violation of the law. The FTC even accuses the companies of building pipelines to provide themselves with "cheap transportation." Again, as in titanium dioxide, it is apparently illegal to reduce costs and pass enough of these cost savings on to customers to win an appreciable share of the market. (In the petroleum case, we cannot say a "large" share of the market has been won since no petroleum-refining firm sells as much as ten percent of the petroleum products sold in the United States.)

These three cases are cited to show the current state of antitrust doctrine at the antitrust agencies. The question remains of whether the courts will buy this upside-down view of antitrust law in view of its legislative history.[4]

Antitrust Not Intended to Fragment Industry

When federal antitrust policy began, with the signing of the Sherman Act in 1890, it was aimed at benefiting consumers. In the words of Senator John Sherman, the act was to outlaw arrangements "designed, or which tend, to advance the cost to the consumer." It was neither intended to fragment industry nor to prevent occupancy of a major share of a market by one or a few firms. When Senator George Hoar explained to the Senate the Judiciary Committee's final draft of the bill, he declared that *a man who "got the whole business because nobody could do it as well as he could" would not be in violation of the Sherman Act*. As Professor Robert Bork has pointed out in his examination of Sherman Act legislative history, "The statute was intended to strike at cartels, horizontal mergers of monopolistic proportions, and predatory business tactics."[5] As the act itself says, "Every conspiracy in *restraint* of trade . . . is hereby declared illegal" (emphasis supplied).

Cost and price reductions and product improvements by a firm expand the trade of a whole industry. Since firms doing this frequently win a large share of the markets in which they operate, judges in the early days of antitrust litigation did not hold "concentration" of sales in the hands of a few firms or "dominance" by a single firm to be illegal in and of itself. Standard Oil and American Tobacco were broken up in 1911 because they had been built by a very large number of mergers of monopolistic proportions with wrongful intent and had then engaged in "acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business . . . by usual methods. . . ." The defendants failed to show that the intent underlying their mergers and their acts was the normal one of efficiency and expansion of trade—they failed to show "countervailing circumstances" in Chief Justice Edward White's phrase. They were, therefore, subjected to antitrust remedies. The remedies were not applied because of their dominance but because they were formed and maintained by *monopolizing* acts and intent—that is, by a desire to gain *control* of the supply of a product and to use that control to charge a monopoly price and thereby restrain trade.

Dominant Firms Do Not Control Supply and Price

There is a distinction between *controlling* the supply of a product and *producing* or selling most of the supply of a product. "Dominant" producers who *sell* a major portion of a product's supply usually have no control over the supply. They have no power to set any lower level of industry output and a higher price than that which would prevail in a market with many suppliers and no dominant firm. Usually, a dominant producer is the most efficient firm in the industry. Its large output is the result of its efficiency in supplying the market. The market price is as low as it would be with many producers—frequently lower. Any attempt by a dominant firm to restrict its own supply and increase price after reaching a "dominant" position simply results in the expansion of output by other firms, the entry of additional firms, and loss of its dominance. A dominant firm can keep its dominance only by behaving competitively. *The fact that there is a dominant firm, or small group of firms, in an industry is evidence of competitive behavior—not of monopolization.*

The lack of ability of a dominant firm (or group of firms) to control supply and price simply because it produces a major part of the supply of a product is illustrated by the experience of the automobile industry in 1927. From 1921 to 1925 the Ford Motor Company supplied more automobiles than all other firms combined. The Ford Company was a dominant firm. It completely shut off its supply to the market for nearly the entire year in 1927 when it closed down to retool for the change from the Model T to the Model A. If the fact that a firm supplies the majority of a market gives it any power to *control* supply and price, then the complete withdrawal of that firm's supply should certainly cause a rise in price. Yet the prices of automobiles failed to rise when Ford shut down despite its having been the dominant producer. Other manufacturers increased their output and prices *fell* by mid-1927 despite the complete withdrawal of the Ford supply of newly manufactured cars from the market.[6]

The fact that a dominant producer has, at most, a very short-lived ability to influence the price of a product can be illustrated by numerous anecdotes. The American Sugar Refining Company merged 98 percent of the capacity for refining sugar east of the Rockies in 1891 and 1892. By cutting production it managed to raise refining margins by 40 percent in 1893 (which raised the price of sugar by 8 percent). Expansion of output in other firms cut sugar-refining margins in 1894 to a level little higher than the 1891 margins despite further reductions in output by American Sugar. By 1894, the entry of additional capacity had forced margins back nearly to 1891 levels and had cut American's share of the sugar business by one-quarter. American was still a dominant firm by today's FTC definition, but it had lost all influence over price and output despite its 85 percent share of capacity.[7]

In 1901, American Can merged 90 percent of all capacity in the can business. It raised prices by one-quarter and lost one-third of its share of market in short order despite additional buying up of competitors and their output. Prices returned to the pre-merger level in a very short time.

These are the most successful monopolizing cases I can find aside from the Air Line Pilots Association, the Teamsters, and similar labor unions.[8] What they demonstrate is that a dominant firm quickly ceases to have any influence in the market if it charges a supracompetitive price. In some cases a dominant firm willing to restrict output greatly has *no* ability to obtain a supracompetitive price even in the short run.

Shifting Market Shares

Dominant firms, that is, firms which sell a major part of all product sold, remain dominant only if they charge the competitive price *and* are more efficient than other firms in their industries. If they are less efficient, they soon find their market share dwindling despite selling at competitive prices. The Big Four in the meatpacking industry, for example, has seen its share of the market dwindle from 56 percent in 1935 (and from an even higher share in earlier years) to 47 percent in 1947 to 38 percent in 1956 to 22 percent in 1972.[9] The relative inefficiency of the Big Four showed in the 1920s when their rates of return on investment ran at one-third the rate earned by smaller companies.[10] That situation continued up to at least 1972, and market share of these inefficient firms fell.

The Big Four meat-packers (the Big Five in the 1917 FTC investigation) originally achieved a large market share in meatpacking by their efficiency—by instituting assembly-line methods with complete utilization of all by-products. They became known for using everything "but the squeal." Also, their development of refrigerated packing houses, cold storage, the refrigerator car, and an efficient distribution system created enlarged markets for meat supplied from cheaper livestock sources. They grew large by being innovative. Once their innovations were imitated by other packers, the decline of the Big Four began, accelerating with the spread of highways and the rise of trucking.

The "dominance" of the Big Four did not give them any power to restrict output or to control price. If anything, the rise of the Big Four decreased the dominance of local mar-