, equal opportunity, equitable income distribution, and 'fairness' in economic dealings."[32] Taking a harmonizing view, antitrust scholar Phillip Areeda wrote that these goals are congruent with the goal of efficiency and maximizing consumer welfare.[33] Indeed, it is both fair and economically efficient (and thus beneficial to consumers) to eradicate behavior that erects barriers to participation in a market, says Areeda. To Areeda and others, much of the debate seems to center on a scholar or advocate's choice of lens with which to view the law.[34]

In truth, antitrust law has the potential to serve several policy priorities at once. Perhaps "maximizing consumer welfare" is a useful term—as long as one acknowledges that it is not defined solely by measures of efficiency. In fact, protecting the competitive market creates myriad benefits, promoting consumer welfare in ways unrelated to efficiency. Consumers care about the number of choices

29. Phillip E. Areeda, *Introduction to Antitrust Economics*, *in* ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS 45, 56-59 (1984).

30. Richard Posner, *The Chicago School of Antitrust Analysis,* 127 U. PA. L. REV. 925 (1979). This growth in prominence has warranted a greater emphasis on a solid grasp of the economics underlying monopoly and the use of market power. *See* HYLTON, *supra* note 3.

31. *See* Walter E. Adams & James W. Brock, *The Antitrust Vision and its Revisionist Critics*, 35 N.Y.L. SCH. L. REV. 939-46 (1990); Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust*, 125 U. PA. L. REV. 1214, 1218 (1977).

32. Phillip E. Areeda, *Introduction to Antitrust Economics,* 52 ANTITRUST L.J. 523, 534 (1983).

33. *Id.*

34. *Id.* (adding that "[i]n antitrust, as elsewhere in the law, we must be careful about unqualified absolutes."); Louis B. Schwartz, *On the Uses of Economics: A Review of the Antitrust Treatises*, 128 U. PA. L. REV. 244, 266-68 (1979) (cautioning against application of the antitrust law based on economic theory and analyses alone).

available to them, the quality of said choices, and, to some extent, the community impacts associated with a product or service. If, for example, consumers in a market prefer a product that current suppliers are not providing, and the reason for the unavailability of such a product is the current suppliers' anticompetitive conduct in blocking new entrants or stifling innovation, then enforcement of the antitrust laws against such conduct will benefit consumers by ensuring them the broader range of options they seek.

Finally, by "community impacts" I mean to embrace the original impetus behind the antitrust law; the first "trust busters" championed, as many Americans still do today, the benefits of dispersed control of resources and of that which is small and local rather than large and distant.[35] When huge multinational corporations leverage themselves into new geographic and product markets, threatening the existence of smaller participants (who may provide employment and routinely invest in a locality) in such a market, their conduct may be anticompetitive from both an efficiency-based and a moral viewpoint. The tension between a "community impacts" view and a simpler, laissez-faire view is seemingly encompassed by the debate on the relative merits of Walmart (lowest possible prices thanks to greatest efficiency) versus "Main Street" retail (higher prices but greater product variety, lower barriers to competition, and unique community-building value). Keeping a measure of this antitrust orthodoxy may be useful as the country continues to embrace, and be embraced by, a globalized economy with all of its benefits and setbacks.[36]

III. *UNITED STATES V. NATIONAL CITY LINES, INC., ET AL.*

In 1939, National City Lines, Inc. ("National") owned and operated twenty-nine local transit companies located in twenty-seven different cities in ten states. It was in the midst of rapid growth, having already grown considerably from its "humble beginning in 1920, consisting of the ownership and operation of two second-hand

35. *Cf.* Sullivan, *supra* note 31, at 1220. ("Many of the forces that now affect [Americans] are less personal, more remote, than they used to be. A people may care about these changes as well as about changes in efficiency and market power. They may expect policy about industrial structure to deal with their concerns, and it would be incongruous to suppose that antitrust would not reflect such solicitude.").

36. *See id.* at 1223 ("Americans continue to value institutions the scale and the workings of which they can comprehend. Many continue to value the decentralization of decision making power and responsibility. Many favor structures in which power in one locus may be checked by power in another. Antitrust, broadly perceived and sensitively administered, may contribute to the realization of these values. So doing, it may reduce various of the pressures for fuller governmental regulation of commercial and industrial activity.").

busses in Minnesota."[37] Summarizing the trial record, the district court wrote: "National was engaged in the pursuit of taking over local transportation systems in various cities throughout the country. Most of the companies taken over employed street cars, and it was National's practice to convert these systems to the use of motor buses."[38]

Starting around 1938, National financed its growth through tactics that would later form the basis of government prosecution.[39] National needed to raise large amounts of capital to continue acquiring streetcar systems and converting them to bus systems.[40] "Accordingly it devised the plan of procuring funds from [the] manufacturing companies whose products its operating companies were using constantly."[41] National approached the six large companies who supplied its new bus systems and stood to benefit from National's business plan.[42] It approached General Motors and Mack Manufacturing Corporation, which built busses. It approached Firestone, which sold tires. It also approached Phillips Petroleum and Standard Oil Company (through its subsidiary, Federal Engineering Corporation), which would, of course, become suppliers as each transit system was converted to the use of petroleum products.[43]

National obtained large investments for itself and its two subsidiaries—Pacific City Lines (organized in 1938 to operate West Coast transit systems) and American City Lines (organized in 1943 to operate larger metropolitan systems)—by entering into a series of requirements contracts with each of its six above-named suppliers.[44] In exchange for the suppliers' purchase of preferred stock in National and its subsidiaries, National's subsidiaries agreed to terminate all existing supplier contracts and to instead purchase all of their busses, tires, and oil from its six new shareholders.[45] National further agreed that its subsidiaries would not "purchase any new equipment using any fuel or means of propulsion other than gas."[46]

37. United States v. Nat'l City Lines, Inc., 186 F.2d 562, 565 (7thCir. 1951).

38. United States v. Nat'l City Lines, Inc., 134 F. Supp. 350, 356-57 (N.D. Ill. 1955).

39. *Id.* at 357.

40. 186 F.2d 562, 566 ("Its capital was limited . . . it could not successfully finance the purchase of an increasing number of operating companies in various parts of the United States.").

41. *Id.*

42. *Id.* at 565-66.

43. *Id.*; *see also* 134 F. Supp. at 357.

44. 186 F.2d at 565.

45. *Id.*

46. *Id.*

These contracts would, much later, constitute the basis of a conviction under the Sherman Act. In the mean time, National kept growing; by 1947, it owned and controlled forty-six transit systems in forty-five cities across sixteen states.[47]

Finally, nearly ten years after National and its suppliers formed its first illegal requirements contract, the government took action. It indicted National, its subsidiaries, and the six suppliers on a first charge of conspiracy to control "a substantial number of" public transportation systems while also eliminating competition in the sale of busses, tires and petroleum production supplying the same, under section 1 of the Sherman Act.[48] In its second count, the government alleged that National, its subsidiaries, and the six suppliers conspired to monopolize sales of busses, tires, and petroleum products to the forty-six transit systems at issue, in contravention of section 2 of the Sherman Act.[49]

A trial on the felony charges occurred in 1949, with the jury finding only a violation of section 2 of the Sherman Act. In 1953, a civil judgment was entered in the same fashion. The convictions and judgments found that "a violation of Section 2 of the Sherman Act [was] conclusively established for the purposes of this case and that this violation consisted of a conspiracy to monopolize the sale of supplies used by the local transportation companies controlled by the City Lines defendants."[50] Simply stated: the defendants were guilty of using their market power and their exclusive dealing contracts to block out competition, with the intent to monopolize the sale of supplies for bus systems.

In late 1954, the district court entered a consent decree in which the government and the defendants agreed that National would cancel the remaining supply contracts between it (or its subsidiaries) and the supplier defendants, and National was enjoined from entering into any further supply contracts in which the supplier's financing of the transit company's operations was a condition.[51] Thus, the court reversed the offensive conduct and barred any such conduct going forward.

Nevertheless, the government thereafter sought an injunction against the suppliers, which led to a 1955 ruling that the government could not obtain any further injunction.[52] The court articulated the

47. *Id.*
48. *Id.* at 564.
49. *Id.*
50. United States v. Nat'l City Lines, 134 F. Supp. 350, 353 (1955).
51. *Id.*
52. *Id.* at 362.

standards for imposing an injunction,[53] and explained why one was not warranted since the violative contracts had virtually all expired and the suppliers had sold their stakes in the transit companies.[54] The anticompetitive conduct had ceased; "much ha[d] already been accomplished by the Government," leaving nothing further they could do at that point. [55] Indeed, the offensive conduct had ceased thanks to the consent decree but the intended damage had been done.

IV. THE SCARS OF *NATIONAL CITY* AND THE COSTS OF LATE ENFORCEMENT

A. The Incurable Effects

In the ten years that the illegal funding mechanism among National and its suppliers went undetected, or at least unprosecuted, dozens of urban transit systems were destroyed. When the government finally indicted the participants in this scheme, the district court became empowered to end the illegal contractual arrangements; to decree that no similar contracts could be formed in the future; to order that the supplier defendants divest their shares in the transit companies,[56] *but not* to order the replacement of the rails that were removed or the streetcars that were scrapped. In this sense, the effects of the anticompetitive conduct were incurable (and would continue to be, constituting a huge cost to society).

While there is open debate over the nature of the conspiracy alleged in *National City*,[57] what is not in debate (and what is relevant for purposes of this Commentary) is the following: National removed streetcar systems in at least twenty-three cities (by its own count), and partially scrapped the streetcar systems in several additional major cities, such as Los Angeles. The cars were sold or scrapped, and the rails were torn out. The egregiousness of this conduct aside, the most important fact is that it resulted from anticompetitive contracts which the government could have enjoined a decade earlier and thereby prevented these effects.

53. And the policy underlying those standards. *Id.* at 355-56. *See supra* Part I.B and *infra* Part III (considering how the same standard justifies early action to prevent damages of anticompetitive behavior).

54. *Nat'l City Lines,* 134 F. Supp. at 357-58 (explaining how each supplier had pulled out of the formerly offensive agreements); *see also id.* at 361-62 ("[T]here appears to be no cognizable probably of a resumption of the requirements relationships. . . . The unlawful investments and requirements contracts have been divested. The court is not persuaded that more is necessary to protect the public . . . .").

55. *Id.* at 362.

56. The court did all of these things in the 1954 consent decree.

57. In particular, whether General Motors was the architect of a vast scheme to deprive American cities of quality public transit and eliminate competition to its car sales— these debates are in desperate need of more thorough research.

In 1946, retired Navy Commander E. Jay Quinby wrote a 36-page letter addressed to "The Mayor; The City Manager; The City Transit Engineer; The members of The Committee on Mass-Transportation and The Tax-Payers and The Riding Citizens" of practically every American city. His letter turned out to be the crucial exposé of National's conduct that may well have spurred on the government's prosecution. In it, Quinby described the incurable effects of National's anticompetitive conduct:

> You will realize too late that the electric railway is unquestionably more comfortable, more reliable, safer and cheaper to use than the bus system. But <u>what can you do about it once you have permitted the tracks to be torn up? Who do you think you can find to finance another deluxe transit system for your city . . .</u> ?[58]

In the history of American transportation, truer words have never been spoken.

Author Guy Span addressed Quinby's query from a modern viewpoint:

> With almost sixty years of hindsight, we can now answer that question. The taxpayers of the Bay Area funded billions for BART. The Feds (and locals) funded billions and billions for new electric transit systems in San Jose, Sacramento, Los Angeles, Dallas, Washington, D.C., Baltimore, Denver, Portland, and others–all cities whose systems had been unwisely removed. Quinby was right.[59]

Indeed, the cost of replacing the infrastructure senselessly removed by National and its subsidiaries has been onerous. Obtaining dedicated rights of way and installing electrified rails constitute massive barriers to entry,[60] surmountable only with levels of public funding rarely available at any level of government today.

Several cities, therefore, saw the course of their history changed by the actions of National and its subsidiaries. Los Angeles is an excellent example. There, National's West Coast subsidiary, Pacific City Lines, "began [in 1940] to acquire and scrap portions of the $100 million Pacific Electric system," a regional rail system connecting Los Angeles to places like Burbank and Pasadena.[61] Then, in 1944,

58. Guy Span, S.D., *Paving the Way for Buses – The Great GM Streetcar Conspiracy,* http://www.baycrossings.com/Archives/2003/04_May/paving_the_way_for_buses_the_great_gm_streetcar_conspiracy.htm (last visited Dec. 21, 2012) (emphasis added).

59. *Id.*

60. *See infra* Part III.B (ii).

61. BRADFORD C. SNELL, AMERICAN GROUND TRANSPORT: A PROPOSAL FOR RESTRUCTURING THE AUTOMOBILE, TRUCK, BUS & RAIL INDUSTRIES, n.202 (1974). Snell, a government attorney, has been criticized for making allegedly overzealous or poorly researched claims in this paper. At the same time, however, few thorough

American City Lines (National's offer affiliate) purchased the street rail system of downtown Los Angeles, "scrapped its electric transit cars, tore down its power transmission line, ripped up the tracks, and placed GM diesel buses fueled by Standard Oil on Los Angeles' crowded streets."[62] This thorough "motorization" of the country's second largest city can be looked to as the cause of modern Los Angeles's notoriously congested freeways, onerous construction spending, and extreme smog. Mitigating these woes has been financially untenable; even in the 1970s, the estimated cost of constructing a rail system less than one-sixth the size of the earlier Pacific Electric system was over $6 billion.[63]

Simply stated, the cities that had their rail systems removed by National would thereafter face the massive upfront cost of constructing new rails in order for any rail transit to be offered in the future. As a result, these cities have either endured such costs (generally through taxpayer money) or endured an existence without clean, reliable transit. A precise accounting of how many rail systems were removed, and the costs (and timeframes) of replacing them, would be a worthwhile digression, but would also entail an entirely new research project.

The remainder of this Commentary will discuss how these incurable effects are themselves highly offensive to the policy goals of the antitrust laws. In doing so, it will underscore the incredible potential of the Sherman Act to prevent anticompetitive harm, and the equally incredible peril of delayed detection of, or enforcement against, anticompetitive conduct.

B. *The effects of the* National City *conspiracy offend the goals of antitrust*

i. *National City* reduced the choices available to consumers

"Antitrust law protects a competitive array of options in the marketplace, undiminished by artificial restrictions, such as price fixing or anticompetitive mergers."[64] A firm with market power, however, is able to "significantly change the mix of price/quality/variety choices that would arise from competition."[65]

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accounts of GM and National's conspiracy exist, and some of his more basic observations continue to hold water.

62. *Id.*

63. *Id.*

64. Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L. J. 175, 181 (2007).

65. *Id.* "What choice theory does do is prohibit business conduct that harmfully and significantly limits the range of choices that the free market, absent the restraints being challenged, would have provided." *Id.*

Indeed, the mission statement of the Antitrust Division of the Department of Justice states: "Competition in a free market benefits American consumers through lower prices, better quality and greater choice."[66]

Without question, an anticompetitive conspiracy whose effect is the elimination of an entire mode of transportation from a city directly offends the policy goal of protecting consumer choice. In particular, the elimination of rail transit drastically limited the options of riders who, due to their income or geography, have no choice but to use one of the limited available modes of public transportation. Thus, the wholesale removal of a rail system is a particularly egregious offense against consumer choice. By failing to protect against this effect (or rather, goal) of the anticompetitive contracts in *National City* through timely action and a preventative injunction, the government failed to enforce the antitrust laws toward a key policy end. Had the government detected and enjoined, pursuant to Sherman Act section 4, the illegal contracts among National and its suppliers when they were formed, these losses to consumers would have been prevented.

ii. *National City* created a barrier to entry

A barrier to entry is any factor that allows firms earning a profit to deter or prevent others from entering and competing, notwithstanding the profitability of the market.[67] The costs of entering, or "starting up," a competitive business, particularly the fixed costs, are classic barriers to entry.[68] In addition, if there is some "essential facility" to which a competitor needs access in order to compete, then any conduct that keeps them from accessing it or which otherwise keeps competition out through the abuse of that facility may be an anticompetitive barrier to entry.[69] Generally, this involves infrastructure such as transmission lines, or, in this case, roads and railroad tracks.

Certainly, conduct which *destroys* the facility essential for the provision of a service—here, the rails and electric lines used by street rail operators—and which thereby forces any new entrant to build

66. *Mission: Antitrust Laws,* UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, http://www.justice.gov/atr/about/mission.html (last visited Dec. 21, 2012) (emphasis added).

67. *See generally* Daniel E. Lazaroff, *Article: Entry Barriers and Contemporary Antitrust Litigation,* 7 U.C. Davis Bus. L.J. 1, 2-4 (2006).

68. *See* Metronet Servs. Corp v. Qwest Corp., 2001 U.S. Dist. LEXIS 7436, *17-18 (W.D. Wash. Apr. 16, 2001) (discussing the various startup costs that new entrants competing against a former monopolist would naturally have to face, but eventually be able to overcome).

69. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

entirely new infrastructure, constitutes a particularly ruinous barrier to entry. Unlike some barriers that new entrants have hope to eventually surmount,[70] a barrier that requires a potential competitor to rebuild a public good that the existing competitors tore down leaves no hope for any entrant. In standing by while a public good was destroyed and a massive barrier to entry was erected, rather than preventing such harm to competition and consumer choice through vigorous use of the Sherman Act, the government neglected to stand up for a basic goal of the antitrust laws.

iii. *National City* promoted centralized and concentrated—rather than dispersed—control of resources

After the series of acquisitions funded by the anticompetitive contracts in *National City,* the same companies that provided and maintained cars and trucks for personal consumption also provided mass transit. Companies such as General Motors and Standard Oil horizontally leveraged their market power in their respective industries into market power in a related and competing sector—mass transit. Yet, "a firm may not employ its market position as a lever to create or attempt to create a monopoly in another market."[71] In addition, the dozens of acquisitions of transit companies made possible[72] by the illegal contracts among National and its suppliers created extreme concentration across the transportation sector (particularly for General Motors), which itself should have raised red flags and given all the more reason for swift, injunctive action.

iv. *National City* had disastrous effects on communities

The connection between the loss of urban transit and the fall of most U.S. cities in the 20th century could be the subject of its own paper. While many things went awry in U.S. cities from the 1930s through 1980s, one of the first, precipitating blows was the dismantling of rail transit and the corresponding facilitation of automobility. Though popularly embraced by many at the time, the long-term effects are still lamented today. "The misguided and unfortunate result of such thinking was that Americans would no longer have transit options and that the car would become a prerequisite to survival, with disastrous consequences for energy

70. *See Metronet*, 2001 U.S. Dist. LEXIS 7436, at *18.

71. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. N.Y. 1979). It appears that, following *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004), monopoly leveraging is a strong badge of anticompetitive behavior but is not violative conduct by itself.

72. United States v. Nat'l City Lines, Inc., 186 F.2d 562, 566 (7th Cir. 1951) (describing how the funding scheme under the requirements contracts was needed to make National City's acquisition plan feasible).

consumption and traffic deaths."[73] Meanwhile, with the rail lines having been torn up, the government decided it was wiser to subsidize road infrastructure rather than replacing the rails, thus facilitating the most rapid suburbanization the world has ever seen.[74] Though the antitrust enforcers of the 1940s could not have known all of this, they must have sensed something grave in the widespread destruction of what had been the standard mode of inner city transportation for decades.

V. CONCLUSION

The foregoing analysis goes beyond that which was required of the jury in *National City*, in order to put a spotlight on a lesser appreciated aspect of that prosecution: its timing. In so doing, this analysis of *National City* illustrates the potential of the Sherman Act, especially the injunctive powers in section 4, and the peril of its non-use. It is not productive to condemn the government for being a decade late to the scene of a massive economic crime. It is productive, though, to appreciate the preventative capabilities of our antitrust laws—whose enforcement can change the course of history—to ensure that they are used as intended and not squandered in the face of anticompetitive conduct that wreaks incurable harm.

The Sherman Act was developed and implemented to protect markets by deterring and punishing conduct that selfishly perverts and distorts a market's functioning. Without question, one of the bleaker moments in the history of that Act's enforcement was in 1955, when, after at least twenty-three urban transit systems had been obliterated, the United States District Court for the Northern District of Illinois opined that Sherman Act section 4 could offer no further remedy, but that the government had accomplished "much" in that "the unlawful investments and requirements contracts have been divested."

Thanks to *National City,* those charged to be the caretakers of our markets now know that, when faced with the selfishness of the country's largest corporations teaming up to destroy their last remaining competition, the only acceptable response is a timely one.

73. *See* Kenneth T. Jackson, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 170-171 (1987).

74. *See id.* at 250.